IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10478-D

MARCUS ANTHONY TERRELL,

Petitioner-Appellant,

versus

WALTER BERRY,

Respondent-Appellee.

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

ORDER:

To merit a certificate of appealability, Marcus Anthony Terrell must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Terrell has failed to make the requisite showing, his motion for a certificate of appealability is DENIED.

Terrell's motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARCUS ANTHONY TERRELL, Petitioner, vs. WALTER BERRY, Respondent.	CIVIL ACTION FILE NO. 1:17-cv-2594-WSD

JUDGMENT

This petition for a writ of habeas corpus having come before the court, Honorable William S. Duffey, Jr., United States District Judge, for consideration, and the petition having been considered and the court having rendered its opinion, it is

Ordered and Adjudged that the petition for a writ of habeas corpus be, and the same hereby is **dismissed**.

Dated at Atlanta, Georgia, this 22nd day of January, 2018.

JAMES N. HATTEN
CLERK OF COURT

By: s/Andrea Gee
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
January 22, 2018
James N. Hatten
Clerk of Court

By: s/Andrea Gee
Deputy Clerk

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

MARCUS ANTHONY TERRELL **GDC ID 831124,** **Petitioner,** **v.** **WALTER BERRY,** **Respondent.**	**1:17-cv-2594-WSD**

OPINION AND ORDER

This matter is before the Court on Magistrate Judge Catherine M. Salinas's Final Report and Recommendation [4] ("R&R"). The R&R recommends the Court dismiss the Petition of Marcus Anthony Terrell for Writ of Habeas Corpus [1] and deny Petitioner's Motion for Certificate of Appealability [3].

I. BACKGROUND[1]

State inmate Marcus Anthony Terrell pled guilty to sexual battery on September 20, 2004, pursuant to Carolina v. Alford, 400 U.S. 25 (1970). ([1-2] at

[1] The facts are taken from the R&R and the record. The Petitioner has not objected to any specific facts in the R&R, and the Court finds no plain error in them. The Court thus adopts the facts set out in the R&R. See Garvey v. Vaughn, 993 F.2d 776, 779 n.9 (11th Cir. 1993).

1; [1-3] at 8). Petitioner's conviction became final on October 20, 2004, when the time to file for direct appeal expired. (Id. at 9).

Terrell is currently serving concurrent life sentences and a term of years for rape and other crimes committed in 2012. ([4] at 1; [1-2] at 7). On July 10, 2017, Terrell filed a Petition for Writ of Habeas Corpus [1]. Terrell asserts that his 2004 Alford Plea was "used to enhance [his] present sentence." ([3] at 2). Terrell maintains that (1) the state breached the plea agreement, (2) the plea was not knowingly and voluntarily made, (3) he was victim of ineffective assistance of counsel, (4) he was coerced by vindictive prosecution, (5) the Alford Plea was a "miscarriage of justice" because of his "actual innocence," (6) there is no factual bases for the Alford Plea, (7) he was never informed of his appeal rights, and (8) the Georgia courts erred in dismissing his state petitions as untimely. ([1-2] at 2, 5-6, 12-16).

Although 28 U.S.C. § 2244(d)(1) imposes a 1-year period of limitation to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court, Terrell contends that this period should not run from the October 20, 2004, date his guilty plea conviction became final, but from the date he learned that his guilty plea was used to enhance his current sentence. Terrell claims that he could not file earlier because of a state created impediment

(ineffective assistance of counsel and the judge's failure to notify him of his right to challenge the conviction). ([1-2] at 7-8). Terrell asserts he was diligent in pursuing this petition upon "discover[ing] he could file a Habeas-Corpus to collaterly [sic] attack the prior unconstitutional conviction pursuant to the enhancement of present conviction." ([9] at 2). Terrell filed an application for state post-conviction review of his 2004 guilty plea in December 2015, at the earliest. ([4] at 4, citing [3] at 1).

On December 4, 2017, the Magistrate Judge issued the R&R rejecting Petitioner's arguments and recommending that the Petition be dismissed. ([4]). The Magistrate Judge concluded that by the time Petitioner filed an application for state post-conviction review of his 2004 guilty plea in December 2015, "the federal one-year limitation period had already expired long-before and could not be revived." (Id. at 4). The Magistrate Judge also concluded that "Terrell does not satisfy the prerequisites for a Certificate of Appealability, so his "Motion for Application Certificate of Appealability" should be denied and a Certificate of Appealability ought not be issued. (Id. at 5).

On December 29, 2017, Petitioner filed an Objection to the Final R&R [9]. Petitioner contends that the Magistrate Judge erred in finding that the 1-year limitation period ran from the date his conviction for sexual battery became final,

rearguing that a state created impediment prevented a timely filing and that the limitation period should be equitably tolled. ([9] at 4-8). Petitioner also reargues his actual innocence. ([9] at 8-10).

II. DISCUSSION

A. Legal Standard

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); Williams v. Wainwright, 681 F.2d 732, 732 (11th Cir. 1982) (per curiam). A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Where no party has objected to the report and recommendation, the Court conducts only a plain error review of the record. United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983) (per curiam).

B. Analysis

The Magistrate Judge concluded, and the Court agrees, that Terrell's Petition is untimely. As stated by the Magistrate Judge, "[o]rdinarily, a petition for a federal writ of habeas corpus must be filed within one-year of the latest to occur of four specified events. See 28 U.S.C. § 2244(d)(1). In this case, as in most, the

relevant event was "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. Id. at (d)(1)(A)." ([4] at 2). Here, the relevant judgment became "final" on October 20, 2004. ([1-3] at 8). While 28 U.S.C. § 2244(e) tolls the 1-year period of limitation during the time "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending," that application must be timely filed. "[O]nce a deadline has expired, there is nothing left to toll." Sibley v. Culliver, 377 F.3d 1196, 1204 (11th Cir. 2004). "A state court filing after the federal habeas filing deadline does not revive it." Id.

The Magistrate Judge correctly rejected Petitioner's arguments that the October 20, 2004, date should not be used to start the running of the 1-year limitation period pursuant to 28 U.S.C. § 2244(d)(1)(B) or (D). In particular, the Magistrate Judge concluded that "[n]either the state's alleged failure to inform Terrell of his appeal rights, nor the state's alleged breach of the 2004 plea agreement constitutes an 'impediment' to the pursuit of state post-conviction relief" that would alter the deadline in accordance with 28 U.S.C. § 2244(d)(1)(B). ([4] at 2 n.1). The Magistrate also concluded that Terrell was not entitled to invoke 28 U.S.C. § 2244(d)(1)(D) pursuant to Stewart v. United States, 646 F.3d 856 (11th Cir. 2011), because Stewart "applies only when a state court has vacated a

prior conviction used to enhance a later sentence, and Terrell has failed to persuade the Georgia courts to vacate his 2004 conviction for sexual battery." ([4] at 2 n.1). In his Objection, Petitioner reasserts that, due to ineffective assistance of counsel and the judge's omission, he was never informed of his appeal rights and that "it was not till the conviction (Alford) plea was used to enhance petitioner's present sentence that Petitioner discovered that he could collateraly [sic] attack the unconstitutional (Alford Plea) pursuant to Parris v. State, 232 Ga. 687, 688 (1974)." ([9] at 5). But Parris is not applicable because that case involved a "change in the law concerning right to counsel" that potentially rendered the prior conviction null and void. Parris, 232 Ga. at 688. And the failure of Petitioner's counsel or the sentencing judge to inform Petitioner of his appeals rights is not a state created impediment justifying a later filing of a federal habeas petition. Outler v. U.S., 485 F.3d 1273, 1282 n.4 (11th Cir. 2007) ("the law does not require a court, *sua sponte,* to remind a *pro se* litigant that he has only one year to file his claim"); Miller v. Cason, 49 F. App'x 495, 497 (6th Cir. 2002) (rejecting the petitioner's argument that the State "impeded the filing of his federal habeas petition by failing to give him notice of his appeal rights at sentencing" because the petitioner failed to explain how the action, which "may have interfered with [his]

direct appeal in state court in the early 1990s, ... prevented him from filing his federal habeas corpus petition until 2001")

Petitioner also asserts the limitation period should be equitably tolled pursuant to Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998), because "petitioner did not know he could appeal until the unconstitutional conviction was used to enhance" his sentence. ([9] at 6). But there is no showing of "extraordinary circumstances" that justify an equitable tolling of the limitations period. Petitioner's lack of knowledge of the law does not excuse his failure to timely file a habeas corpus petition. Perez v. Florida, 519 F. App'x 995, 997 (11th Cir. 2013).

The Magistrate Judge also correctly concluded that that "equitable exception to § 2244(d)(1)['s]" one-year limitation period in cases involving a convincing showing of "actual innocence" does not apply. ([4] at 4 n.2, citing McQuiggin v. Perkins, 133 S. Ct. 1924, 1931 (2013)). As recognized by the Magistrate Judge, "the Supreme Court expressly noted that 'tenable actual innocence gateway pleas are rare [and] a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" (Id. citing McQuiggin, 133 S. Ct. at 1928 (citations omitted)). Here, Terrell has offered no "new evidence," just his reinterpretation of old transcripts.

In his objection, Petitioner disagrees with the Magistrate Judge's conclusion that the equitable exception to Section 2244(d)(1)'s one-year limitation based on "actual innocence" does not apply. ([9] at 8-10). Petitioner asserts that the evidence of innocence meets the standard of Murray v. Carrier, 477 U.S. 478 (1986). (Id. at 8). Murray held that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Murray, 477 U.S. at 496. Petitioner offered no new evidence in his Objection to undermine the Magistrate Judge's conclusion that Petitioner's arguments of actual innocence are "meritless." ([4] at 4 n.2). As noted by the Magistrate Judge, ample evidence supports Petitioner's guilty plea. (Id.). This is not an extraordinary case justifying an equitable tolling of the limitation period.

After conducting a *de novo* review, the Court concludes that none of the exceptions for extending the limitation period beyond the year after Terrell's sexual battery conviction became final on October 20, 2004, apply. Plaintiff's objection is overruled.

The Magistrate Judge further concluded, and the Court agrees, that "Terrell does not satisfy the prerequisites for a Certificate of Appealability, so his "Motion

for Application Certificate of Appealability" [3] should be denied and a Certificate of Appealability ought not be issued." ([4] at 5). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner does not appear to specifically challenge the Magistrate Judge's recommendation that a COA should not issue. Nevertheless, the Court has conducted a *de novo* review and Petitioner has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" or "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," as required by Slack. 529 U.S. at 484.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Petitioner's Objection to the Final Report and Recommendation [9] is **OVERRULED**.

IT IS FURTHER ORDERED that Magistrate Judge Catherine M. Salinas's Final Report and Recommendation [4] is **ADOPTED**.

IT IS FURTHER ORDERED that Marcus Anthony Terrell's Petition for Writ of Habeas Corpus [1] is **DISMISSED**.

IT IS FURTHER ORDERED that Petitioner's Motion for Certificate of Appealability [3]is **DENIED**.

SO ORDERED this 22nd day of January, 2018.

William S. Duffey

WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE

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

MARCUS ANTHONY TERRELL, GDC ID 831124, Petitioner,	:	HABEAS CORPUS 28 U.S.C. § 2254
v.	:	CIVIL ACTION NO. 1:17-CV-2594-WSD-CMS
WALTER BERRY, Respondent.	:	

FINAL REPORT AND RECOMMENDATION

State inmate Marcus Anthony Terrell is serving concurrent life sentences and a lengthy term of years for rape and other crimes committed in 2012. *See* http://www.dcor.state.ga.us/GDC/Offender/Query (last viewed Nov. 29, 2017; searched for "831124"). *See also* [3] at 2 ("Sentence to max sentence guidelines 3 lifes & 50 years"); [1-2] at 7 (same).

This case does not challenge those convictions. Rather, Terrell is now seeking a federal writ of habeas corpus with respect to a guilty plea to sexual battery that he entered in an earlier case in 2004 pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). *See* [1-2] at 1. Terrell states that his 2004 guilty plea and conviction were "used to enhance [his] present sentence." [3] at 2. For the reasons that follow, I **RECOMMEND** that this case be **DISMISSED** and that a Certificate of Appealability be **DENIED**.

As a preliminary matter, I **DENY** Terrell's application for permission to proceed *in forma pauperis*, *see* [2], because (A) his average balance for the six-month period before he initiated this case exceeded $100, *see* [2-1] at 2, and (B) his application is now moot in any event because he has paid the filing fee, *see* [Unnmbrd. Dkt. Entry dated Aug. 24, 2017].

Because Terrell is proceeding *pro se*, I have construed his 250-plus pages of filings liberally. *See, e.g., Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

Ordinarily, a petition for a federal writ of habeas corpus must be filed within one-year of the latest to occur of four specified events. *See* 28 U.S.C. § 2244(d)(1). In this case, as in most, the relevant event was "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. *Id.* at (d)(1)(A).[1]

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[1] Terrell argues that 28 U.S.C. § 2244(d)(1)(C)&(D) should be applied instead of (d)(1)(A). Neither of these arguments has any merit.

First, Terrell asserts that he was prevented from pursuing state post-conviction relief by a "state impediment," [3] at 7, and he impliedly argues that the relevant date here is "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States [was] removed," 28 U.S.C. § 2244(d)(1)(C). But Terrell does not support this conclusory argument, either by identifying an actual "impediment" or by identifying the date on which the alleged "impediment"

Here, the exhibits to Terrell's petition indicate that the relevant judgment became "final" on October 20, 2004. *See* [1-3] at 8.

Federal law provides that "[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 shall not be counted toward [the one-year limitation period.]" 28 U.S.C. § 2244(e). But for this tolling provision to apply, such an application must be filed promptly. Otherwise, "once a deadline has expired, there is nothing left to toll." *Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004). Simply put: "[a] state court filing after the federal habeas filing deadline does not revive it." *Id.*

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was removed. Neither the state's alleged failure to inform Terrell of his appeal rights, nor the state's alleged breach of the 2004 plea agreement constitutes an "impediment" to the pursuit of state post-conviction relief. Indeed, Terrell's own petition and exhibits demonstrate that when he first sought to file a state habeas petition in December 2015 (or January 2016), he was able to do so without difficulty.

Second, Terrell cites *Stewart v. United States*, 646 F.3d 856 (11th Cir. 2011), and argues that he is entitled to invoke 28 U.S.C. § 2244(d)(1)(D). *See* [1-6] at 14. But *Stewart* is inapposite, because it applies only when a state court has *vacated* a prior conviction used to enhance a later sentence, and Terrell has failed to persuade the Georgia courts to vacate his 2004 conviction for sexual battery.

Here, the exhibits to Terrell's petition indicate that he did not file an application for state post-conviction review of his 2004 guilty plea until December 2015, at the earliest. *See* [3] at 1. *But see* [1-2] at 2 (giving a later filing date in January 2016); [1-3] at 9 (same); [1-8] at 19 (state habeas petition cover page reflecting a docketing date of January 28, 2016). And, at that point, the federal one-year limitation period had already expired long-before and could not be revived. Thus, Terrell's federal habeas petition is plainly untimely.[2]

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[2] The Supreme Court has recently recognized an "equitable *exception* to § 2244(d)(1)['s]" one-year limitation period in cases involving a convincing showing of "actual innocence." *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013). Terrell asserts that he is "actually innocent" of the sexual assault charge to which he pleaded guilty in 2004. *See, e.g.*, [1-2] at 13; [3] at 4. This argument is meritless. First, Terrell acknowledged a factual basis for his guilty plea when he entered it, *see, e.g.*, [1-4] at 13 ("the defendant tried to lay on top of the victim, and he placed his hand on her chest") & 19 ("Q. . . . you're just agreeing that there is a factual basis for your plea . . . A. Yes, ma'am."), and even the excerpts of the cross-examination his own attorney performed during an earlier proceeding in which Terrell's probation on a prior drug conviction was revoked (based on his commission of the subsequent crime of sexual assault) includes answers from the 13-year-old victim stating that Terrell sexually assaulted her, *see, e.g.*, [1-5] at 3-12 (relating that Terrell got into the victim's bed, positioned himself beside and over her so they were in contact and she could not escape his grasp, and then attempted to place his hands under her shirt and pants). Second, the Supreme Court expressly noted that "tenable actual-innocence gateway pleas are rare [and] 'a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of

"If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge *must* dismiss the petition and direct the clerk to notify the petitioner." 28 U.S.C. foll. § 2254, Rule 4 (emphasis added). Terrell is not entitled to relief in this case because his petition is plainly untimely, and, consequently, that petition must be dismissed.

In addition, Terrell does not satisfy the prerequisites for a Certificate of Appealability, so his "Motion for Application Certificate of Appealability" [3] should be denied and a Certificate of Appealability ought not be issued. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (requiring a two-part showing (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the 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"); *see also Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014) (en banc) (holding that the *Slack v. McDaniel* standard will be strictly applied prospectively).

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the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggin*, 133 S. Ct. at 1928 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). And Terrell has offered no "new evidence," just his reinterpretation of old transcripts.

I **DIRECT** the Clerk to terminate the referral of this case to me.

SO RECOMMENDED, ORDERED, AND DIRECTED, this 4th day of December, 2017.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE

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