APPENDIX

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11499-A

ANDRE K. CLARKE,

Petitioner-Appellant,

versus

DEPARTMENT OF CORRECTIONS,
Michael D. Crews,

Respondent-Appellee.

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

ORDER:

Andre Clarke is a Florida prisoner serving a life sentence after a jury convicted him, in 2005, of second-degree murder with a firearm and aggravated battery with a firearm. On July 10, 2014, Clarke filed the instant *pro se* 28 U.S.C. § 2254 petition, which the district court denied as untimely. He now seeks a certificate of appealability ("COA") from this Court.

In order to obtain a COA, a § 2254 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 the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court denies a § 2254 petition on procedural grounds alone, the COA applicant must show that reasonable jurists would

find it debatable (1) whether the district court was correct in its procedural ruling, and (2) whether the § 2254 petition stated a valid claim of the denial of a constitutional right. *Id.*

Clarke has not shown that reasonable jurists would debate the district court's denial of his § 2254 petition as time-barred. His convictions became final on November 5, 2007, after the time had expired in which he could have sought review in the U.S. Supreme Court, from the denial of rehearing of his direct appeal. *See Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012). As such, his federal-limitations period expired on November 5, 2008. *See* 28 U.S.C. § 2244(d)(1)(A). Because his § 2254 petition was filed on July 10, 2014, it was time-barred. Clarke's Fla. R. Crim. P. 3.850 motion, filed on July 21, 2009, did not toll his federal-limitations period, because it was filed after his federal-limitations period had expired.

Clarke also did not demonstrate that reasonable jurists would debate the district court's conclusion that he was not entitled to equitable tolling. Assuming that Morgan was supposed to file a Fla. R. Crim. P. 3.850 motion on Clarke's behalf, Clarke did not demonstrate that Morgan's conduct amounted to anything greater than negligence. Clarke testified that Morgan wrote to him and apologized, stating that he got confused and filed a Rule 3.850 motion in another case, rather than Clarke's. This Court has held that negligence, even gross negligence, such as attorney errors in calculating a federal limitations period or a misunderstanding about the law, does not warrant equitable tolling in a federal habeas case. *See Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1235-36 (11th Cir. 2017).

Clarke also did not demonstrate that Morgan abandoned his representation of Clarke. During the district-court evidentiary hearing, Clarke testified that Morgan wrote to him regularly, and Clarke stated that Morgan would respond to him any time he had a question about his case. Missing a filing deadline does not constitute temporary abandonment sufficient to warrant

equitable tolling. *See Lawrence v. Florida,* 549 U.S. 327, 336 (2007) (holding that attorney miscalculation is not sufficient to warrant equitable tolling, particularly in post-conviction context, where prisoners have no right to counsel).

Because Clarke has not demonstrated that jurists of reason would debate the district court's denial of his § 2254 petition, motion for a COA is DENIED.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 15-80061-CIV-MARRA/WHITE

ANDRE K. CLARKE,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

ORDER AFFIRMING AND APPROVING REPORT AND RECOMMENDATION

This cause is before the Court upon the Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus by a Person in State Custody [DE 1]. This Petition was referred to Magistrate Judge Patrick A. White for consideration and report and recommendation 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. Also before the Court is Respondent's Motion to Strike Exhibit [DE 54].

Magistrate Judge White entered a Report of Magistrate Judge on January 19, 2016, in which he recommended that the petition be dismissed as untimely filed pursuant to 28 U.S.C. §2244(d)(1)-(2) and no certificate of appealability be issued [DE 15] . Objections to the Report were filed by Petitioner on February 11, 2016 [DE 16].

This Court remanded this matter to the Magistrate Judge for a hearing based upon the Eleventh Circuit decision in *Roper v. Department of Corrections*, 434 F. App'x 786 (11th Cir. 2011). [DE 17]. Upon remand, the Magistrate Judge reviewed evidence newly submitted by Petitioner and conducted an evidentiary hearing.

The Magistrate Judge issued an extensive, well-reasoned and supported Report of Magistrate Judge on December 1, 2017. [DE 47]. Petitioner filed Objections thereto. [DE 52]. As part of those objections, Petitioner submitted an additional affidavit, to which Respondent objects as being beyond the record that was before the Magistrate Judge. Although the Court grants the motion to strike on that basis, having reviewed the affidavit, it adds nothing that would alter this Court's analysis of the habeas petition. Nor is the Court convinced by the arguments made by Petitioner in opposition to the Report and Recommendation.

The Court, having conducted a *de novo* review of the entire file and record herein, agrees with the conclusion of the Magistrate Judge. Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Report of Magistrate Judge **[DE 47]** be, and the same is, **AFFIRMED AND APPROVED** in its entirety. The Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus by a Person in State Custody **[DE 1]** is **DENIED**. Respondent's Motion to Strike Exhibit [**DE 54**] is **GRANTED**.

Under Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts, this Court must issue or deny a certificate of appealability when entering a final order adverse to the applicant. The Court concludes under *Slack v. McDaniel*, 529 U.S. 473 (2000), that Petitioner cannot shown that "jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478. Therefore, the Court **DENIES** the issuance of a certificate of appealability. The Court notes that under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, the Petitioner may seek a certificate of appealability from the U.S. Court of Appeals for the Eleventh Circuit.

The Clerk shall **CLOSE** this case.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida this 7th day of March, 2018.

KENNETH A. MARRA
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CIV-80061-MARRA
MAGISTRATE JUDGE P.A. WHITE

ANDRE K. CLARKE, :

Petitioner, :

v. : REPORT OF MAGISTRATE JUDGE

JULIE JONES, :

Respondent. :

Introduction

Andre K. Clarke has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction and sentence in case number 50-2003-CF-004781-AXXX-MB, entered in the Fifteenth Judicial Circuit Court of Palm Beach County.

This cause has been 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.

The court has before it the petition for writ of habeas corpus (DE#1), Respondent's response to an order to show cause and appendix of exhibits (DE#13), and Petitioner's reply (DE#14), the Order Remanding Case for Evidentiary Hearing (DE#15), the Notice by the Department of Corrections of Filing Documents Ordered by the Court (DE#21), Petitioner's Declaration Regarding Filing Petition (DE#22), Petitioner's Second Supplemental Status Report (DE#26), the State's Supplemental Memorandum (DE#27), the documents appended to Petitioner's Unopposed Motion to Expand the Record (DE#43; see also DE#44), and the evidence presented at the evidentiary hearing on this matter (DE#45).

Procedural History

Petitioner Clarke was charged by Information filed on May 23, 2003, with the offenses of second degree murder with a firearm and aggravated battery with a firearm. (DE# 13-1; Ex. 2). Clarke entered pleas of not guilty to the offenses and the case proceeded to jury trial after which he was found guilty as charged.[1] (DE# 13-1; Ex. 3). The trial court adjudicated Clarke guilty of the offenses and sentenced him to a total term of imprisonment of life with a twenty-five-year mandatory minimum term. (DE# 13-1; Ex. 1, 4).

Clarke prosecuted a direct appeal from his convictions, raising the following issues: (1) the trial court improperly permitted the prosecutor to express his opinion as to the credibility of a state witness during closing argument; and (2) the trial court incorrectly instructed the jury on the defense of others, rising to the level of fundamental error. (DE# 13-1; Ex. 6). The Florida Fourth District Court of Appeal affirmed the convictions in a *per curiam* decision without written opinion. (DE# 13-1; Ex. 9). See also Clarke v. State, 954 So.2d 36 (Fla. 4th DCA 2007)(table). Clarke's motion for rehearing was subsequently denied by order entered on August 6, 2007. (DE# 13-1; Ex. 10, 11).

After waiting for more than twenty months after his convictions were affirmed on direct appeal, Clarke filed a *pro se*

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[1]The evidence admitted at trial was summarized by the Florida Fourth District Court of Appeal in an opinion issued in the postconviction appeal as follows:

> The evidence presented at his jury trial showed that Defendant was with three other men at a strip club when Larry Lark, the club's bouncer, escorted Joel Colas, one of Defendant's group, out of the establishment. The rest of the group followed. Outside the club, Lark and Colas exchanged words and then began to have a physical altercation. Another club employee, bartender Rafael Vasallo, entered the fray, taking a swing at Colas. Lark gained the upper hand in the fray and began to beat Colas severely, but no one attempted to pull Lark away from Colas. Colas's beating did not end until Defendant shot Lark in the head and Vasallo in the leg. Lark was pronounced dead at the scene.

Clarke v. State, 102 So. 3d 763, 764 (Fla. 4th DCA 2012).

motion for postconviction relief pursuant to Fla.R.Crim.P. 3.850 on July 21, 2009, attacking his convictions on multiple grounds of ineffective assistance of trial counsel. (DE# 13-1; Ex. 13). More specifically, in his first three grounds, Clarke claimed his trial counsel was ineffective in connection with the jury instructions given on justifiable homicide and the affirmative defense of justifiable use of force. Id. In his fourth ground, consisting of multiple subclaims, Clarke claimed that trial counsel was ineffective in failing to object to portions of the prosecutor's closing argument. Id. The state filed a response to the Rule 3.850 motion with supporting exhibits, arguing that Clarke was not entitled to postconviction relief pursuant to the standard established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). (DE# 13-1; Ex. 15).

The trial court entered a written order with attached exhibits summarily denying the first three claims of the Rule 3.850 motion as procedurally barred since Clarke had raised as fundamental error on direct appeal the giving of erroneous jury instructions. (DE# 13-2; Ex. 16). The trial court concluded that certain claims involving the jury instructions were barred because they were, or could have been, raised on direct appeal. Id. The court also found that the claims were not sufficient to satisfy the *Strickland* standard. Id. The trial court found ground four, with all its subclaims, meritless as refuted by the record or insufficient to satisfy the prejudice prong of *Strickland*. Id.

Clarke took an appeal from the trial court's summary denial, and the Florida Fourth District Court of Appeal issued a written opinion on December 19, 2012, in which the court affirmed in part and reversed in part the trial court's ruling and remanded the case to the trial court. Clarke v. State, 102 So. 3d 763, 764-66 (Fla. 4th DCA 2012). The Florida appellate court affirmed the summary denial of the part of the first and second grounds for relief in

which Clarke claimed his trial counsel was ineffective for agreeing to use self-defense instructions rather than a charge-specific special jury instruction on the basis that Clarke had not suggested what language would have been more appropriate and had not demonstrated how he was prejudiced by the instruction his counsel assisted in crafting. Id. at 765. The court reversed the summary denial of that portion of the first and second grounds concerning jury instructions in which Clarke alleged counsel was ineffective for including in the jury instructions the forcible felony exception and the instruction on use of force by aggressor, which instructions would have negated his defense of defense of another. Id. The appellate court affirmed the summary denial as to the ground where Clarke claimed his trial counsel was ineffective for failing to object to the use of the "and/or" conjunction in the jury instructions when referring to the victims, because the language was not objectionable. Id. at 765-66. And, the court affirmed without discussion the summary denial of Clarke's fourth ground in which Clarke contended that counsel was ineffective in failing to object to portions of the prosecutor's closing argument, because many of Clarke's claims were refuted by the record or meritless. Id. at 766. Thus, the summary denial of Clarke's Rule 3.850 motion was reversed with regard to portions of grounds one and two concerning the jury instructions and the case was remanded for further proceedings on those claims. Id. at 764-66.

The state sought review of the Fourth District Court of Appeal's decision by the Florida Supreme Court, but the Florida Supreme Court declined to accept jurisdiction. (DE# 13-2; Ex. 27). See also State v. Clarke, 118 So. 3d 222 (Fla. 2013). The state then filed in the trial court a supplemental response to the Rule 3.850 motion with attached exhibits, arguing that contrary to Clarke's assertions, the trial court did not instruct the jury on use of force by the aggressor or the forcible felony exception.

(DE# 13-2, 13-3; Ex. 28). In support of its argument, the state attached a copy of the transcript of the court's charge to the jury as well as a written copy of the jury instructions. Id. The state, therefore, maintained that the claims remanded by the appellate court were refuted by the record and Clarke's ineffective assistance of trial counsel claims were meritless under *Strickland*. Id.

After conducting a thorough review of the record and analyzing the claims pursuant to the applicable *Strickland* standard in conjunction with relevant state law pertaining to relevant jury instructions, the trial court found the claims meritless. (DE# 13-3; Ex. 31). Accordingly, by written order entered on September 23, 2013, the trial court again summarily denied the Rule 3.850 on the issues remanded by the state appellate court. Id. The trial court incorporated by reference the exhibits attached to the state's response. Id. Clarke appealed the trial court's ruling and on February 27, 2014, the Florida Fourth District Court of Appeal affirmed the summary denial of postconviction relief in a *per curiam* decision without written opinion. (DE# 13-4; Ex. 34, 36). See also Clarke v. State, 138 So.3d 460 (Fla. 4th DCA 2014), *reh'g denied* (Fla. 4th DCA Apr. 25, 2014). The mandate issued on May 16, 2014. (DE# 13-4; Ex. 37).

Petitioner Clarke then submitted to this Court a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, attacking on six grounds the lawfulness of his convictions entered in Palm Beach County Circuit Court Case No. 03-04781. (DE# 1). The habeas petition indicated that Clarke executed and placed it in the prison mail system on July 10, 2014, but it was not received by this Court until January 20, 2015. Id. The case 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.

After consideration of the petition (DE# 1), the respondent's response to an order to show cause with supporting Appendix (DE# 13), and Petitioner's Reply (DE# 14), the undersigned entered a Report, recommending dismissal of the petition as time-barred pursuant to 28 U.S.C. §2244(d)(1)-(2). See Report of Magistrate Judge. (DE# 15). In pertinent part, the undersigned concluded that Petitioner's convictions had become final on November 5, 2007, requiring a federal habeas petition to be filed in this Court on or before November 5, 2008. Id. at 2-10. Petitioner's request for equitable tolling of the limitations period on the basis that postconviction counsel affirmatively misrepresented to him that his state postconviction motion pursuant to Fla.R.Crim.P. 3.850 had been filed on June 5, 2007, was rejected as meritless. Id. at 11-16.

Petitioner filed objections to the Report, relying upon Roper v. Department of Corrections, 434 F.App'x 768 (11th Cir. 2011) to support his argument that he was entitled to equitable tolling on the basis of attorney misconduct. See Objections to Report and Recommendations of Magistrate Judge. (DE# 15). On March 28, 2016, the Honorable Kenneth A. Marra, United States District Judge, entered an Order remanding the case to the undersigned for evidentiary proceedings on Clarke's equitable tolling argument. See Order Remanding Case for an Evidentiary Hearing. (DE# 17). Judge Marra recognized that the petitioner in *Roper* did more to support his allegations than Clarke did in the instant case, however, the Court found Clarke's assertions were specific and not wholly incredible. Id. at 3. The Court did go on to note that Clarke's allegations, on the face of the record, appeared highly doubtful. Id. The stated purpose for the evidentiary hearing was to afford the undersigned a better opportunity to assess the credibility of Petitioner's assertions in view of the evidence, or lack thereof,

that may be presented on the question of equitable tolling; particularly, his diligence in pursuing his claim. Id.

Clarke maintains in his petition that he retained Kayo Morgan, an attorney admitted to The Florida Bar in 1984, who practiced law in Broward County, Florida until his death in November 2014,[2] to file a Rule 3.850 motion on his behalf and such motion was to have been filed on or before June 5, 2007. At the time that the matter was remanded, there was no evidence of record of any written retainer agreement between Clarke and Morgan. Nor had Clarke submitted any copies of emails and/or letters between him and Morgan, indicating that Morgan was to file a Rule 3.850 as counsel for Clarke. No telephone logs had been submitted, indicating telephone calls were placed to counsel Morgan or received from counsel during the relevant time period. Additionally, Clarke had not submitted any documents showing that attorney Morgan misadvised, misled or abandoned him with regard to a Rule 3.850 motion. Clarke had also not provided this Court with any documentation whatever of efforts undertaken for the period of June 5, 2007, through July 3, 2009, when he claims to have learned that no Rule 3.850 motion had been filed.

When remanding the case to the undersigned, Judge Marra suggested that when assessing Petitioner's credibility on remand, as well as the question of Petitioner's diligence in pursuing his claim, the undesigned may wish to have the parties present evidence. The undersigned thus concluded that the type of evidence as outlined immediately above would be of benefit to the Court, before the appointment of counsel and an evidentiary hearing was scheduled in this case.

Furthermore, while the undersigned did not find it necessary to explore the issue whether Clarke was or was not entitled to the

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[2] See http://www.floridabar.org; http://touch.sun-sentinel.com/#section/-1/article/p2p-82041151/.

benefit of the mailbox rule, it was clearly pointed out in the Report that the form petition indicated that Clarke executed his petition under penalty of perjury on July 10, 2014. See Report of Magistrate Judge at 9-11, *citing* Petition at 16. However, the petition did not reach this Court for filing until six months later, January 20, 2015, as indicated by this Court's file-stamp. Id. at 1. *See generally*, Docket. The face of the petition at page 1 contains a stamp purportedly from Clarke's place of confinement which appeared to indicate that the petition was provided to prison authorities for mailing on July 10, 2014. See Petition at 1. Other than the date of "Jul 10 2014," the stamp is unreadable. Id. The respondent did not challenge the file-stamp date for the date of filing in this particular habeas case. See Response to Order to Show Cause at 3. (DE# 13).

Under the circumstances, the undersigned thus found it necessary for the parties to produce evidence relevant to the above-referenced issues. The undersigned thus ordered Petitioner to produce relevant documentation supporting his assertion that he is entitled to equitable tolling of the limitations period on the basis of attorney misconduct, such as a copy of a retainer agreement, correspondence between him and counsel, email exchanges between him and counsel, telephone logs showing telephone calls with counsel, etc . . ., and for Respondent to produce certified copies of the prison mail logs of the institution where the petitioner was confined from July 1, 2014, through January 31, 2015, a declaration from a prison authority whose duties include supervision of mailroom operations regarding when the Petitioner placed the subject habeas petition in the prison mail system, and/or copies of Petitioner's inmate bank account for the relevant time period to confirm that funds were deducted from the inmate's account for the monies needed to pay for the postage of the petition when mailed to this Court. (DE#18).

In response, Respondent filed the Legal Postage Obligation Logs for the pertinent period, the declaration of Dorothy Chambers, and Petitioner's inmate account statement for the pertinent period. (DE#21, Exh. 1). In her declaration, Ms Chambers states that inmates may purchase stamps from the canteen, and may also receive up to 20 first-class postage stamps per mailing from family and friends, and that inmates are allowed to have up to 40 first-class postage stamps in their possession. Ms. Chambers also states that the Florida Statutes do not require corrections institutions to keep a log of outgoing legal mail, unless the Petitioner is indigent and does not have sufficient funds to pay for postage. Ms. Chambers further states that Petitioner was only indigent for 19 days during the relevant period and that, as such, she has no way of knowing whether he placed a petition in the prison mailing system with his own postage during the relevant time. She also states, however, that the purported prison mail stamp on Petitioner's initial Petition does not match the format of the stamp used at Petitioner's institution during the relevant time, or on Petitioner's subsequent filings with this Court.

Petitioner, for his part, filed a declaration (DE#22), stating that he used a model form available for his petition that had a provision for declaring the date that the petition was provided for the prison official for mailing, but not indicating that postage was prepaid. Petitioner thus explicitly declares in this filing that the postage was in fact pre-paid. He further declares that, when he placed his petition in the hands of the prison authorities, a corrections officer stamped the date on the front, and placed his initials next to the stamp.

Petitioner also filed a Status Report and Motion for Extension of Time (DE#23), stating that he could not provide evidence of electronic or telephonic communications with his lawyer because the FDOC did not maintain any records of such communications between

inmates and their counsel. Petitioner also stated that he could not provide a copy of any retainer agreement, because counsel agreed to represent Petitioner pro bono. Petitioner also stated that, due to "exceptional circumstances," he could not provide copies of any correspondence between himself and counsel, because the law clerk that was assisting him had been released and had all of Petitioner's paperwork.

Thereafter, Petitioner filed a Second Status Report (DE#26), stating that, after a diligent search, he had confirmed that he did not have any copies of any correspondence between himself and counsel. Petitioner also asserted in conclusory fashion that FDOC officers had destroyed relevant documents and that, if he lost this petition because of that, that he would have a § 1983 claim against them.

After Petitioner made his filings, Respondent filed a Supplemental Memorandum (DE#27), arguing that Petitioner was not entitled to application of the mailbox rule 1) because Petitioner's initial filing did not include the declaration that he had pre-paid the postage, 2) because it would not have taken 6 months for the petition to reach the Court, and 3) because Petitioner had failed to provide any documentation or supporting evidence, as the Petitioner did in *Roper*, supra, that would corroborate his claims of attorney misconduct. Respondent also noted that it had already responded to Petitioner's claims on the merits, and that the claims should be denied on the merits.

Finally, Petitioner filed an Unopposed Motion to Expand the Record (DE#41), which was granted. (DE#44). Via that motion, Petitioner submitted the following documents: a) records from Petitioner's Illinois prosecution, establishing that Petitioner was in Cook County, Illinois, in May of 2006 to answer what appear to have been various murder, robbery and weapons charges, that he was found guilty of involuntary manslaughter on October 23, 2007, and

that an order was entered on November 27, 2007 directing that he be returned to Florida to serve out his sentence there b) Mr. Morgan's November 21, 2014 obituary, c) a Florida Supreme Court's opinion ordering that Mr. Morgan be suspended from practice for conduct disrespectful of the judiciary, as well as the April 19, 2007 order of reinstatement, d) a number of documents filed by other pro se prisoners about the same time as Petitioner, demonstrating the various types of stamps used at Avon Park, as well as the lack of stamps, e) the declarations of Messers. Helton and Thacker, two inmate law clerks who assisted Petitioner with his case, and f) post-conviction filings from another case, demonstrating that Mr. Morgan simply re-filed a pro se motion that was provided to him.

On November 8, 2017, the court conducted evidentiary proceedings in this matter. Petitioner was the only witness on his behalf. Petitioner testified in pertinent part that he had an appointed lawyer in the Florida case that he challenges here, and that he had no money or family in the United States to help him during the pendency of those proceedings. Petitioner testified that he also has the Illinois conviction, and that he first learned that Illinois was going to charge him during his Florida proceedings, when two detectives from Illinois came to the Palm Beach county jail and told Petitioner that he was going to be extradited on murder charges. Petitioner further testified that he was then in fact extradited, after he got to Glades Correctional Institution.

Petitioner testified that, when he was extradited to Chicago, he still had a public defender prosecuting a direct appeal in his Florida case. Petitioner further testified that, when he left, he didn't know how long he was going to be in Chicago. Petitioner testified that he knew that his meant he would need help in his Florida case, beyond what his appointed appellate counsel was going to do.

Petitioner testified that, while at Glades CI, he met an inmate that was known simply as "St. Pete" who was "well-versed in the law," and offered to help Petitioner. According to Petitioner, St. Pete told him that jailhouse lawyers could only do so much, and that Petitioner therefore needed an outside attorney. Petitioner further testified that he himself is not "versed in the law," and was therefore not comfortable handling his own matters.

Petitioner testified that St. Pete told him the odds of prevailing on direct appeal were low, and that Petitioner would need help with things like a 3.850. Petitioner further testified that St. Pete told him to reach out to an attorney named Kayo Morgan, because he did pro bono work. Petitioner testified that he informed St. Pete of all the errors in his cases, and that St. Pete wrote Mr. Morgan asking for pro bono help. According to Petitioner, in that letter St. Pete informed Morgan that Petitioner was being extradited to Chicago, and that he would need help if his direct appeal did not work out.

Petitioner testified that Mr. Morgan wrote back to him, but that he did not read the letter. Rather, he simply took it to St. Pete. According to Petitioner, St. Pete told him that Mr. Morgan wanted a draft of Petitioner's 3.850 motion, and that he would sign off as the pro bono attorney. Petitioner testified that St. Pete thus drafted the 3.850 motion, and that it was Petitioner's understanding that the motion was to be filed immediately upon the completion of his direct appeal.

Petitioner again testified that, when he was extradited, his direct appeal was pending, and that he was in Chicago when he lost that appeal. Petitioner testified that he did not hear anything from Mr. Morgan or St. Pete while he was in Chicago, and that he had no communication at all with Florida while he was there. Petitioner further testified that he didn't have access to his Florida legal materials while he was in Chicago because they were

taken away from him at the jail, until his Chicago attorney finally filed a motion to have them returned to Petitioner. This happened when Petitioner's Chicago matter was almost completed. Petitioner testified that he did not remember how long he was in Chicago.

Petitioner testified that, when he returned to Florida, he was sent back to Glades CI, but that St. Pete was no longer there. Petitioner further testified that no one else would help him – that everybody wanted to charge.

Petitioner testified that he returned to Avon Park in early 2009. Petitioner fruther testified that there he met a guy on the compound named Frederick Thacker, who immediately filed a 3.850 on Petitioner's behalf. Petitioner explained that Thacker asked for all of Petitioner's paperwork to look through it, and also checked to see if anything had been filed. Petitioner also explained that Mr. Thacker was the one who found out that nothing had been filed for Petitioner. Petitioner testified that he thought that Mr. Thacker probably came across the letter that Mr. Morgan had written to Petitioner, because Petitioner gave Mr. Thacker all his papers.

Petitioner testified that Mr. Thacker eventually left, so then Petitioner received help from a guy named Selway. According to Petitioner, when the motion that Thacker had filed for him came back denied, Selway re-arranged the language and then it was reversed and remanded.

Petitioner testified that Selway eventually asked Kris Helton to take over for him (apparently because Selway was being released), and that Mr. Helton then helped Petitioner with everything else, including the filing of Petitioner's habeas petition.

Petitioner testified that Mr. Helton, a certified inmate law clerk, had a work area in the law library. Petitioner further testified that, at some point, Mr. Helton went to confinement for something – what he was not sure. Petitioner testified that many

of the documents that Mr. Helton had in his possession, including Petitioner's documents and his correspondence with Mr. Morgan, were lost in the search of Mr. Helton's work area incident to his being taken to confinement.

With regard to how and when his federal petition was mailed, Petitioner testified that the law clerk handed the documents to Petitioner, and that Petitioner put the necessary postage on the envelope and took it to the officer station in his dorm to be mailed out. Petitioner further testified that the procedure for signing and stamping outgoing legal mail at the time varied depending on the officer and the location, but that now there is someone designated to handle legal mail, and that inmates take it to the center gate. Petitioner testified that inmates were not allowed to handle the stamps that were used for legal mail or mechanical date stamps like the one used on his federal habeas petition, and that being caught with such stamps could result in confinement.

On cross-examination, Petitioner explained that he had copies of his trial court records, including transcripts, and that he provided those to St. Pete to draft the 3.850 motion. According to Petitioner, Mr. Morgan was then going to sign off on the motion, without the benefit of any of Petitioner's state court records, or the transcript. With regard to what Mr. Morgan actually agreed to do, Petitioner testified that was all between St. Pete and Mr. Morgan. Petitioner further testified that, when he got the letter back from Mr. Morgan he didn't read it because he was "illiterate to the law."

With regard to whether there was any correspondence between Petitioner and Mr. Morgan, Petitioner testified that he received "just everything that was necessary." He further testified that he could not recall if he ever received anything from Mr. Morgan stating that he had filed the 3.850, that he received multiple

letters from Mr. Morgan but was not sure how many, and that if he had a concern he could write Mr. Morgan and Mr. Morgan would write back. And according to Petitioner, Mr. Morgan even wrote him a letter acknowledging that he made a mistake in failing to file his 3.850. Indeed, Petitioner even confirmed that Mr. Morgan apologized to him and stated that he had confused Petitioner's case with another, and that he had filed a 3.850 in another case, instead of in Petitioner's case. And with regard to whether Mr. Morgan offered to nevertheless file the 3.850 for Petitioner, Petitioner stated that Petitioner thought it was too late at that time. Petitioner then admitted, however, that his 3.850 motion was in fact timely filed.

On re-direct, Petitioner further explained that, based on what St. Pete had told him, Petitioner thought it was in his best interest to file the 3.850 immediately to stop the clock, since he was going to be in Chicago.

Mailbox Rule

The Eleventh Circuit recognizes the "mailbox" rule in connection with the filing of a prisoner's pleadings. 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). The Court assumes, "[a]bsent evidence to the contrary, ... that a prisoner delivered a filing to prison authorities on the date that he signed it." Daniels v. United States, 809 F.3d 588, 589 (11th Cir. 2015), *quoting*, Jeffries v. United States, 748 F.3d 1310, 1314 (11th Cir. 2014).

Rule 3(d) of the Rules Governing Section 2254 Proceedings for the United States District Courts provides:

> A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution

> has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. §1746 or by a notarized statement.

Rule 3(d) thus permits a prisoner to show that his habeas petition was timely by making that type of declaration. Rule 3(d) further provides, however, that the prisoner's declaration must not only "set forth the date of deposit," it must "state that first-class postage has been prepaid." Id. (emphasis added). When a petition sets forth the date of deposit, but it does not state that first-class postage had been prepaid, that omission is fatal to the §2254 petition. To demand anything other than strict compliance with those requirements would render them nullities. See United States v. Winkles, 795 F.3d 1134, 1146-47 (9th Cir. 2015)(stating that to adopt an interpretation of Rule 3(d) that does not require the prisoner to state that postage has been prepaid "would render this portion of the rule mere surplusage"). As recognized by the Eleventh Circuit, "the declaration [is required] to state only two things; 50% is not enough." Daniels, 809 F.3d at 589-90, *quoting*, United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004).

When a prisoner provides a declaration under penalty of perjury establishing that he has satisfied the requirements of the "mailbox rule" by providing his federal court filing to prison officials for mailing, the burden of proof then shifts to the respondent to establish through the prison mail log or other records that the pleading was not in fact delivered in a timely manner. See Allen v. Culliver, 471 F.3d 1196, 1198-99 (11th Cir. 2006). See also Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001)("Absent evidence to the contrary, in the form of prison logs or other records, [the Court] will assume that [Movant's *pro se* §2255 motion] was delivered to prison authorities the day he signed it...").

Here, although Petitioner's initial filing did not establish his entitlement to the mailbox rule, he has since provided the requisite affirmation that he did in fact place his petition in the prison mailing system with the first-class postage pre-paid, which was missing from his petition. In addition, although the Respondent's declarant stated that the date stamp on the petition seemed suspect, the fact remains that she could not rebut Petitioner's assertion regarding when he originally mailed his § 2254 petition. Conversely, Petitioner testified that the legal mail procedures varied greatly at Avon Park, particularly with regard to the stamps, prior to the facility instituting a centralized mailing procedure. Moreover, Petitioner has submitted numerous legal filings from prisoners at Avon Park during the relevant time, corroborating Petitioner's assertions regarding the wide variation in stamps and legal mailing procedures. The Court thus finds that Petitioner's assertions that on July 10, 2014 he placed his § 2254 petition in the hand of prison authorities for mailing, with first-class postage prepaid, are unrebutted and corroborated, and further concludes that Petitioner is therefore entitled to application of the mailbox rule as of that date.

As Respondent properly notes, however, the mailbox rule issue is a bit of a red herring. The real issue of course whether Petitioner is entitled to equitable tolling of the limitations period. If he is not, the mailbox rule does not help him, because even using the July 10, 2014 filing date, his § 2254 petition would be time barred. The Court thus simply notes that, although it is giving Petitioner the benefit of the mailbox rule, it seems inherently suspicious that Petitioner supposedly mailed the petition in July of 2014, that Mr. Morgan died in November of 2014 and his death was highly publicized, and that the Court then mysteriously received the petition in January of 2015. Moreover, Petitioner has maintained throughout and testified that the reason

he does not have copies of his legal papers is because they were lost in the search of his last inmate law clerk's work area when he was taken to confinement. And Petitioner also admitted that mailing stamps and date stamps were considered contraband, and that possession of such stamps would subject an inmate to confinement.

Equitable Tolling

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." Holland v. Florida, 560 U.S. 631, 649 (2010) (*quoting* Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.' " Id., at 653 (citations omitted). Furthermore, "the reasonable diligence and extraordinary circumstance requirements are not blended factors; they are separate elements, both of which must be met before there can be equitable tolling." Cadet v. Fla. Dep't of Corr., 853 F.3d 1216, 1225 (11th Cir. 2017).

The circumstances that justify equitable tolling based on alleged attorney misconduct are defined by three principal Supreme Court decisions. See Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012); Holland, 560 U.S. 631, 130 S.Ct. 2549; Lawrence v. Florida, 549 U.S. 327, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007); see also Menominee Indian Tribe of Wisc. v. United States, 577 U.S. ----, 136 S.Ct. 750, 755-57, 193 L.Ed.2d 652 (2016); Christeson v. Roper, 574 U.S. ----, 135 S.Ct. 891, 190 L.Ed.2d 763 (2015) (discussing the Holland and Maples equitable tolling requirements).

The first decision, Lawrence, squarely holds that an attorney's mistake in calculating the statute of limitations period, even when caused by the failure to do rudimentary legal

research, does not justify equitable tolling. 549 U.S. at 336-37, 127 S.Ct. at 1085. The attorney's error in that case was based on his uninformed belief that the limitations period was statutorily tolled under 28 U.S.C. § 2244(d)(2) during the pendency in the Supreme Court of a certiorari petition to review the state courts' denial of state collateral relief. See id. Moreover, the attorney in that case did not do even rudimentary legal research; if he had, he could have easily learned that then-applicable precedent foreclosed any argument that § 2244's statute of limitations was tolled during that time. See id. at 331, 127 S.Ct. at 1082.

Because the attorney did not do any research, he was ignorant of what the Court characterized as "[t]he settled state of the law at the relevant time," id. and missed the filing deadline. The court explained, however, that allowing Lawrence to rely on his attorney's mistake to entitle him to equitable tolling "would essentially equitably toll limitations periods for every person whose attorney missed a deadline." Id. The Court thus unequivocally held that: "Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." Id. at 336-37, 127 S.Ct. at 1085.

The second Supreme Court decision addressing the standard for equitable tolling of the § 2244(d) statute of limitations, Holland v. Florida, rejected as "too rigid" the Eleventh Circuit's rule that even attorney conduct that is "grossly negligent" cannot justify equitable tolling of AEDPA's limitations period absent proof of "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part." 560 U.S. at 649, 130 S.Ct. at 2562-63 (*quoting* Holland v. Florida, 539 F.3d 1334, 1339 (11th Cir. 2008)). The Court acknowledged that, under its own precedent, a petitioner ordinarily must bear the risk of attorney error, and that a "garden variety claim of attorney negligence," such as a

"simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling." Id. at 650-52, 130 S.Ct. at 2563-64 (citation and quotation marks omitted). The Court implied that counsel's conduct in the Holland case may have constituted an extraordinary circumstance because it involved "far more than 'garden variety' or 'excusable neglect.' " Id. at 652, 130 S.Ct. at 2564. And there was another critical fact in Holland. During his state post-conviction proceedings, Holland had unsuccessfully sought to discharge his attorney, complaining to the Florida Supreme Court that there had been "a complete breakdown in communication," that counsel had "not kept him updated on the status of his capital case," and that counsel had "abandoned" him. Id. at 637, 130 S.Ct. at 2555 (quotation marks and alterations omitted).

In his concurring opinion in Holland, which set the stage for the Supreme Court's later decision in Maples, Justice Alito agreed with the majority that Holland had alleged "certain facts that go well beyond any form of attorney negligence," but criticized the majority opinion as not doing "enough to explain the right standard" for determining when attorney misconduct rises to the level of an extraordinary circumstance. Id. at 654-55, 130 S.Ct. at 2566 (Alito, J., concurring). He further considered that any distinction between ordinary and gross negligence would be "impractical," "highly artificial," and "hard to administer." Id. at 658, 130 S.Ct. at 2567. Rather, in his view, the relevant distinction should be between all forms of attorney negligence, "however styled," which would be "constructively attributable to the client," and "attorney misconduct that is not constructively attributable to the petitioner" because counsel had "essentially abandoned" the client. Id. at 657, 659, 130 S.Ct. at 2567-68 (quotation marks omitted).

Two years later in Maples v. Thomas, the Supreme Court revisited the question of when attorney misconduct might rise to the level of "extraordinary circumstances beyond [a petitioner's] control," albeit in the context of what it takes to establish cause to excuse a state procedural bar to federal habeas relief. 565 U.S. at 283, 132 S.Ct. at 924 (quotation marks omitted). The petitioner in Maples was an Alabama death-row inmate who had been represented in post-conviction proceedings by two pro bono attorneys from a New York law firm, and a local attorney recruited for the sole purpose of allowing the out-of-state attorneys to be admitted pro hac vice. Id. at 274-75, 132 S.Ct. at 918-19. While Maples' state post-conviction petition was pending, the two New York attorneys left their firm for positions that made them ineligible to continue to represent him. Id. at 275, 283-84, 132 S.Ct. at 919, 924. Neither attorney notified Maples of their departure and resulting inability to represent him. Id. at 275, 132 S.Ct. at 919. And neither of them asked the state trial court for leave to withdraw or moved for substitution of counsel. See id. Maples thus did not receive timely notice of the denial of his state post-conviction petition and, as a result, failed to timely appeal that ruling, which led to the procedural default of his claims in federal court. Id. at 275-79, 132 S.Ct. at 919-21.

The Maples Court adopted Justice Alito's view that "under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him," and emphasized that Justice Alito's Holland concurrence had "homed in on the essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client." Id. at 282-83, 132 S.Ct. at 923-24. Emphasizing that "essential difference," the Court also clarified that its Holland decision had turned on counsel's "abandonment" of his client, instead of on counsel's egregious errors, and it held that there

was "no reason ... why the distinction between attorney negligence and attorney abandonment should not hold in both" the equitable tolling and procedural default contexts. Id. at 282 & n.7, 132 S.Ct. at 923 & n.7 (emphasis added). The Court then concluded that counsel had abandoned Maples because, as a matter of both common sense and agency law principles, he was effectively "left without any functioning attorney of record" and "had been reduced to pro se status." Maples, 565 U.S. at 288-89, 132 S.Ct. at 927.

More recently, in Cadet, supra, the Eleventh Circuit had occasion to apply the foregoing precedents to again consider the circumstances under which an attorney's failure to meet the federal habeas filing deadline might amount to an extraordinary circumstance meriting equitable tolling. Cadet involved a case where significant time had run on the federal AEDPA limitations period before Cadet filed state post-conviction proceedings that had tolling effect. See 853 F.3d at 1219. Cadet had been advised by jailhouse lawyers that he had little time remaining after resolution of this state post-conviction proceedings to file his federal § 2254 petition, but his lawyer repeatedly erroneously assured him that the AEDPA's one-year limitations period ran from the conclusion of the post-conviction proceedings. Id.[3]

The Court accepted as the starting point of its analysis that Cadet's lawyer's "misinterpretation of the filing deadline and his failure to conduct any research into the matter, particularly when faced with Cadet's persistent challenges to his calculation, was certainly negligent and, we assume, grossly so." 853 F.3d at 1233. And consistent with the Supreme Court's delineation of the pertinent standards, the Court went on to hold:

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[3]It is of course black-letter law that the AEDPA runs from the latest of four potential trigger dates pursuant to § 2244(d)(1), the most common of which is the date that the judgment of conviction became final, but in any event certainly never the date of the conclusion that the post-conviction proceedings become final.

However much Goodman's negligence harmed Cadet's interests, that negligence and the harm it caused did not occur because Goodman was acting to promote his own or a third party's interests at the expense of Cadet's interests. To disregard that critical fact, as Cadet and the dissent would have us do, would ignore the "essential difference" the Supreme Court emphasized in Maples between an attorney's negligent errors, which are attributable to a client even though harmful, and defaults that occur as a result of extraordinary circumstances such as attorney abandonment or other forms of misconduct, which are not attributable to a client.

Contrary to Cadet's contention, Goodman's negligence in missing the filing deadline does not mean that he abandoned or effectively abandoned Cadet. Negligence, however gross, is not the same as abandonment. If it were, there would be no point in Maples' refinement or explication of what Holland said. Abandonment denotes renunciation or withdrawal, or a rejection or desertion of one's responsibilities, a walking away from a relationship . . . We do not mean to suggest that temporary abandonment during a critical period (a situation we do not have before us) would not be enough even if the attorney un-abandons his client after the harm has occurred or can no longer be avoided. What we mean is that the reason the filing deadline was missed must be because of abandonment or some other extraordinary circumstance, not negligence alone, even gross negligence.

Although attorney Goodman screwed up, as lawyers sometimes do, he did not withdraw from representing Cadet, renounce his role as counsel, utterly shirk all of his professional responsibilities to Cadet, or walk away from their attorney-client relationship. Unlike the lawyer in Holland, Goodman did not fail to keep his client abreast of key developments in his case, did not fail to respond to his client's inquiries or concerns, and did not sever nearly all communication with his client for a period of years, or even for months, or even for weeks . . . And unlike the two lawyers in Maples, Goodman did not wholly desert, forsake, or abandon his client without notice, thereby ceasing to serve as his agent "in any meaningful sense of that word," . . . and

> leave him "without any functioning attorney of record." Instead, Goodman maintained regular contact with Cadet throughout his state post-conviction proceedings, and discussed the case with him on a number of occasions, and responded to all of his many inquiries and concerns about the federal filing deadline, and sent him copies of the relevant statutory language and state appellate court opinion, and did prepare and eventually file a § 2254 petition on Cadet's behalf.

Id., 853 F.3d 1233-35 (citations omitted).

Here, even accepting as true that Petitioner had the alleged relationship that he claims to have had with Mr. Morgan, there is simply no evidence that Mr. Morgan's conduct amounted to anything more than attorney negligence. Rather, Petitioner himself admitted at the evidentiary hearing that Mr. Morgan wrote to him and apologized for not promptly filing Petitioner's 3.850 motion, stating that he got confused and had made a mistake by filing a 3.850 motion for post-conviction relief in someone else's case, rather than in Petitioner's. This rises, at best, to garden variety attorney negligence, such as missing a filing deadline. But under the legions of above-referenced precedents, a garden variety case of attorney negligence does not constitute an extraordinary circumstance for purposed of equitable tolling. Moreover, even assuming that Mr. Morgan's conduct amounted to gross negligence, this similarly cannot constitute the requisite extraordinary circumstance as a matter of law.

Counsel for Petitioner argued at the evidentiary hearing that, under Cadet, an attorney can temporarily abandon a client, and that should constitute the extraordinary circumstance in this case. It is true that, as set forth above, the Cadet Court did leave the door open to that possibility. The problem is that there is no evidence whatsoever that Mr. Morgan ever abandoned Petitioner, even temporarily. Rather, Petitioner admitted at the hearing that Mr. Morgan wrote him several times throughout the proceedings. And

critically, Petitioner also emphatically and unequivocally stated that Mr. Morgan would respond to Petitioner any time Petitioner had a question or concern about this case.

Counsel for Petitioner argued in conclusory fashion at the close of the hearing that this was a case of temporary abandonment. Counsel did not point to any specific evidence, and the Court finds that the evidence set forth above demonstrates just the contrary. The Court thus simply notes that, to the extent that counsel may mean to suggest that Mr. Morgan's failure to timely file the 3.850 motion as agreed constituted a temporary abandonment, any such argument would of course make a missed filing deadline and temporary abandonment one and the same, and thereby impermissibly convert any missed filing deadline into an extraordinary circumstance for purposes of equitable tolling. And the law is of course well settled to the contrary. See Lawrence, 549 U.S. at 336, 127 S.Ct. at 1085 ("Lawrence's argument that his attorney's mistake in miscalculating the limitations period entitled him to equitable tolling 'would essentially equitably toll limitations periods for every person whose attorney missed a deadline.'").

Because the Court finds that Petitioner cannot establish any extraordinary circumstances for purposes of his equitable tolling claim, the Court need not reach the question of whether Petitioner was diligent in pursuing his rights. See Cadet, 853 F.3d at 1225 (the reasonable diligence and extraordinary circumstance requirements are separate elements, both of which must be met for equitable tolling). However, for the sake of judicial economy, the Court sets forth here its findings with regard to the pertinent facts that would bear on whether Petitioner was diligent as a matter of law under the circumstances of this case, in the event that a reviewing Court may disagree with this Court's conclusion that Petitioner has not established the existence of an extraordinary external factor beyond his control.

The Court finds that Petitioner promptly began attempting to determine what he needed to do to protect his rights upon conviction here in Florida. The Court further finds that Petitioner concluded, with the assistance of inmate law clerks, that it was in his best interest to file a 3.850 motion for post-conviction relief as soon as his direct appeal was concluded. The Court also finds that Petitioner made arrangements, or at least believed he had made arrangements, for Mr. Morgan to file the 3.850 immediately upon the conclusion of Petitioner's direct appeal.

The Court also finds that, shortly thereafter, Petitioner was extradited to Illinois. Indeed, Respondent does not dispute this and counsel for Petitioner has submitted the relevant records from Petitioner's Cook County proceedings. The Court finds that Petitioner had appointed counsel while he was in Cook County. More specifically, Petitioner testified that his lawyer in Illinois was the one who finally obtained a court order granting Petitioner access to his Florida legal papers. The Court finds that Petitioner never attempted to contact Mr. Morgan or anyone else to determine the status of his Florida case, or whether his direct appeal had been resolved and his 3.850 filed, while he was in Cook County. The Court also finds that Petitioner did not ask his court-appointed Chicago lawyer to look into his Florida matter for him, even if it were simply to pull the dockets or to determine the status of his case (i.e., whether his direct appeal had been resolved and, if so, whether his 3.850 motion had been filed).

Finally, the Court finds that Petitioner promptly inquired about the status of his Florida case upon his return from Illinois, again as best he could under the circumstances of his incarceration. The Court further finds that Petitioner then promptly filed a 3.850 motion for post-conviction relief, upon learning that no such motion had been filed upon resolution of his direct appeal in his absence.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Cases provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the 2applicant," and that 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)." Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts. Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a habeas petitioner's constitutional claims have been adjudicated and denied on the merits by the district court, the petitioner must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a petitioner's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the petitioner can demonstrate both "(1) 'that jurists of reason would find it debatable whether the petition [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may

find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Petitioner's claims are barred on procedural grounds, the court considers whether Petitioner is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find debatable the correctness of the court's procedural rulings. Accordingly, a certificate of appealability is not warranted. See Slack, 529 U.S. at 484-85 (each component of the §2253(c) showing is part of a threshold inquiry); see also Rose, 252 F.3d at 684.

Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be DISMISSED AS TIME BARRED, and that no certificate of appealbility be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections to the recommendation that no certificate of appealability be issued.

SIGNED this 1st day of December, 2017.

UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 15-80061-CIV-MARRA/WHITE

ANDRE K. CLARKE,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

ORDER REMANDING CASE FOR AN EVIDENTIARY HEARING

This cause is before the Court upon the Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus by a Person in State Custody [DE 1]. This Petition was referred to Magistrate Judge Patrick A. White for consideration and report and recommendation 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.

Magistrate Judge White entered a Report of Magistrate Judge on January 19, 2016, in which he recommends that the petition be dismissed as untimely filed pursuant to 28 U.S.C. §2244(d)(1)-(2) and no certificate of appealability be issued [DE 15] . Objections to the Report were filed by Petitioner on February 11, 2016 [DE 16].

Petitioner relies upon *Roper v. Department of Corrections*, 434 F. App'x 768 (11th Cir. 2011) to support his argument that the applicable statute of limitations should be equitably tolled because his post-conviction attorney affirmatively misrepresented to him that his state post-conviction motion under Rule 3.850 had been filed on June 5, 2007. Had it been filed on that

date as he claims had been represented to him, the current Petition would not be untimely.

The Magistrate Judge rejected this argument when Petitioner made it below. The Report notes that Petitioner's claims as to his post-conviction attorney are conclusory with no substantiation. No records were submitted to show that Petitioner had even retained this attorney, who passed away in 2014. The Report notes that there is no indication of abandonment of the attorney-client relationship; however, if Petitioner's allegations are true, and his counsel never filed the Rule 3.850 motion, that might constitute abandonment. The Report also criticizes Petitioner for failing to act diligently in pursuing his post-conviction remedies.

In *Roper*, the petitioner argued that the limitations period should be equitably tolled, because his attorney had repeatedly assured him, his mother and his sister that a Rule 3.850 motion had been filed when it had not. Roper requested an evidentiary hearing, which was denied.

The Magistrate Judge in *Roper* concluded that equitable tolling was not warranted, because Roper had failed to establish his own diligence, and there was no evidentiary support for his allegations. In his objections thereto, Roper submitted his own affidavit as well as affidavits from his mother and sister. The District Court rejected Roper's objections and adopted the Magistrate Judge's report.

The Eleventh Circuit vacated the District Court's dismissal of Mr. Roper's habeas petition and remanded for an evidentiary hearing. The Court noted that: "Affirmative misrepresentations by counsel about the filing of a state habeas petition can constitute extraordinary circumstances that warrant equitable tolling." 434 F. App'x at 790. In Roper's case, the information he submitted was not sufficient to establish a causal connection between

the alleged extraordinary circumstances and the late filing of the petition. The Eleventh Circuit ruled that an evidentiary hearing might establish that connection. *Id.* at 790-91.

A petitioner in a § 2254 proceeding is not entitled to an evidentiary hearing when his claims are merely conculsory allegations unsupported by specifics or contentions that on the face of the record are wholly incredible. *Tejada v. Dugger,* 941 F.2d 1551, 1559 (11th Cir. 1991). Although the petitioner in *Roper* did more to support his allegations than Mr. Clarke did here, the Court is mindful of the fact that Mr. Clarke is proceeding *pro se*, his assertions are specific and, while on the face of the record they may be highly doubtful, they are not wholly incredible. Under the circumstances, the Court believes that the more prudent course would be to conduct an evidentiary hearing where the Magistrate Judge will have a better opportunity to assess the credibility of Petitioner's assertions in view of the evidence, or lack thereof, that may be presented on the question of equitable tolling.[1]

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Report of Magistrate Judge **[DE 15]** be, and the same is **REMANDED** to Magistrate Judge White for an evidentiary hearing consistent with this

[1] In assessing Petitioner's credibility on remand, as well as the question of Petitioner's diligence in pursuing his claim, the Magistrate Judge may wish to have the parties present evidence relative to the actual date Petitioner submitted his petition to the jail officials for mailing. *See* discussion at pp. 9-11 of the Report of Magistrate Judge. [DE 15].

order.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida this 28th day of March, 2016.

KENNETH A. MARRA
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-80061-Civ-MARRA
MAGISTRATE JUDGE P.A. WHITE

ANDRE K. CLARKE,

Petitioner,

v.

JULIE JONES,[1]

Respondent.

REPORT OF
MAGISTRATE JUDGE

I. Introduction

Andre K. Clarke, a state prisoner confined at Avon Park Correction Institution in Avon Park, Florida, filed this pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, attacking his convictions entered in Palm Beach County Circuit Court Case No. 03-04781. (DE# 1). Clarke challenges his convictions on six grounds, which include claims of ineffective assistance of trial counsel and trial court error regarding the jury instructions and comments made by the prosecutor during closing argument. Id.

The case has been 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.

For its consideration of the petition (DE# 1), the Court has the respondent's response to an order to show cause with supporting Appendix, consisting of state court documents, transcript of state

[1]Julie Jones is the Secretary of the Florida Department of Corrections and is, therefore, the proper respondent in this proceeding. She should "automatically" be substituted as a party under Federal Rule of Civil Procedure 25(d)(1). The Clerk is directed to docket and change the designation of the Respondent.

court proceedings, and records on appeal (DE# 13), and Petitioner's Reply (DE# 14).

II. Procedural History

Petitioner was charged by Information filed on May 23, 2003, with the offenses of second degree murder with a firearm and aggravated battery with a firearm. (DE# 13-1; Ex. 2). Clarke entered pleas of not guilty to the offenses and the case proceeded to jury trial after which he was found guilty as charged.[2] (DE# 13-1; Ex. 3). The trial court adjudicated Clarke guilty of the offenses and sentenced him to a total term of imprisonment of life with a twenty-five-year mandatory minimum term. (DE# 13-1; Ex. 1, 4).

Clarke prosecuted a direct appeal from his convictions, raising the following issues: (1) the trial court improperly permitted the prosecutor to express his opinion as to the credibility of a state witness during closing argument; and (2) the trial court incorrectly instructed the jury on the defense of others, rising to the level of fundamental error. (DE# 13-1; Ex. 6). The Florida Fourth District Court of Appeal affirmed the convictions in a *per curiam* decision without written opinion. (DE# 13-1; Ex. 9). See also Clarke v. State, 954 So.2d 36 (Fla. 4th DCA

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[2]The evidence admitted at trial was summarized by the Florida Fourth District Court of Appeal in an opinion issued in the postconviction appeal as follows:

> The evidence presented at his jury trial showed that Defendant was with three other men at a strip club when Larry Lark, the club's bouncer, escorted Joel Colas, one of Defendant's group, out of the establishment. The rest of the group followed. Outside the club, Lark and Colas exchanged words and then began to have a physical altercation. Another club employee, bartender Rafael Vasallo, entered the fray, taking a swing at Colas. Lark gained the upper hand in the fray and began to beat Colas severely, but no one attempted to pull Lark away from Colas. Colas's beating did not end until Defendant shot Lark in the head and Vasallo in the leg. Lark was pronounced dead at the scene.

Clarke v. State, 102 So. 3d 763, 764 (Fla. 4th DCA 2012).

2007)(table). Clarke's motion for rehearing was subsequently denied by order entered on August 6, 2007. (DE# 13-1; Ex. 10, 11).

After waiting for more than twenty months after his convictions were affirmed on direct appeal, Clarke filed a *pro se* motion for postconviction relief pursuant to Fla.R.Crim.P. 3.850 on July 21, 2009, attacking his convictions on multiple grounds of ineffective assistance of trial counsel. (DE# 13-1; Ex. 13). More specifically, in his first three grounds, Clarke claimed his trial counsel was ineffective in connection with the jury instructions given on justifiable homicide and the affirmative defense of justifiable use of force. Id. In his fourth ground, consisting of multiple subclaims, Clarke claimed that trial counsel was ineffective in failing to object to portions of the prosecutor's closing argument. Id. The state filed a response to the Rule 3.850 motion with supporting exhibits, arguing that Clarke was not entitled to postconviction relief pursuant to the standard established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). (DE# 13-1; Ex. 15).

The trial court entered a written order with attached exhibits summarily denying the first three claims of the Rule 3.850 motion as procedurally barred since Clarke had raised as fundamental error on direct appeal the giving of erroneous jury instructions. (DE# 13-2; Ex. 16). The trial court concluded that certain claims involving the jury instructions were barred because they were, or could have been, raised on direct appeal. Id. The court also found that the claims were not sufficient to satisfy the *Strickland* standard. Id. The trial court found ground four, with all its subclaims, meritless as refuted by the record or insufficient to satisfy the prejudice prong of *Strickland*. Id.

Clarke took an appeal from the trial court's summary denial, and the Florida Fourth District Court of Appeal issued a written opinion on December 19, 2012, in which the court affirmed in part and reversed in part the trial court's ruling and remanded the case to the trial court. Clarke v. State, 102 So. 3d 763, 764-66 (Fla. 4th DCA 2012). The Florida appellate court affirmed the summary denial of the part of the first and second grounds for relief in which Clarke claimed his trial counsel was ineffective for agreeing to use self-defense instructions rather than a charge-specific special jury instruction on the basis that Clarke had not suggested what language would have been more appropriate and had not demonstrated how he was prejudiced by the instruction his counsel assisted in crafting. Id. at 765. The court reversed the summary denial of that portion of the first and second grounds concerning jury instructions in which Clarke alleged counsel was ineffective for including in the jury instructions the forcible felony exception and the instruction on use of force by aggressor, which instructions would have negated his defense of defense of another. Id. The appellate court affirmed the summary denial as to the ground where Clarke claimed his trial counsel was ineffective for failing to object to the use of the "and/or" conjunction in the jury instructions when referring to the victims, because the language was not objectionable. Id. at 765-66. And, the court affirmed without discussion the summary denial of Clarke's fourth ground in which Clarke contended that counsel was ineffective in failing to object to portions of the prosecutor's closing argument, because many of Clarke's claims were refuted by the record or meritless. Id. at 766. Thus, the summary denial of Clarke's Rule 3.850 motion was reversed with regard to portions of grounds one and two concerning the jury instructions and the case was remanded for further proceedings on those claims. Id. at 764-66.

The state sought review of the Fourth District Court of Appeal's decision by the Florida Supreme Court, but the Florida Supreme Court declined to accept jurisdiction. (DE# 13-2; Ex. 27). See also State v. Clarke, 118 So. 3d 222 (Fla. 2013). The state then filed in the trial court a supplemental response to the Rule 3.850 motion with attached exhibits, arguing that contrary to Clarke's assertions, the trial court did not instruct the jury on use of force by the aggressor or the forcible felony exception. (DE# 13-2, 13-3; Ex. 28). In support of its argument, the state attached a copy of the transcript of the court's charge to the jury as well as a written copy of the jury instructions. Id. The state, therefore, maintained that the claims remanded by the appellate court were refuted by the record and Clarke's ineffective assistance of trial counsel claims were meritless under *Strickland*. Id.

After conducting a thorough review of the record and analyzing the claims pursuant to the applicable *Strickland* standard in conjunction with relevant state law pertaining to relevant jury instructions, the trial court found the claims meritless. (DE# 13-3; Ex. 31). Accordingly, by written order entered on September 23, 2013, the trial court again summarily denied the Rule 3.850 on the issues remanded by the state appellate court. Id. The trial court incorporated by reference the exhibits attached to the state's response. Id. Clarke appealed the trial court's ruling and on February 27, 2014, the Florida Fourth District Court of Appeal affirmed the summary denial of postconviction relief in a *per curiam* decision without written opinion. (DE# 13-4; Ex. 34, 36). See also Clarke v. State, 138 So.3d 460 (Fla. 4th DCA 2014), *reh'g denied* (Fla. 4th DCA Apr. 25, 2014). The mandate issued on May 16, 2014. (DE# 13-4; Ex. 37).

III. Discussion

After all state postconviction proceedings had concluded unfavorably, Clarke came to this Court, instituting the instant pro se habeas corpus proceedings pursuant to 28 U.S.C. §2254. See Petition (DE# 1). In response to the order to show cause, the respondent argues that the petition should be dismissed as untimely filed and that Petitioner should not be excused from the time-bar based upon his argument that he is entitled to equitable tolling of the limitations period. See Response to Order to Show Cause at 3-7. (DE# 13). The respondent also argues that Clarke is not entitled to review on the merits of certain claims because they are unexhausted and procedurally barred. Id. at 9. The respondent additionally argues, in the alternative, Clarke is not entitled to relief in that all his claims are meritless. Id. at 29-37. For the reasons stated below, the respondent is correct that the instant petition has been filed beyond the one-year federal limitation period, warranting dismissal of this habeas proceeding as time-barred. The time-bar argument is dispositive of the instant case, therefore, this Court need not address the respondent's various other arguments.

Since Clarke filed his federal habeas petition after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") governs this proceeding. See Wilcox v. Fla.Dep't of Corr., 158 F.3d 1209, 1210 (11th Cir. 1998)(per curiam). The AEDPA imposed for the first time a one-year statute of limitations on petitions for writ of habeas corpus filed by state prisoners.[3] See 28 U.S.C.

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[3]The statute provides that the limitations period shall run from the latest of —

> (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

§2244(d)(1)("A 1-year period of limitation shall apply to an application for a writ of habeas corpus ....").

As a starting point, the Court turns to the date upon which Phoenix's judgment became final under 28 U.S.C. §2244(d)(1)(A). See Gonzalez v. Thaler, ____ U.S. ____, 132 S.Ct. 641, 653-54, 181 L.Ed.2d 619 (2012)(holding that conviction becomes final upon expiration of time for seeking direct review); Jimenez v. Quarterman, 555 U.S. 113, 118-21, 129 S.Ct. 681, 685-86, 172 L.Ed.2d 475 (2009)(explaining the rules for calculating the one-year period under §2244(d)(1)(A)). See also Clay v. United States, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003)(holding that "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."); Chavers v. Secretary, Florida Dept. of Corrections, 468 F.3d 1273 (11th Cir. 2006)(holding that one-year statute of limitations established by AEDPA began to run 90 days after Florida appellate court affirmed habeas petitioner's conviction, not 90 days after mandate was issued by that court).

Since Clarke prosecuted a direct appeal from his convictions to the Florida Fourth District Court of Appeal, his convictions did not become final until after the time for filing a petition for a

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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 action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that 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).

writ of certiorari in the United States Supreme Court had expired. Petitioner did not file a petition for certiorari, therefore, his convictions and sentences became final on November 5, 2007,[4] ninety days after the Florida Fourth District Court of Appeal denied his motion for rehearing after affirming his convictions. See Supreme Court Rule 13.3;[5] Clay v. United States, 537 U.S. 522, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003). Thus, Clarke had until November 5, 2008, to file a timely §2254 petition, unless he availed himself of state postconviction motions which would toll the time period. See 28 U.S.C. §2244(d)(2)(tolling the limitation period for "[t]he 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"); Wall v. Kholi, 562 U.S. 545, 131 S.C. 1278 (2011).[6] The AEDPA clock resumes running when the state's highest court issues its mandate disposing of the motion for post-conviction relief. Lawrence v. Florida, 549 U.S. 327, 331-32, 127 S.C. 1079, 166 L.Ed.2d 924 (2007).

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[4]Petitioner's 90-day period expired on November 4, 2007, but because that was a Sunday, the deadline for filing a petition for a writ of certiorari was, instead, Monday, November 5, 2007. See San Martin v. McNeil, 633 F.3d 1257 (11th Cir. 2011):

> Under Fed.R.Civ.P. 6(a)(1), "in computing any time period specified in ... any statute that does not specify a method of computing time ... [we must] exclude the day of the event that triggers the period[,] count every day, including intermediate Saturdays, Sundays, and legal holidays[, and] include the last day of the period," unless the last day is a Saturday, Sunday, or legal holiday.

Id. at 1266 (alterations in original).

[5]Supreme Court Rule 13.3 states, in pertinent part, that "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate[.]"

[6]A properly-filed application is defined as one whose "delivery and acceptance are in compliance with the applicable laws and rules governing filings," which generally govern such matters as the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. Artuz v. Bennett, 531 U.S. 4 (2000)(overruling Weekley v. Moore, 204 F.3d 1083 (11th Cir. 2000)).

The above-reviewed record of the state court proceedings reveals that Clarke pursued state postconviction relief. He is, however, not entitled to tolling time credit for the state postconviction proceedings pursuant to 28 U.S.C. §2244(d)(2). From the time Clarke's conviction became final on November 5, 2007, the limitations period ran unchecked for **623 days**. He did not file his Rule 3.850 motion in the trial court until July 21, 2009. The Rule 3.850 proceeding was commenced well after the federal one-year limitation had already expired on November 5, 2008. Consequently, the Rule 3.850 proceedings do not statutorily toll the federal one-year limitations period. See Tinker v. Moore, 255 F.3d 1331, 1332 (11th Cir. 2001)(holding that a state petition filed after expiration of the federal limitations period cannot toll the period, because there is no period remaining to be tolled); Webster v. Moore, 199 F.3d 1256, 1258-60 (11th Cir.)(holding that even properly filed state court petitions must be pending in order to toll the limitations period), cert. denied, 531 U.S. 991 (2000). See also Hollinger v. Secretary Dept. of Corrections, 334 F.App'x 302, 304-305, 2009 WL 1833746, *2 (11th Cir. 2009), *citing*, Moore v. Crosby, 321 F.3d 1377, 1381 (11th Cir. 2003)(concluding that Rule 3.850 motion, "filed after expiration of the limitations period[,] does not relate back so as to toll idle periods preceding the filing of the federal [habeas] petition").

Accordingly, Clarke's federal petition was due in this Court on or before November 5, 2008. The Eleventh Circuit recognizes the "mailbox" rule in connection with the filing of a prisoner's pleadings. 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). The Court assumes, "[a]bsent evidence to the contrary, ... that a prisoner delivered

a filing to prison authorities on the date that he signed it." Daniels v. United States, 2015 WL 9583893, *1 (11th Cir. Dec. 30, 2015), *quoting*, Jeffries v. United States, 748 F.3d 1310, 1314 (11th Cir. 2014).

When giving Clarke the benefit of the mailbox rule, he filed the instant federal petition on July 10, 2014, the date that the form petition shows that Clarke executed his petition under penalty of perjury. See Petition at 16. (DE# 1). The undersigned notes that the petition did not reach this Court for filing until January 20, 2015, as indicated by this Court's file-stamp. Id. at 1. *See generally*, Docket. The respondent relies upon the file-stamp date for the date filing in this particular habeas case. See Response to Order to Show Cause at 3. (DE# 13).

The face of the petition at page 1 contains a stamp purportedly from Clarke's place of confinement which appears to indicate that the petition was provided to prison authorities for mailing on July 10, 2014. See Petition at 1. Other than the date of "Jul 10 2014," the stamp is unreadable. Id. Since this petition is time-barred for the reasons stated below regardless of which date is considered the date of filing (i.e., July 10, 2014, or January 20, 2015), the undersigned will not further pursue the matter whether Clarke should or should not be entitled to the benefit of the mailbox rule in this case other than to comment that it seems highly unlikely that Clarke placed his habeas petition in the prison mailing system on *July 10, 2014*, as reflected in his pleading, and the petition was not received by this Court until *January 20, 2015*, more than six-months later.[7] Also, the fact that

[7]When a prisoner provides a declaration under penalty of perjury establishing that he has satisfied the requirements of the "mailbox rule" by providing his federal court filing to prison officials for mailing, the burden of proof then shifts to the respondent to establish through the prison mail log

Clarke made no inquiry to this Court to determine the status of his petition allegedly sent to this Court in July 2014, until March 2015, *see* DE# 7, renders the date of July 10, 2014, suspect.

Clarke's federal petition is clearly untimely in that it was filed after November 5, 2008. In order for this petition to be deemed timely, Clarke must demonstrate that he is entitled to proceed under one of §2244(d)'s statutory tolling provisions, see §2244(d)(1)(B)-(D), or is entitled to equitable tolling of the limitations period. Clarke has expressly addressed the limitations issue in his pleadings. See Petition at ¶18 (DE# 1); Reply to Response to Order to Show Cause at 3-11 (DE# 14). Clarke essentially asserts that he is entitled to equitable tolling of the limitations period on the basis of attorney misconduct.

Equitable tolling might be available under limited circumstances. In order to receive an extension of the limitations period on such a basis, the petitioner must demonstrate that there were extraordinary circumstances that were both beyond his control and unavoidable with diligence. See Holland v. Florida, 560 U.S. 631, 130 S.C. 2549, 177 L.Ed.2d 130 (2010). See also Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.C. 1807, 161 L.Ed.2d 669 (2005)(holding that a petitioner is entitled to equitable tolling

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or other records that the pleading was not in fact delivered in a timely manner. See Allen v. Culliver, 471 F.3d 1196, 1198-99 (11th Cir. 2006). See also Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001)("Absent evidence to the contrary, in the form of prison logs or other records, [the Court] will assume that [Movant's *pro se* §2255 motion] was delivered to prison authorities the day he signed it..."). Under the circumstances of this case, the record does not need to be supplemented by the respondent. Under different circumstances, however, the undersigned might have requested documentation in the form of copies of outgoing mail logs and/or certified mail logs for the relevant time period, a declaration from a prison authority whose duties include supervision of mailroom operations regarding when the Petitioner placed the subject petition in the prison mail system, and/or copies of Petitioner's inmate bank account for the relevant time period to confirm that funds were deducted from the inmate's account for the monies needed to pay for the postage of the petition when mailed to this Court.

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); Helton v. Secretary for Dept. of Corrections, 259 F.3d 1310, 1312 (11th Cir. 2001)(stating that "[e]quitable tolling can be applied to prevent the application of the AEDPA's statutory deadline when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition."), cert. denied, 535 U.S. 1080 (2002). The burden is on the petitioner to prove circumstances that justify the application of the equitable tolling doctrine. Drew v. Department of Corrections, 297 F.3d 1278, 1286 (11th Cir. 2002). Mere conclusory allegations are insufficient to raise the issue of equitable tolling. See id. at 1292-93; Pugh v. Smith, 465 F.3d 1295, 1300-01 (11th Cir. 2006); Helton, 259 F.3d at 1314. The Eleventh Circuit has emphasized that "[e]quitable tolling is an extraordinary remedy that must be applied sparingly" for "[a] truly extreme case." Holland v. Florida, 539 F.3d 1334, 1338 (11th Cir. 2008)(per curiam).

Clarke maintains that postconviction counsel Kayo E. Morgan should have filed his Rule 3.850 motion on June 5, 2007, which would then have entitled him to statutory tolling under §2244(d)(2) through May 16, 2014, the conclusion of the Rule 3.850 proceedings. Clarke states that if counsel had done so, his later filed federal habeas petition would not be deemed untimely filed. According to Clarke, he did not learn until July 3, 2009, that counsel had not filed a Rule 3.850 on June 5, 2007, as he believed. Clarke states that when he learned no Rule 3.850 motion had been filed, he filed the Rule 3.850 motion on a *pro se* basis eighteen days later, therefore, he is entitled to equitable tolling of the limitations period from June 5, 2007, until July 3, 2009, and statutory tolling until May 16, 2014.

First, as correctly argued by the respondent, Clarke's claim is wholly conclusory with not substantiation whatever in the record. Clarke has submitted no records to this Court showing that he retained attorney Morgan to represent him in any postconviction challenge to his convictions.[8] For example, Clarke could have provided written correspondence between himself and Morgan, a copy of a retainer agreement, copies of emails, etc. The record also does not show that the trial court ever appointed counsel to represent Clarke for the postconviction proceedings and there is no indication that Morgan participated in the filing of any of the postconviction documents. Additionally, no documents have been submitted to show that Clarke had been misadvised, misled or abandoned by counsel Morgan. Accordingly, Clarke's assertion could be found meritless on this basis alone. As indicated above, the burden of establishing entitlement to this extraordinary remedy plainly rests with the petitioner. Drew, 297 F.3d at 1287. See also Helton, 259 F.3d at 1313-14 (denying equitable tolling in light of petitioner's failure to present necessary evidence); Justice v. United States, 6 F.3d 1474, 1479 (11th Cir. 1993) ("The burden is on the plaintiff to show that equitable tolling is warranted."). Further, it is well accepted that absent supporting evidence in the record, a court cannot consider a habeas petitioner's mere assertions on a critical issue in his pro se petition to be of probative value. Ross v. Estelle, 694 F.2d 1008, 1011-12 (5th Cir. 1983). See also Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991)(recognizing that a petitioner is not entitled to habeas relief "when his claims are merely 'conclusory allegations unsupported by specifics'").

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[8]Kayo Morgan was a practicing attorney in Broward County Florida, admitted to the Florida Bar in 1984. See http://www.floridabar.org. Morgan died in November 2014. See http://touch.sun-sentinel.com/#section/-1/article/p2p-82041151/.

Even if Clarke's claim was not found improperly conclusory, his equitable tolling argument is nevertheless unavailing to overcome the time-bar. "Because a lawyer is the agent of his client, a federal habeas petitioner—who does not have a constitutional right to counsel—is ordinarily bound by his attorney's errors, including a miscalculation or misinterpretation of a filing deadline." Cadet v. Fla. Dep't of Corr., 742 F.3d 473, 477-78 (11th Cir. 2014). The Eleventh Circuit has recently noted that run-of-the-mill claims of excusable neglect by an attorney, "such as a simple miscalculation that leads a lawyer to miss a filing deadline," do not constitute the kind of "extraordinary circumstance" that is necessary to merit equitable tolling. Damren v. Florida, 776 F.3d 816, 821 (11th Cir. 2015), *quoting*, Holland, 560 U.S. at 651-52, 130 S.C. at 2564 (quotation marks omitted). Attorney negligence, however egregious, does not qualify as an "extraordinary circumstance" unless the negligence rises to the level of actual or effective abandonment of the client. Cadet, 742 F.3d at 481. See also Gillman v. Sec'y, Fla. Dep't of Corr., 576 F.App'x 940, 943 n.7 (11th Cir. 2014)(unpublished)(stating that in this circuit, "the correct standard for determining whether attorney misconduct qualifies as an extraordinary circumstance for equitable tolling purposes is whether the conduct amounts to abandonment of the attorney-client relationship.")(*citing* Cadet, 742 F.3d at 481)); Alewine v. United States, 2010 WL 3732258, *3 (S.D.Ga. Aug. 23, 2010)("[I]t is well-settled that attorney negligence is not a basis for equitable tolling.").

Based upon *Cadet*, the correct standard for determining whether attorney misconduct qualifies as an extraordinary circumstance for equitable tolling purposes is whether the conduct amounts to abandonment of the attorney-client relationship. Here, there is no

indication whatever of anything more than attorney negligence, if that. Moreover, equitable tolling is only available to Clarke if he pursued his rights diligently. Aureoles v. Sec'y, D.O.C., 2015 WL 4113627, *1 (11th Cir. July 9, 2015) (*citing* Damren, 776 F.3d at 821). Clarke clearly did not act diligently in pursuing his postconviction remedies. If he had done so, this federal petition would not be time-barred. Even if he retained counsel to pursue a Rule 3.850 motion on his behalf before or immediately after his convictions had been affirmed on direct appeal, as he apparently contends, Clarke offers no specific explanation why he failed to discover trial counsel's failure to file the motion until July 2009, approximately two years later and what, if any, efforts he made to learn of counsel's alleged failure.

In sum, there is no basis for this Court to conclude that the late filing of the instant federal petition resulted from attorney abandonment. See Harris v. Hart, 2014 WL 1056692, 2-6 (M.D.Ga. 2014)(finding that despite the arguable abandonment by his attorney, the Petitioner failed to show the requisite causal connection between this extraordinary circumstance and the late filing of his federal petition); Reynolds v. McLaughlin, 2013 WL 3756473, *2 (M.D.Ga. 2013)(finding the petitioner did not show causal connection between his attorney's misconduct in not informing him his appeal was denied and late filing of petition where petitioner learned of appellate ruling with enough time to pursue habeas relief). Since Clarke has not demonstrated that he has pursued the process with diligence and alacrity, he is not entitled to equitable tolling on the basis of alleged attorney misconduct. One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence. See Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984). See also Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96

(1990)(principles of equitable tolling do not extend to what is best a garden variety claim of excusable neglect). "[E]quity is not intended for those who sleep on their rights." See Fisher v. Johnson, 174 F.3d 710 (5th Cir. 1999), citing, Convey v. Arkansas River Co., 865 F.2d 660, 662 (5th Cir. 1989).

If Clarke were to argue that he is entitled to equitable tolling of the federal limitations period based upon his status as a *pro se* litigant and his unfamiliarity with the legal process or ignorance of the law, he would not be entitled to equitable tolling on this basis either.[9] See Johnson v. United States, 544 U.S. 295, 311, 125 S.C. 1571, 1582 (2005)(stating that "the Court has never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness."). See also Rivers v. United States, 416 F.3d 1319, 1323 (11th Cir. 2005)(holding that while movant's lack of education may have delayed his efforts to vacate his state conviction, his procedural ignorance is not an excuse for prolonged inattention when promptness is required); Carrasco v. United States, 2011 WL 1743318, *2-3 (W.D.Tex. 2011)(finding that movant's claim that he just learned of *Padilla* decision did not warrant equitable tolling, although movant was incarcerated and was proceeding without counsel, because ignorance of the law does not excuse failure to timely file §2255 motion). The record here also does not demonstrate that Clarke was in any way impeded by any unconstitutional governmental action in pursuing collateral relief as required for application of §2244(d)(1)(B).

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[9]It is well accepted that pro se filings are subject to less stringent pleading requirements, Estelle v. Gamble, 429 U.S. 97, 106 (1976), and should be liberally construed with a measure of tolerance. See Haines v. Kerner, 404 U.S. 519 (1972). See also Gomez-Diaz v. United States, 433 F.3d 788, 791 (11th Cir. 2005); Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991). However, the policy of liberal construction for pro se litigants' pleadings does not extend to a "liberal construction" of the one-year limitations period.

When viewing Clarke's pleadings liberally, as this Court must,[10] Clarke may additionally be attempting to escape the time-bar by relying on the principles established in Martinez v. Ryan, ____ U.S. ____, ____, 132 S.C. 1309, 1315-16, 182 L.Ed.2d 272 (2012)(modifying the general rule in *Coleman* to expand the "cause" that may excuse a procedural default) and/or Trevino v. Thaler, ___ U.S. ___, 133 S.C. 1911, 185 L.Ed.2d 1044 (2013).[11] If so, this argument would also fail.

The Eleventh Circuit has expressly rejected the argument that *Martinez* applies to overcome the AEDPA limitations bar. See Arthur v. Thomas, 739 F.3d 611, 630-31 (11th Cir. 2014) ("Because Arthur's § 2254 petition was denied due to his complete failure to timely file that § 2254 petition, the Supreme Court's analysis in *Martinez* and *Trevino* of when and how 'cause' might excuse noncompliance with a state procedural rule is wholly inapplicable here.... Thus, we also hold that the reasoning of the *Martinez* rule does not apply to AEDPA's limitations period in § 2254 cases or any potential tolling of that period."). See also Lambrix v. Sec'y, Dep't of Corr., 756

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[10]As indicated, *pro se* pleadings should be liberally construed. See Haines v. Kerner, 404 U.S. 519 (1972).

[11]In *Martinez*, the Supreme Court held that if "a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim ..." when (1) "the state courts did not appoint counsel in the initial-review collateral proceeding" or (2) "appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective" pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Id. In such instances, the prisoner "must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Id. *Trevino* extended this rule to situations in which, even if a state's procedures technically permit a defendant to bring a claim of ineffective assistance of trial counsel on direct appeal, "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." 133 S.C. at 1921.

F.3d 1246, 1262-63 (11th Cir. 2014)(explaining "*Martinez* does not alter the statutory bar against filing untimely § 2254 petitions"). Any reliance on *Martinez* and/or *Trevino* would be misplaced to overcome the time-bar.

Since this habeas corpus proceeding is untimely, and since Petitioner has provided no lawful justification supported by the record whatever to excuse his untimeliness, Petitioner's claims challenging the lawfulness of his convictions are now time-barred pursuant to 28 U.S.C. §2244(d)(1)-(2) and should not be considered on the merits.

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 appealablilty 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.C. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir.

2001). Because the petition is clearly time-barred, 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. Recommendations

Based upon the foregoing, it is recommended that this petition for habeas corpus relief be dismissed as untimely filed pursuant to 28 U.S.C. §2244(d)(1)-(2). It is further recommended that no certificate of appealability issue.

SIGNED this 19th day of January, 2016.

UNITED STATES MAGISTRATE JUDGE

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