IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15088-J

LABARRION HARRIS,

Petitioner-Appellant,

versus

JAMES DEAL,

Respondent-Appellee.

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

ORDER:

LaBarrion Harris is a Georgia prisoner serving a 20-year sentence after pleading guilty in November 2011 to armed robbery, aggravated assault, aggravated battery, and possession of a weapon during the commission of a crime. Harris did not timely file a direct appeal. Instead, on June 25, 2013, Harris filed a self-styled motion in state court for a "*de novo* out of time appeal," which was denied. Harris filed a motion to vacate sentence in state court on March 21, 2017, which the state trial court also denied. Harris then filed a 28 U.S.C. § 2254 petition in the district court in June 2017, arguing that his custody was unlawful and violated his constitutional rights because his statutes of conviction had not been properly enacted according to the Georgia Constitution and, thus, were void. Harris also filed a demand for a jury trial for his § 2254 petition.

"Appendix A"

The district court dismissed Harris's § 2254 petition as time-barred and denied his motion demanding a jury trial. Additionally, Harris filed a motion for reconsideration and a motion for "relief from mistake of judgment," both of which the district court denied. Harris then filed a "motion of rebuttal," arguing that the order dismissing his petition was incorrect because his conviction was void. The district court denied that motion as well. Harris has now appealed the dismissal of his § 2254 petition, the denial of his demand for a jury trial, and the denial of his rebuttal motion. He has moved for a certificate of appealability ("COA"), as well as leave to proceed on appeal *in forma pauperis* ("IFP"). Harris also has filed a Rule 60(b) motion for relief from judgment.

To merit a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court denies a habeas petition on procedural grounds, the petitioner must demonstrate that reasonable jurists would find it debatable whether (1) the petition states a valid claim of the denial of a constitutional right and (2) the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

This Court reviews *de novo* the district court's dismissal of a § 2254 petition as untimely. *Pugh v. Smith*, 465 F.3d 1295, 1298 (11th Cir. 2006). Pursuant to 28 U.S.C. § 2244(d)(1), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a § 2254 petition is governed by a one-year statute-of-limitations period that begins to run on the latest of four triggering events, including the date on which the judgment becomes final or the date on which a new factual predicate could have been discovered through due diligence. 28 U.S.C. § 2244(d)(1)(A), (D).

Harris's claims do not merit a COA. As a preliminary matter, there is no constitutional right to a jury trial in a habeas corpus proceeding. Also, reasonable jurists would not debate that Harris's § 2254 petition was time-barred because his conviction became final on December 4, 2011, 30 days after his conviction, when he failed to seek timely review. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (holding that, when a petitioner does not pursue direct appeal, judgment becomes final upon the expiration of time for seeking review); O.C.G.A. § 5-6-38(a) (providing 30 days to file a direct appeal). As none of the other triggering dates applied, the statute of limitations lapsed one year later on December 4, 2012. *See* 28 U.S.C. § 2244(d)(1)(A). Harris did not make the requisite showing for equitable tolling because he did not show that anything prevented him from timely filing his petition. *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (holding that the statute of limitations can be equitably tolled when an extraordinary circumstance prevented timely filing). He also cannot avail himself of the actual-innocence exception to relieve him of the strictures of the statute of limitations because he did not show that he was factually innocent. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (holding that actual innocence can serve as a gateway through which to overcome the statute of limitations); *Rozzelle v. Sec'y, Fla. Dep't of Corrs.*, 672 F.3d 1000, 1012-15 (11th Cir. 2012) (holding that actual innocence requires a showing of actual, factual innocence, rather than legal innocence). Because the district court correctly determined that Harris's § 2254 petition was time-barred, his rebuttal motion was meritless. Accordingly, Harris's motion for a COA is DENIED and his motion for leave to proceed on appeal IFP is DENIED AS MOOT. His Rule 60(b) motion is DENIED because it should have been filed in the district court.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

"End of Appendix A"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LABARRION HARRIS, Petitioner, vs. JAMES DEAL, Respondent.	CIVIL ACTION FILE NO.1:17-CV-02553-ODE

JUDGMENT

This petition for a writ of habeas corpus having come before the court, Honorable Orinda D. Evans, United States District Judge, on the Magistrate Judge's Final Report and Recommendation and the Respondent's Motion to Dismiss, and the court having ADOPTED said recommendation and GRANTED said motion, it is

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

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

JAMES N. HATTEN
CLERK OF COURT

By: s/ Stephanie Pittman
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
October 19, 2017
James N. Hatten
Clerk of Court

By: s/ Stephanie Pittman
Deputy Clerk

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

LABARRION HARRIS,	:	CIVIL ACTION NO.
GDC ID # 1000689140, Case # 747289,	:	1:17-CV-02553-ODE
Petitioner,	:	
	:	
v.	:	
	:	
JAMES DEAL,	:	HABEAS CORPUS
Respondent.	:	28 U.S.C. § 2254

ORDER

This action is before the Court on the Order and Final Report and Recommendation of Magistrate Judge J. Clay Fuller ("R&R") (Doc. 15), recommending that Respondent's motion (Doc. 11) to dismiss Petitioner's habeas corpus petition as time-barred be granted. Petitioner objects. (Doc. 18 ("Objs.")). He also has filed Amendments to Objections (Doc. 19) and a Demand for Jury Trial (Doc. 20).

In reviewing a Magistrate Judge's R&R, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need

not be considered by the district court." *United States v. Schultz*, 565 F.3d 1353, 1361 (11th Cir. 2009) (quoting *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988)) (internal quotation marks omitted). Absent objection, the district court judge "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate [judge]," 28 U.S.C. § 636(b)(1), and "need only satisfy itself that there is no clear error on the face of the record" in order to accept the recommendation. Fed. R. Civ. P. 72, advisory committee note, 1983 Addition, Subdivision (b). In accordance with 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the Court has conducted a *de novo* review of those portions of the R&R to which Petitioner objects and has reviewed the remainder of the R&R for plain error. *See United States v. Slay*, 714 F.2d 1093, 1095 (11th Cir. 1983).

The R&R provides the following procedural history, to which Petitioner does not object:

> Petitioner entered his guilty plea on November 3, 2011. There is no record that he filed a direct appeal. On June 25, 2013, Petitioner filed a De Novo Out Of Time Appeal and a Motion To Reduce/Modify Sentence. On July 10, 2013, the trial court denied each motion. On September 22, 2014, in an unpublished opinion, the Court of Appeals of Georgia denied Petitioner's appeal from the denial of these motions. Petitioner next filed a Motion To Vacate Void Sentence on March 17,

> 2017, which the trial court denied on March 21, 2017. Petitioner then executed and filed his federal habeas petition on June 23, 2017.

(R&R at 1-2 (citations omitted) (formatting altered)). Petitioner's federal habeas claims are based on the rather novel proposition that none of Georgia's criminal statutes pass constitutional muster. (*Id.* at 2).

The R&R rejects Petitioner's argument that the start of the limitations period should be delayed during the "many years" he needed to discover the factual predicate for his claims, because "his claims are not based on a newly discovered factual predicate, but rather on Petitioner's idiosyncratic legal analysis of the Georgia statutory scheme. Nothing about this statutory scheme involves a fact affecting Petitioner's guilt or innocence, and thus he may not rely on the date he discovered this alleged factual predicate to trigger the limitations period for his claims." (*Id.* at 4-5). The R&R concludes, therefore, that Petitioner missed the one-year cutoff of December 5, 2012 for filing either a tolling state application for post-conviction relief or a federal habeas petition, and thus statutory tolling does not apply here. (*Id.* at 6-7). The R&R also concludes that equitable tolling is not available to Petitioner based on his alleged ignorance of the law and that Petitioner may not rely on his actual innocence to overcome the time bar because he has not

offered new reliable evidence of his innocence. (*Id.* at 7-10). Thus, his "federal habeas petition, due no later than December 5, 2012, but filed on June 23, 2017, is untimely by more than four years and six months." (*Id.* at 10).

Petitioner objects that the state trial court lacked jurisdiction over his alleged crimes because they are based on unconstitutional Georgia criminal statutes, and that "jurisdiction can be challenged at any time." (Objs. at 2-3). But a federal district court may not address the merits of any claim raised in a time-barred federal habeas petition, including a claim challenging the jurisdiction of the state criminal court. *See Walker v. Alabama*, 2:14cv982-WKW, 2015 U.S. Dist. LEXIS 59932, at *8 n.5 (M.D. Ala. Apr. 2) ("Walker is incorrect in arguing that the federal limitation period does not apply to his § 2254 petition because he presents what he says is a 'jurisdictional' claim . . . . There is no exception to the limitation period in 28 U.S.C. § 2244(d) for such claims seeking to impugn the jurisdiction of the state trial court."), *adopted by* 2015 U.S. Dist. LEXIS 59629 (M.D. Ala. May 7, 2015).

Petitioner also objects that there is no controversy established by Respondent's motion to dismiss, presenting arguments that are appropriate when offered by a defendant in a civil action, not by a petitioner in a habeas action. (Objs. at 1-2, 4, 13). This objection is thus puzzling and ultimately irrelevant. The timeliness of

Petitioner's federal habeas petition is the sole matter at issue here, and Respondent had every right to raise it.

Petitioner next objects that his petition must be considered on the merits because the writ of habeas corpus cannot be suspended except during rebellion or invasion (*see* Objs. at 5-6), but it is well-settled that the dismissal of a federal habeas petition as time-barred does not violate the Suspension Clause of the United States Constitution. *See Collazo v. United States*, 190 F. App'x 759, 761 n.5 (11th Cir. 2006) ("We have previously held that neither the one-year limitations period for filing an initial habeas corpus petition nor [the] restrictions on successive petitions amounts to suspension of the writ." (citing *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1217 (11th Cir. 2000))).

Finally, Petitioner objects to the R&R's conclusions regarding the starting date for the limitations period, the availability of statutory and equitable tolling and his right to invoke the actual innocence exception to the habeas time-bar — all based on the state trial court's alleged lack of jurisdiction to convict and sentence him. (Objs. at 6-12). These objections are frivolous because Petitioner's jurisdictional claims are frivolous, nor do they warrant statutory or equitable tolling or the application of the actual innocence exception. *See, e.g., Walker v. Alabama*, 2:14-CV-982-WKW,

2015 U.S. Dist. LEXIS 72093, at *3 (M.D. Ala. June 4, 2015) ("A claim of actual innocence is separate and apart from challenges grounded upon legal or procedural insufficiencies. Because the present motion is grounded entirely upon Mr. Walker's challenge to the state-court's jurisdiction, his arguments regarding actual innocence remain without merit and the federal time-bar applies to the present petition." (citing *Bousley v. United States*, 523 U.S. 614, 623 (1998) ("It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency."))).

In his Amendments, Petitioner argues that under FED. R. CIV. P. 60(b)(4) there is no time bar for a federal habeas petition that challenges a void judgment, and therefore his habeas petition cannot be dismissed as untimely. (Doc. 19). This argument fails. Petitioner misconstrues this Court's jurisdiction, which does not extend to correcting state court judgments, void or otherwise, under Rule 60(b). Petitioner may only prevail in overturning his criminal convictions by filing a *timely* federal habeas petition that includes a meritorious claim, and Petitioner has failed on both counts.

CONCLUSION

Petitioner's Objections, as amended (Docs. 18, 19), are therefore **OVERRULED**. Finding no error, plain or otherwise, in the remainder of the Report, the Court **ADOPTS** the Magistrate Judge's Order and Final Report and Recommendation (Doc. 15) as the Opinion and Order of the Court; **GRANTS** Respondent's Motion to Dismiss Petition as Time-Barred (Doc. 11); **DISMISSES** Petitioner's federal habeas petition (Doc. 1) as untimely; **DENIES** Petitioner a certificate of appealability; and **DENIES** his Demand for Jury Trial (Doc. 20).

IT IS SO ORDERED this 18 day of October, 2017.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

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

LABARRION HARRIS,	:	CIVIL ACTION NO.
GDC ID # 1000689140, Case # 747289,	:	1:17-CV-02553-ODE-JCF
Petitioner,	:	
	:	
v.	:	
	:	
TOM GRAMIAK,	:	HABEAS CORPUS
Respondent.	:	28 U.S.C. § 2254

MAGISTRATE JUDGE'S ORDER AND
FINAL REPORT AND RECOMMENDATION

Petitioner, a Georgia prisoner, challenges via a 28 U.S.C. § 2254 habeas corpus petition his November 2011 convictions in the Superior Court of Cobb County upon the entry of his plea of guilty to armed robbery, aggravated assault, aggravated battery and possession of a firearm during the commission of a crime. (Doc. 1; *see* Doc. 11-1). **IT IS RECOMMENDED** that Respondent's Motion To Dismiss Petition As Untimely (Doc. 11) be **GRANTED**.

I. Procedural History

Petitioner entered his guilty plea on November 3, 2011. (Doc. 1 at 2; *see* Doc. 12-2). There is no record that he filed a direct appeal. (*See* Doc. 11-1 at 2). On June 25, 2013, Petitioner filed a De Novo Out Of Time Appeal and a Motion To Reduce/Modify Sentence. (Docs. 12-4, 12-5). On July 10, 2013, the trial court denied

each motion. (Docs. 12-6, 12-7). On September 22, 2014, in an unpublished opinion, the Court of Appeals of Georgia denied Petitioner's appeal from the denial of these motions. (Doc. 12-8). Petitioner next filed a Motion To Vacate Void Sentence on March 17, 2017 (Doc. 12-9), which the trial court denied on March 21, 2017 (Doc. 1 at 3).

Petitioner then executed and filed his federal habeas petition on June 23, 2017. (Doc. 1 at 14). He raises four claims: (1) the criminal statutes contained in the Official Code of Georgia Annotated, under which he was convicted, "have no jurisdiction over [him] because they are unconstitutional and void ab initio" due to the defective manner in which they were codified, i.e., by delegation in 1978 to the Code Revision Commission and the Michie Company from the Georgia General Assembly, the exclusive repository of the legislative power of the state; (2) for this reason, and also because of retroactive changes in the codified definitions of armed robbery and aggravated assult, he is in custody in violation of the federal and state constitutions; (3) the judgment against him is void because the Georgia criminal statutes under which he was convicted are void; (4) he has been deprived of life and liberty in violation of the Georgia constitution and the Fifth Amendment of the United States Constitution. (Doc. 1 at 6 *et seq.*). With respect to the timeliness of his federal habeas petition,

Petitioner states that jurisdiction can be challenged at any time and that 28 U.S.C. § 2244(d) "does not bar [his] petition because [he] had to put [him]self through law school with no teacher and no help." (*Id.* at 12).

Respondent moves to dismiss the petition as time-barred. (Doc. 11). Petitioner responds that "the factual predicate of the claims presented took [him] many years to discover through [the] exercise of due diligence." (Doc. 13 at 2).

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

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

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due

diligence.

28 U.S.C. § 2244(d)(1).

If the record does not suggest otherwise, and here it does not, the limitations period for a federal habeas petition is triggered by the finality of the judgment of conviction at issue, i.e., "by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Because Petitioner did not file a direct appeal within the thirty-day time limit for doing so, *see* O.C.G.A. § 5-6-38(a) (allowing thirty days to appeal a judgment of conviction in Georgia), his convictions became final under 28 U.S.C. § 2244(d)(1)(A) on December 5, 2011, the first business day after the thirty-day period expired for Petitioner to file a direct appeal following the entry of his judgment of conviction on November 4, 2011. *See Cantu v. Florida*, No. 2:13-cv-400-FtM-29MRM, 2016 U.S. Dist. LEXIS 64645, at *5-6 (M.D. Fla. May 17, 2016) (citing *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir. 2002), involving a Georgia prisoner, to the effect that "where petitioner did not seek direct review of his judgment of conviction or sentence, his judgment of conviction (entered upon his guilty plea) became 'final' for purposes of § 2244 on the date his 30-day right to appeal expired").

Petitioner argues that the start of the limitations period should be delayed

because he required "many years" to discover the factual predicate for his claims. (Doc. 13 at 2). But his claims are not based on a newly discovered factual predicate, but rather on Petitioner's idiosyncratic legal analysis of the Georgia statutory scheme. Nothing about this statutory scheme involves a fact affecting Petitioner's guilt or innocence, and thus he may not rely on the date he discovered this alleged factual predicate to trigger the limitations period for his claims. Nor does he provide any evidence that he pursued the information about the codification of the Georgia criminal statutes with any diligence, for he first raised a claim based on this information in his Motion To Vacate Void Sentence (Doc. 12-9), which he filed more than five years after the entry of his guilty plea. *See Esry v. Escapule*, CV-13-2028-PHX-SRB, 2014 U.S. Dist. LEXIS 93345, at *15-16 (D. Ariz. May 28) ("Petitioner's discovery of [] information [about Arizona legal procedures] was not the discovery of a 'factual predicate' but his discovery of a legal principle of Arizona law."), *adopted by* 2014 U.S. Dist. LEXIS 92417 (D. Ariz. July 7, 2014); *see id.* at 16 ("Moreover, the commencement [of the limitations period] is not delayed until actual discovery, but only until the date on which it could have been discovered through the exercise of due diligence. Even if it were presumed that an adverse ruling of the Arizona Supreme Court was necessary to alert Petitioner to those legal principles, Petitioner proffers

nothing to suggest that he was diligent in pursuing such a ruling." (citation and internal quotations omitted)).

A. Statutory Tolling

Statutory tolling applies when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). The limitations period in this case ran untolled for 365 days after Petitioner's judgment of conviction became final on December 5, 2011 and expired on December 5, 2012 — more than six months before Petitioner filed his motion for out-of-time appeal on June 25, 2013. Because Petitioner did not file an application for state post-conviction or other collateral review with respect to his judgment of conviction during the one-year federal limitations period, statutory tolling does not apply here.[1] *See George v. Sec'y Dep't of Corr.*, 438 Fed. Appx. 751, 753 n.5 (11th Cir. 2011) (noting "that § 2244(d)(2) does not provide for

[1]Had Petitioner received leave to file an out-of-time appeal, the appeal process would have reset the limitations period, *see Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009), but because he did not, his motion for out-of-time appeal had no effect. *See Espinosa v. Sec'y, Dep't of Corr.*, 804 F.3d 1137, 1142 (11th Cir. 2015) ("When the state appellate court denied Espinosa's petition for belated appeal, it never considered the merits of his underlying claims. Espinosa's petition for belated appeal never triggered a reexamination of his conviction or sentence and, as a result, failed to toll the federal limitation period. Espinosa's federal habeas petition was untimely.").

statutory tolling [when] the one-year limitations period provided by AEDPA ha[s] already expired [before a petitioner files] his state post-conviction motion"; and citing *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001), for its "holding that a properly filed application for state post-conviction relief does not provide statutory tolling of [the] AEDPA limitations period where the motion for state post-conviction relief was not filed until after § 2244(d)'s one-year limitation period had expired"). Thus, to obtain merits review of his otherwise untimely federal habeas claims, Petitioner must establish either that equitable tolling is warranted or that he is actually innocent of his crimes of conviction. He has done neither.

B. Equitable Tolling

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

("[E]quitable tolling is an extraordinary remedy, [and] it is limited to rare and exceptional circumstances and typically applied sparingly. Thus, . . . [it] is available only when a [petitioner] untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." (citation and internal quotations omitted)). "The petitioner bears the burden of showing that equitable tolling is warranted." *Hunter*, 587 F.3d at 1308. "To establish diligence, . . . [he] must present evidence showing reasonable efforts to timely file his action." *Dodd v. United States*, 365 F.3d 1273, 1282 (11th Cir. 2004). A petitioner "must plead or proffer enough facts that, if true, would justify an evidentiary hearing on the issue." *Hutchinson v. Florida*, 677 F.3d 1097, 1099 (11th Cir. 2012). "And the allegations supporting equitable tolling must be specific and not conclusory." *Id.*; *see Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011) ("Conclusory allegations are simply not enough to warrant a hearing.").

Petitioner suggests a possible basis for equitable tolling — that he was required to put himself through "law school" and thus should be given more time to file his federal habeas claims. (Doc. 1 at 12). But ignorance of the law — or rather, here, a lack of awareness of a fantastical interpretation of the law — does not justify equitable tolling. *See Holmes v. Florida*, 17-22609-Civ-MARTINEZ, 2017 U.S. Dist. LEXIS

115100, at *18 (S.D. Fla. July 21) ("The Eleventh Circuit has further held that a lack of a legal education and related confusion or ignorance about the law as excuses for a failure to file [a habeas corpus petition] in a timely fashion does not warrant equitable tolling of the limitations period."), *adopted by* 2017 U.S. Dist. LEXIS 141296 (S.D. Fla. Aug. 29, 2017).

C. Actual Innocence

Finally, even if the limitations period has expired, "actual innocence, if proved, serves as a gateway through which a petitioner may pass," although "[t]he gateway should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.' " *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928, 1936 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)). "To be credible," a "claim that constitutional error has caused the conviction of an innocent person" must be supported "with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. To prevail on such a claim, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at

327; *see Kuenzel v. Comm'r, Ala. Dep't of Corr.*, 690 F.3d 1311, 1314-15, 1318 (11th Cir. 2012) (discussing "*Schlup* gateway" to consideration of procedurally barred claims, which the Supreme Court created to prevent the conviction of a defendant who is actually innocent).

Petitioner has offered no new reliable evidence of his actual innocence. His federal habeas petition, due no later than December 5, 2012, but filed on June 23, 2017, is untimely by more than four years and six months.

III. Certificate of Appealability

A state prisoner must obtain a certificate of appealability (COA) before appealing the denial of his federal habeas petition. 28 U.S.C. § 2253(c)(1)(A). A COA may issue only when the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is met when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). A petitioner need not "show he will ultimately succeed on appeal" because "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Lamarca v. Sec'y, Dep't of*

Corr., 568 F.3d 929, 934 (11th Cir. 2009) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 337, 342 (2003)). Furthermore,

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, . . . a certificate of appealability should issue only when the prisoner shows both that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

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

IV. Conclusion

For the foregoing reasons, **IT IS RECOMMENDED** that Respondent's Motion To Dismiss Petition As Untimely (Doc. 11) be **GRANTED**; that Petitioner's habeas corpus petition (Doc. 1) be **DISMISSED as time-barred**; and that Petitioner be **DENIED** a certificate of appealability.

Petitioner's motion (Doc. 14) to substitute his current warden, James Deal, for Respondent Gramiak is **GRANTED**. The Clerk is **DIRECTED** to change the style

of this case accordingly and is further **DIRECTED** to terminate the referral to the Magistrate Judge.

SO ORDERED and RECOMMENDED this 22nd day of September, 2017.

/s/ *J. CLAY FULLER*
J. CLAY FULLER
United States Magistrate Judge