

APPENDIX A

OPINION 11TH CIR.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-15943
Non-Argument Calendar

D.C. Docket No. 9:14-cv-81300-DMM

RICHARD S. BUTTON,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

(November 14, 2017)

Before TJOFLAT, MARCUS and NEWSOM, Circuit Judges.

PER CURIAM:

Richard Button, a Florida prisoner serving a life sentence for first-degree murder and robbery with a deadly weapon, appeals from the district court's dismissal of his 28 U.S.C. § 2254 petition as untimely. We granted a certificate of

appealability (“COA”) on the following issue: “Whether Button’s May 25, 2013, motion for post-conviction relief under Fla. R. Crim. P. 3.850 was properly filed such that it tolled the time to file his 28 U.S.C. § 2254 petition for a writ of habeas corpus, rendering the petition timely?” The Rule 3.850 motion, filed in May 2013 (“May 2013 motion”), was filed about 11 years after judgment became final in June 2002. It was based on new evidence in the form of recanted testimony, but Button did not explain how or when he discovered the new evidence, and did not include an affidavit from the recanting witness.¹ He filed an amended petition in 2014, but again did not explain how or when he discovered the new evidence, and did not include an affidavit. In this appeal, Button: (1) argues that the May 2013 motion tolled the time because it was properly filed; and (2) requests appointment of counsel on appeal. After careful review, we affirm and deny his request.

When reviewing the district court’s denial of a habeas petition, we review questions of law and mixed questions of law and fact de novo, and findings of fact for clear error. Nyland v. Moore, 216 F.3d 1264, 1266 (11th Cir. 2000).

An application is “properly filed” when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. Artuz v. Bennett, 531 U.S. 4, 8 (2000). Laws and rules governing filings include those prescribing

¹ Although Button argues on appeal that his May 2013 petition asserted that he learned of the new evidence in 2012, it is clear from the documents filed by both parties in the district court that the petition did not include any information like this when it was filed in state court.

the forms to be used, time limits, the court and office for filing, filing fees, and other preconditions imposed on filers. Id. A post-conviction petition that is dismissed as untimely under state law is not “properly filed,” and thus, does not toll the statute of limitations. Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005); Webster v. Moore, 199 F.3d 1256, 1258-59 (11th Cir. 2000).

When a state court has not addressed the timeliness of a petition, we must examine the delay in each case and determine what the state courts would have held in respect to timeliness. Evans v. Chavis, 546 U.S. 189, 197-98 (2006). Under Florida law, Rule 3.850(b)(1) provides that no motion shall be considered pursuant to the rule if filed more than two years after the judgment and sentence became final, unless the motion alleges that the facts on which the claim is predicated were unknown to the movant or the movant’s attorney and could not have been ascertained by the exercise of due diligence, and that the claim is made within two years of the time the new facts were or could have been discovered. Fla. R. Crim. P. 3.850(b)(1). If the defendant files a newly discovered evidence claim based on recanted trial testimony, he shall include an affidavit from that person as an attachment to the motion or an explanation why the required affidavit could not be obtained. Fla. R. Crim. P. 3.850(c).

As a threshold requirement, a movant must allege that the Rule 3.850 motion has been filed within two years from the date that the evidence was discovered, and

that the evidence could not have been discovered earlier with the exercise of due diligence. Bolender v. State, 658 So. 2d 82, 85 (Fla. 1995). Where these threshold requirements are not alleged or demonstrated, a motion filed after the two-year period may be dismissed as untimely. See Swafford v. State, 828 So. 2d 966, 976-978 (Fla. 2002).

In this case, the district court did not err in determining that Button's § 2254 petition was untimely filed since his May 2013 motion did not toll his time in which to file his § 2254 petition. See Nyland, 216 F.3d at 1266; 28 U.S.C. § 2244(d)(1)(A), (2). Although the state court did not expressly dismiss the motion due to timeliness, we may examine the timeliness of the May 2013 motion, and we determine that the motion was untimely. See Evans, 546 U.S. at 197-98. As the record reveals, the May 2013 motion was filed more than two years after the judgment and sentence became final. See Fla. R. Crim. P. 3.850(b)(1). Under Florida law, Button did not meet the threshold requirement to show that the motion met the exception to timeliness -- that is, he did not show that the motion was filed within two years of the discovery of the new evidence, and that the evidence could not have been discovered sooner through the exercise of due diligence. See Bolender, 658 So. 2d at 85. Furthermore, the May 2013 motion and the amended motion did not include affidavits, as required by Fla. R. Crim. P. 3.850(c).

Because the May 2013 motion did not comply with the applicable rules, it was untimely and not properly filed. See Artuz, 531 U.S.at 8; Swafford, 828 So. 2d at 976 978; Pace, 544 U.S. at 417; Webster, 199 F.3d at 1258-59; Fla. R. Crim. P. 3.850. A motion that is not properly filed does not toll the statute of limitations. See Pace, 544 U.S. at 417; Webster, 199 F.3d at 1258-59. Accordingly, the May 2013 motion did not toll the time in which to file Button's § 2254 petition, and the petition was untimely. Because the petition was untimely, we affirm, and deny Button's request for appointment of counsel.

AFFIRMED.

APPENDIX B

ORDER ADOPTING REPORT & RECOMMENDATION SOUTHERN
DISTRICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:14-81300-MIDDLEBROOKS/WHITE

RICHARD S. BUTTON,

Petitioner,

v.

JULIE L. JONES,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DE 1) and an amended petition (DE 17). Magistrate Judge Patrick A. White issued a Supplemental Report and Recommendation ("Report") on April 28, 2016. (DE 19). Petitioner filed Objections to the Report. (DE 20).

The Report recommends dismissing the amended petition as untimely based on its finding that the last state court motion (filed May 23, 2013 and amended April 9, 2014) was not "properly filed." Petitioner objects the Report's recommendation to dismiss Petitioner's petition as time-barred, arguing his last state court post-conviction motion was "properly filed."

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The one-year limitations period in § 2244(d) is tolled during the pendency of a "properly filed" application for state post-conviction relief. 28 U.S.C. § 2244(d)(2). An application is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, 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, 8 (2000) (footnote omitted). Filing conditions encompass more than merely the conditions necessary "to get a clerk to accept [a] petition," and include

requirements that “often necessitate judicial scrutiny.” *Pace v. DiGuglielmo*, 544 U.S. 408, 414-15 (2005).

Here, the state court denied Petitioner’s motion, which was originally filed May 25, 2013 and amended on April 9, 2014, because it was untimely. Petitioner’s motion relied on newly discovered evidence – an alleged recantation of a state witness and an alleged witness supporting the recantation. The state court explained that “[u]nder Florida Rule of Criminal Procedure 3.850, a claim of newly discovered evidence must be filed within two years from the date the evidence could have been discovered with the exercises [sic] of due diligence.” (*Id.*, citing *Bolender v. State*, 658 So. 2d 82 (Fla. 1995)). The state court found that Petitioner’s motion was untimely because Petitioner “failed to demonstrate when the Defendant discovered the evidence or why it could not have been discovered sooner.” (DE 10-3 at 192).

Petitioner essentially argues that the state court judge erred in finding he did not demonstrate when he discovered the recantation or why it could not be discovered sooner.

2 → However, “the state post-conviction court’s determination that the motion was not properly verified is entitled to deference on federal habeas review, *see Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (stating federal courts should defer to a state court’s decision as to whether a state post-conviction motion was properly filed under § 2244(d)(2)).” *Jones v. Sec’y, Fla. Dept. of Corr.*, 499 F. App’x 945, 950 (11th Cir. 2012). Petitioner never appealed the state court’s order denying the May 25, 2013 motion as untimely.

Upon a careful, *de novo* review of the record, as well as Petitioner’s Objections, the Court agrees with the Report’s recommendation to dismiss the petition as time barred and to deny a certificate of appealability.

Accordingly, it is

ORDERED AND ADJUDGED:

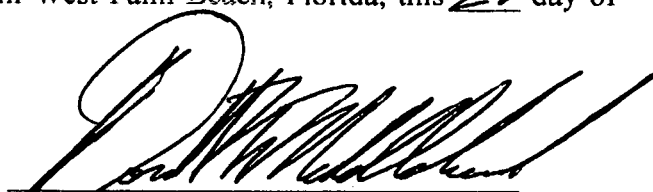
(1) The Supplemental Report and Recommendation (DE 19) is **RATIFIED, AFFIRMED, and ADOPTED** in its entirety.

(2) Petitioner's Amended Petition (DE 17) is **DISMISSED**.

(3) A Certificate of Appealability is **DENIED**.

(4) The Clerk of Court shall **CLOSE** this case and **DENY** all pending motions as **MOOT**.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 27 day of June, 2016.


DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record;
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-81300-Civ-MIDDLEBROOKS
MAGISTRATE JUDGE P.A. WHITE

RICHARD S. BUTTON,	:	
Petitioner,	:	
v.	:	<u>SUPPLEMENTAL REPORT OF</u>
JULIE L. JONES ¹ ,	:	<u>MAGISTRATE JUDGE</u>
Respondent.	:	

I. Introduction

Richard Button, who is presently confined at Hardee Correctional Institution in Bowling Green, Florida, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction in case number 05-1998-CF-000675 from the Fifteenth Judicial Circuit Court for Palm Beach County.

This cause 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. A report recommending dismissal of the petition as time barred was entered. (DE# 12). After the filing of objections (DE# 14) and an amended petition (DE# 17), the District Judge entered an order re-referring in light of the amended petition. (DE# 16).

The Court now has before it the amended petition for writ of habeas corpus, the Respondent's response to an order to show cause

¹Julie L. Jones became Secretary of the Florida Department of Corrections on January 5, 2015 is substituted as party pursuant to Fed.R.Civ.P. 25(d).

with appendix of exhibits and the petitioner's reply.

II. Procedural History

Petitioner was charged in an indictment with first degree murder and robbery with a deadly weapon. (DE# 10-1, p. 28-29). The jury returned a verdict of guilty on both charges. (DE# 10-1, p. 31). The trial court adjudicated petitioner guilty and sentenced him to concurrent terms of life. (DE# 10-1, p. 34-43).

Petitioner appealed his conviction to the Fourth District Court of Appeal, arguing that the trial court erred in denying his motion for judgment of acquittal on both counts and in allowing collateral crime evidence. (DE# 10-1, p. 45-69). The Fourth District per curiam affirmed the conviction on June 5, 2002. See Button v. State, 819 So. 2d 783 (Fla. 4th DCA 2002).

On November 6, 2002, Petitioner filed a motion to correct illegal sentence. (DE# 10-1, p. 132-134). The trial court denied the motion on April 26, 2004. (DE# 10-1, p. 143-145). Petitioner did not appeal this ruling.

Petitioner filed a petition for writ of habeas corpus in the Fourth District on January 3, 2003, arguing that appellate counsel was ineffective for not briefing an issue with regard to the trial court conducting proceedings in the absence of petitioner. (DE# 10-1, p. 147-156). The Fourth District denied the petition on November 4, 2003. (DE# 10-1, p. 180).

Petitioner next filed a motion for post-conviction relief on November 14, 2003, arguing trial counsel was ineffective for: (1)

failing to move to suppress DNA evidence; (2) for failing to request that a sleeping juror be removed; (3) failing to move to suppress letters written by Petitioner; (4) failing to object to testimony of a lay witness; (5) refusing to allow Petitioner to testify in his own behalf; (6) for argument with regard to his request for a court order to obtain exculpatory evidence; (7) failing to call as a witness the medical examiner who performed the autopsy of the victim; (8) misrepresenting to the jury the evidence that they saw during trial; (9) failing to object to improper closing comments by the prosecution; (10) failing to object to an upward departure sentence; and (11) for cumulative errors. (DE# 10-1, p. 182-218). The trial court summarily denied the motion and the petitioner appealed. (DE# 10-1, p. 253 to 10-2, p. 29). The Fourth District found the trial court properly denied ten of the eleven claims, but remanded Claim 6 for an evidentiary hearing in order to determine whether defense counsel's actions at trial were tactical. See Button v. State, 941 So. 2d 531 (Fla. 4th DCA 2006). Mandate issued on September 25, 2006. (DE# 10-2, p. 49).

On remand, the trial court denied the claim after conducting an evidentiary hearing. (DE# 10-2, p. 51-56). The petitioner appealed to the Fourth District. (DE# 10-2, p. 58-98). The Fourth District affirmed the denial, holding the petitioner was not prejudiced by counsel's strategy because the evidence of the petitioner's guilt was overwhelming. See Button v. State, 40 So. 3d 77 (Fla. 4th DCA 2010). Mandate issued on September 17, 2010. (DE# 10-2, p. 142).

On August 12, 2011, the Petitioner filed a notice to invoke the discretionary jurisdiction of the Florida Supreme Court. (DE# 10-2, p. 144-157). On January 11, 2011, the Florida Supreme Court denied review. See Button v. State, 53 So. 3d 1021 (Fla. 2011).

On September 7, 2008, Petitioner filed a motion for post-conviction relief, arguing that he had newly discovered evidence that the State's expert has been negligent in a high percentage of his cases. (DE# 10-2, p. 173-181). He filed an amended motion arguing that the medical examiner intentionally falsified the report and that the prosecutors conspired to substitute another doctor to give the testimony based on the examiner's report. (DE# 10-2, p. 183-228). The State responded. (DE# 10-2, p. 230-238). The trial court denied the motion, adopting the State's reasoning. (DE# 10-2, p. 240). Petitioner appealed the denial. (DE# 10-3, p. 5-31). The Fourth District per curiam affirmed the denial. See Button v. State, 64 So. 3d 1276 (Fla. 4th DCA 2011). Mandate issued on August 26, 2011 (DE# 10-3, p. 35).

Petitioner filed a petition for writ of mandamus in the Florida Supreme Court asking that the Fourth District attach records in support of its opinion. (DE# 10-3, p. 37). The Florida Supreme Court disposed of the motion on October 11, 2011 ruling the Appellant had no legal right to mandamus. See Button v. State, 74 So. 3d 1082 (Fla. 2011).

On August 13, 2010, Petitioner filed a motion for post-conviction relief arguing newly discovered evidence of Brady and

Youngblood violations, and contending that the State withheld information about the victim which would have supported his defense that someone else killed the victim. (DE# 10-3, p. 45-77). The State responded. (DE# 10-3, p. 79-89). The trial court denied the motion. (DE# 10-3, p. 117-125). The court found the petitioner had failed to establish that the evidence was newly discovered because the victim's status as a one time informant was known at the time of trial. Petitioner appealed the denial to the Fourth District. (DE# 10-3, p. 127-140). The Fourth District per curiam affirmed the denial. (DE# 10-3, p. 142). Mandate issued on June 7, 2013. (DE# 10-3, p. 144).

On May 25, 2013, Petitioner filed a motion for post conviction relief, again claiming newly discovered evidence (DE# 10-3, p. 146-156). The State filed a response arguing that the petitioner failed to establish the evidence was newly discovered. (DE# 10-3, p. 158-160). The trial court dismissed the motion without prejudice because Petitioner failed to allege that the evidence was discovered within two years of filing the motion. (DE# 10-3, p. 162-165). On April 9, 2014, the petitioner filed an amended motion for post-conviction relief claiming newly discovered evidence, arguing that the State's main witness, Petitioner's ex-wife, recanted the testimony that she gave at trial. (DE# 10-3, p. 167-175). The State responded that Appellant failed to attach an affidavit by the witness and failed to allege that the witness recanted while under oath and subject to the prospect of perjury (DE# 10-3, p. 177-187). On September 4, 2014 the trial court entered an order dismissing with prejudice petitioner's motion because petitioner still failed to demonstrate when he discovered the evidence or why it could not have been discovered sooner. (DE#

10-3, p. 186-194). The petitioner did not appeal.

Petitioner filed the original petition on October 21, 2014.² He raised three claims, one claim of trial error and two claims of ineffective assistance of counsel. In his amended petition he raises the following claims:

1. Whether petitioner's constitutional right to a fair determination of the facts presented at trial would support a conviction for robbery with a deadly weapon or should the court have granted a motion for judgment of acquittal on the same grounds.
2. Whether the jury's verdict of guilty on counts one and two resulted in a non-unanimous verdict.
3. Whether the petitioner was denied his Sixth Amendment right to effective assistance of counsel when counsel withdrew defense request for confidential informant's file that would have revealed the victim in this case was a police informant and that there were other suspects with a motive for murder.
4. Whether trial counsel rendered ineffective assistance pursuant to Strickland when, during opening remarks, he promised to produce exculpatory photographic evidence that he never produced, and during closing remarks, reminded the jury that they did, indeed view those photographs.
5. Whether trial counsel rendered ineffective assistance pursuant to Strickland by not requesting a "Frye" hearing concerning Dr. Siebert's "new or novel" methodology in determining the manner in which the crime occurred.
6. The medical examiner intentionally falsified the report and the prosecutors conspired to substitute another doctor to give testimony based on the examiner's report.

² Petitioner previously filed a federal petition for writ of habeas corpus, but it was voluntarily dismissed by the petitioner.

7. The state withheld information about the victim which would have supported his defense that someone else killed the victim.
8. Newly discovered evidence that the state's main witness, petitioner's ex-wife, recanted the testimony she gave at trial.

III. Statute of Limitations

The state contends that the petition is untimely and subject to dismissal. As will be discussed below the instant petition is subject to dismissal as untimely.

A one-year statute of limitations applies to petitions for writ of habeas corpus filed by State prisoners. 28 U.S.C. § 2244(d)(1). In most cases, the limitations period begins to run when the judgment becomes final after direct appeal or at the time when seeking such review has expired. 28 U.S.C. § 2244(d)(1)(A). This period is tolled while a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending. 28 U.S.C. § 2244(d)(2).

The Supreme Court has held that the one-year limitations period is subject to equitable tolling in appropriate cases. Holland v. Florida, 560 U.S. 631(2010). See also Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005) (holding 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); Helton v. Secretary for Dept. of Corrections, 259 F.3d 1310, 1312 (11 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); Sandvik v. United States, 177 F.3d 1269, 1271 (11 Cir. 1999).

As indicated above, 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. Pace, 544 U.S. at 418, 125 S.Ct. 1807 (emphasis deleted).

State Motion was not Properly Filed

The petitioner contends that his petition is timely because it was filed within one year of the denial of his most recent motion for post conviction relief. The respondent counters that the most recently filed motion for post conviction was not properly filed and did not operate to toll the limitations period. Thus the initial issue to be decided is whether the most recent state motion for post conviction relief was properly filed in order to toll the limitations period. The determination of whether this petition is timely thus turns on whether the May 25, 2013 motion for post conviction relief restarted the clock because it was based on newly discovered evidence.³

The May 25, 2013 motion alleged that newly discovered evidence, in the form of recanted testimony, cast doubt on the petitioner's conviction. The motion was denied by the state court. In denying the motion the state court found that the motion was untimely because the petitioner had failed to allege when the

³This discussion assumes that the limitations period was tolled up until June 7, 2013 when mandate issued on the petitioner's prior motion for post conviction relief. Although this assumption is made, it is also arguable that the prior motion also did not toll the limitations period because the petitioner's claim of newly discovered evidence appears to have been rejected. As the trial court's ruling was not as clear as in the latest order.

allegedly newly discovered evidence was discovered or why it could not have been found earlier with the exercise of due diligence. The court also adopted the reasoning of the state's response. In its response the state argued that the motion was legally insufficient because it did not include an affidavit from the recanting witness as required under Fla.R.Crim.P. 3.850(c). It is evident from the state court's ruling that the May 25, 2013 motion was dismissed as it did not conform with Fla.R.Crim.P. 3.850 and was untimely. The motion was therefore not properly filed under Florida law.

The petitioner contends that the mere filing of the motion acted to toll the limitations period because it was based on newly discovered evidence. This argument has been rejected by the Supreme Court. See Pace v. Guglielmo, 544 U.S. 408 (2005). In Pace the court held:

In common understanding, a petition filed after a time limit, and which does not fit within any exceptions to that limit, is no more "properly filed" than a petition filed after a time limit that permits no exception. The purpose of AEDPA's statute of limitations confirms this common sense reading. On petitioner's theory, a state prisoner could toll the statute of limitations at will simply by filing untimely state postconviction petitions. This would turn § 2244(d)(2) into a de facto extension mechanism, quite contrary to the purpose of AEDPA, and open the door to abusive delay.

Id. at 413. Here the petitioner attempted to file a motion for post conviction relief alleging newly discovered evidence in order to avoid the state's two year limitations period. The state court found that the petitioner's allegations did not conform with Rule 3.850 and denied the motion with prejudice. The court specifically found "[t]he circumstances of the instant case support the striking of the Defendant's amended motion as the Defendant completely failed to allege or demonstrate that the purported recanted

testimony could not have been discovered within the two year deadline." Thus, the motion was not properly filed and did not act to toll the limitations period. As such the instant petition is untimely and should be dismissed. See Sykosky v. Crosby, 187 Fed. Appx. 953 (11th Cir. 2006) (applying Pace).

The petitioner, in his objections, argued that his petition was timely in light of the decisions in Delancy v. Florida Dep't of Corr., 246 F.3d 1328 (11th Cir. 2001) and Thompson v. Sec'y, Dep't of Corr., 595 F.3d 1233 (11th Cir. 2010). However, as recognized in Sykosky, "[t]o the extent that Delancy . . . can be read to suggest that time limits are not filing conditions, or that a Rule 3.850 motion which has been dismissed as untimely in state court may nevertheless have been "properly filed" for purposes of § 2244(d)(2), they conflict with the Supreme Court's decision in Pace and must be disregarded. Sykosky at 958 (11th Cir. 2006). Pace is controlling in this instance and renders the petition untimely as the petitioner's most recent state post conviction motion was not properly filed and was dismissed as untimely.

The petitioner's reliance on Thompson and Delancy is also misplaced as those cases did not address the timeliness of a prior state post conviction motion, but rather found that the petitioner had chosen the wrong state procedural vehicle to file his otherwise valid state petition for writ of habeas corpus. See Thompson at 1237-1238. Furthermore in Thompson the court found that "the filing requirements typically include '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.'" Thompson at 1236. (quoting Artuz v. Bennett, 531 U.S. 4, 8 (2000)) (emphasis added). Here the state motion was denied with prejudice as untimely not because the petitioner used the wrong procedural avenue.

Equitable Tolling

The petitioner makes a cursory statement that he is entitled to equitable tolling. He does not provide any elucidation on his argument. The petitioner is not entitled to equitable tolling. There has been no showing of extraordinary circumstances or that he diligently pursued these claims in a timely manner.

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 appealability 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.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised are clearly without merit, 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.

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be dismissed as time barred, that no Certificate of Appealability issue and the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 28th day of April, 2016.


UNITED STATES MAGISTRATE JUDGE

cc: Richard S Button, pro se
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-81300-Civ-MIDDLEBROOKS
MAGISTRATE JUDGE P.A. WHITE

RICHARD S. BUTTON,	:	
Petitioner,	:	
v.	:	<u>REPORT OF</u>
	:	<u>MAGISTRATE JUDGE</u>
JULIE L. JONES ¹ ,	:	
Respondent.	:	

I. Introduction

Richard Button, who is presently confined at Hardee Correctional Institution in Bowling Green, Florida, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction in case number 05-1998-CF-000675 from the Fifteenth Judicial Circuit Court for 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 with a memorandum and exhibits, the Respondent's response to an order to show cause with appendix of exhibits and the petitioner's reply.

II. Procedural History

¹Julie L. Jones became Secretary of the Florida Department of Corrections on January 5, 2015 is substituted as party pursuant to Fed.R.Civ.P. 25(d).

Petitioner was charged in an indictment with first degree murder and robbery with a deadly weapon. (DE# 10-1, p. 28-29). The jury returned a verdict of guilty on both charges. (DE# 10-1, p. 31). The trial court adjudicated petitioner guilty and sentenced him to concurrent terms of life. (DE# 10-1, p. 34-43).

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On November 6, 2002, Petitioner filed a motion to correct illegal sentence. (DE# 10-1, p. 132-134). The trial court denied the motion on April 26, 2004. (DE# 10-1, p. 143-145). Petitioner did not appeal this ruling.

Petitioner filed a petition for writ of habeas corpus in the Fourth District on January 3, 2003, arguing that appellate counsel was ineffective for not briefing an issue with regard to the trial court conducting proceedings in the absence of petitioner. (DE# 10-1, p. 147-156). The Fourth District denied the petition on November 4, 2003. (DE# 10-1, p. 180).

Petitioner next filed a motion for post-conviction relief on November 14, 2003, arguing trial counsel was ineffective for: (1) failing to move to suppress DNA evidence; (2) for failing to request that a sleeping juror be removed; (3) failing to move to suppress letters written by Petitioner; (4) failing to object to

testimony of a lay witness; (5) refusing to allow Petitioner to testify in his own behalf; (6) for argument with regard to his request for a court order to obtain exculpatory evidence; (7) failing to call as a witness the medical examiner who performed the autopsy of the victim; (8) misrepresenting to the jury the evidence that they saw during trial; (9) failing to object to improper closing comments by the prosecution; (10) failing to object to an upward departure sentence; and (11) for cumulative errors. (DE# 10-1, p. 182-218). The trial court summarily denied the motion and the petitioner appealed. (DE# 10-1, p. 253 to 10-2, p. 29). The Fourth District found the trial court properly denied ten of the eleven claims, but remanded Claim 6 for an evidentiary hearing in order to determine whether defense counsel's actions at trial were tactical. See Button v. State, 941 So. 2d 531 (Fla. 4th DCA 2006). Mandate issued on September 25, 2006. (DE# 10-2, p. 49).

On remand, the trial court denied the claim after conducting an evidentiary hearing. (DE# 10-2, p. 51-56). The petitioner appealed to the Fourth District. (DE# 10-2, p. 58-98). The Fourth District affirmed the denial, holding the petitioner was not prejudiced by counsel's strategy because the evidence of the petitioner's guilt was overwhelming. See Button v. State, 40 So. 3d 77 (Fla. 4th DCA 2010). Mandate issued on September 17, 2010. (DE# 10-2, p. 142).

On August 12, 2011, the Petitioner filed a notice to invoke the discretionary jurisdiction of the Florida Supreme Court. (DE# 10-2, p. 144-157). On January 11, 2011, the Florida Supreme Court

denied review. See Button v. State, 53 So. 3d 1021 (Fla. 2011).

On September 7, 2008, Petitioner filed a motion for post-conviction relief, arguing that he had newly discovered evidence that the State's expert has been negligent in a high percentage of his cases. (DE# 10-2, p. 173-181). He filed an amended motion arguing that the medical examiner intentionally falsified the report and that the prosecutors conspired to substitute another doctor to give the testimony based on the examiner's report. (DE# 10-2, p. 183-228). The State responded. (DE# 10-2, p. 230-238). The trial court denied the motion, adopting the State's reasoning. (DE# 10-2, p. 240). Petitioner appealed the denial. (DE# 10-3, p. 5-31). The Fourth District per curiam affirmed the denial. See Button v. State, 64 So. 3d 1276 (Fla. 4th DCA 2011). Mandate issued on August 26, 2011 (DE# 10-3, p. 35).

Petitioner filed a petition for writ of mandamus in the Florida Supreme Court asking that the Fourth District attach records in support of its opinion. (DE# 10-3, p. 37). The Florida Supreme Court disposed of the motion on October 11, 2011 ruling the Appellant had no legal right to mandamus. See Button v. State, 74 So. 3d 1082 (Fla. 2011).

On August 13, 2010, Petitioner filed a motion for post-conviction relief arguing newly discovered evidence of Brady and Youngblood violations, and contending that the State withheld information about the victim which would have supported his defense that someone else killed the victim. (DE# 10-3, p. 45-77). The

State responded. (DE# 10-3, p. 79-89). The trial court denied the motion. (DE# 10-3, p. 117-125). The court found the petitioner had failed to establish that the evidence was newly discovered because the victim's status as a one time informant was known at the time of trial. Petitioner appealed the denial to the Fourth District. (DE# 10-3, p. 127-140). The Fourth District per curiam affirmed the denial. (DE# 10-3, p. 142). Mandate issued on June 7, 2013. (DE# 10-3, p. 144).

On May 25, 2013, Petitioner filed a motion for post conviction relief, again claiming newly discovered evidence (DE# 10-3, p. 146-156). The State filed a response arguing that the petitioner failed to establish the evidence was newly discovered. (DE# 10-3, p. 158-160). The trial court dismissed the motion without prejudice because Petitioner failed to allege that the evidence was discovered within two years of filing the motion. (DE# 10-3, p. 162-165). Petitioner filed an amended motion for post-conviction relief claiming newly discovered evidence, arguing that the State's main witness, Petitioner's ex-wife, recanted the testimony that she gave at trial. (DE# 10-3, p. 167-175). The State responded that Appellant failed to attach an affidavit by the witness and failed to allege that the witness recanted while under oath and subject to the prospect of perjury (DE# 10-3, p. 177-187). On September 4, 2014 the trial court entered an order dismissing with prejudice petitioner's motion because petitioner still failed to demonstrate when he discovered the evidence or why it could not have been discovered sooner. (DE# 10-3, p. 186-194). The petitioner did not appeal.

Petitioner filed the instant petition on October 21, 2014.² He raises three claims, one claim of trial error and two claims of ineffective assistance of counsel.

III. Statute of Limitations

The state contends that the petition is untimely and subject to dismissal. As will be discussed below the instant petition is subject to dismissal as untimely.

A one-year statute of limitations applies to petitions for writ of habeas corpus filed by State prisoners. 28 U.S.C. § 2244(d)(1). In most cases, the limitations period begins to run when the judgment becomes final after direct appeal or at the time when seeking such review has expired. 28 U.S.C. § 2244(d)(1)(A). This period is tolled while a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending. 28 U.S.C. § 2244(d)(2).

The Supreme Court has held that the one-year limitations period is subject to equitable tolling in appropriate cases. Holland v. Florida, 560 U.S. 631(2010). See also Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005) (holding 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); Helton v. Secretary for Dept. of Corrections, 259 F.3d 1310, 1312 (11 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

² Petitioner previously filed a federal petition for writ of habeas corpus, but it was voluntarily dismissed by the petitioner.

petitioner from timely filing his petition."), cert. denied, 535 U.S. 1080 (2002); Sandvik v. United States, 177 F.3d 1269, 1271 (11 Cir. 1999).

As indicated above, 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. Pace, 544 U.S. at 418, 125 S.Ct. 1807 (emphasis deleted).

State Motion was not Properly Filed

The petitioner contends that his petition is timely because it was filed within one year of the denial of his most recent motion for post conviction relief. The respondent counters that the most recently filed motion for post conviction was not properly filed and did not operate to toll the limitations period. Thus the initial issue to be decided is whether the most recent state motion for post conviction relief was properly filed in order to toll the limitations period. The determination of whether this petition is timely thus turns on whether the May 25, 2013 motion for post conviction relief restarted the clock because it was based on newly discovered evidence.³

The May 25, 2013 motion alleged that newly discovered evidence, in the form of recanted testimony, cast doubt on the petitioner's conviction. The motion was denied by the state court. In denying the motion the state court found that the motion was untimely because the petitioner had failed to allege when the

³This discussion assumes that the limitations period was tolled up until June 7, 2013 when mandate issued on the petitioner's prior motion for post conviction relief. Although this assumption is made, it is also arguable that the prior motion also did not toll the limitations period because the petitioner's claim of newly discovered evidence appears to have been rejected. As the trial court's ruling was not as clear as in the latest order.

allegedly newly discovered evidence was discovered or why it could not have been found earlier with the exercise of due diligence. The court also adopted the reasoning of the state's response. In its response the state argued that the motion was legally insufficient because it did not include an affidavit from the recanting witness as required under Fla.R.Crim.P. 3.850(c). It is evident from the state court's ruling that the May 25, 2013 motion was dismissed as it did not conform with Fla.R.Crim.P. 3.850 and was untimely. The motion was therefore not properly filed under Florida law.

The petitioner contends that the mere filing of the motion acted to toll the limitations period because it was based on newly discovered evidence. This argument has been rejected by the Supreme Court. See Pace v. Guglielmo, 544 U.S. 408 (2005). In Pace the court held:

In common understanding, a petition filed after a time limit, and which does not fit within any exceptions to that limit, is no more "properly filed" than a petition filed after a time limit that permits no exception. The purpose of AEDPA's statute of limitations confirms this common sense reading. On petitioner's theory, a state prisoner could toll the statute of limitations at will simply by filing untimely state postconviction petitions. This would turn § 2244(d)(2) into a de facto extension mechanism, quite contrary to the purpose of AEDPA, and open the door to abusive delay.

Id. at 413. Here the petitioner attempted to file a motion for post conviction relief alleging newly discovered evidence in order to avoid the state's two year limitations period. The state court found that the petitioner's allegations did not conform with Rule 3.850 and denied the motion without prejudice. Thus, the motion was not properly filed and did not act to toll the limitations period. As such the instant petition is untimely and should be dismissed. See Sykosky v. Crosby, 187 Fed. Appx. 953 (11th Cir. 2006) (applying

Pace).

Claims Raised in Petition are Untimely

Even if the petition itself were timely, the individual claims raised in the petition are untimely. The claims raised in the instant petition were not the subject of the most recent state motion for post conviction relief. The petitioner's first claim, addressing the sufficiency of the evidence, was raised on direct appeal in 2002. The petitioner's second claim, addressing counsel's effectiveness for abandoning his request for information about a confidential informant, was raised in his November 14, 2003 motion for post conviction relief. His third claim, regarding counsel's failure to introduce photographs, was also raised in the November 14, 2003 motion. None of the claims presented in the 2013 motion for post conviction relief are presented in the instant petition.

The Eleventh Circuit has expressly held "that the statute of limitations in AEDPA applies on a claim-by-claim basis in a multiple trigger date case." Zack v. Tucker, 704 F.3d 917, 926 (11th Cir.) cert. denied sub nom. Zack v. Crews, 134 S. Ct. 156, 187 L. Ed. 2d 109 (2013). In Zack the court noted, "[w]e see no reason why a habeas petitioner who allows his judgment to become final should be permitted, by the happenstance of an intervening decision or the discovery of new evidence, to reopen claims that he could have raised earlier but did not." Id. Here the only claims raised are claims that were available to the petitioner before filing the instant petition and were certainly available in March 2011 when the tolling of the federal limitations period ended on those claims. Thus even if the petitioner could bring a newly discovered evidence claim, such as the one raised in his most recent state motion, the claims raised in the instant petition would remain barred by the one year limitations period.

Equitable Tolling

The petitioner makes a cursory statement that he is entitled to equitable tolling. He does not provide any elucidation on his argument.

The petitioner is not entitled to equitable tolling. The claims raised in the instant petition have been known to the petitioner since 2003. There has been no showing of extraordinary circumstances or that he diligently pursued these claims in a timely manner.

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 appealability 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.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised are clearly without merit,

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.

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be dismissed as time barred, that no Certificate of Appealability issue and the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 2nd day of September, 2014.


UNITED STATES MAGISTRATE JUDGE

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APPENDIX C

ORDER DENYING REHEARING 11TH CIR.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 16-15943-AA

RICHARD S. BUTTON,

Petitioner - Appellant,

versus

**SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,**

Respondents - Appellees.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, MARCUS and NEWSOM, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

ORD-42

APPENDIX D

ORDER GRANTING CERTIFICATE OF APPEALABILITY

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15943-A

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAR 29 2017

David J. Smith
Clerk

RICHARD S. BUTTON,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

ORDER:

Richard S. Button moves for a certificate of appealability, as construed from his notice of appeal, in order to appeal the dismissal of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. He also seeks appointment of counsel in his appeal. Button's motion for a certificate of appealability is GRANTED on the following issue:

Whether Button's May 25, 2013, motion for post-conviction relief under Fla. R. Crim. P. 3.850 was properly filed such that it tolled his time to file his 28 U.S.C. § 2254 petition for a writ of habeas corpus, rendering the petition timely?

Reasonable jurists would find debatable whether Button's § 2254 petition, in which he raised, *inter alia*, three claims of ineffective assistance of counsel, stated a facially valid claim of a

denial of a constitutional right. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014).

His motion for appointment of counsel is DENIED.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

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