IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 18-12173-B

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ALLISTER FREEMAN,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

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Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Allister Freeman has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's August 15, 2018, order denying a certificate of appealability, in his appeal from the district court's dismissal of his habeas corpus petition, 28 U.S.C. § 2254, as time-barred. Because Freeman has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

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ALLISTER FREEMAN,

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SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

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ORDER:

Allister Freeman moves for a certificate of appealability in order to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. To merit a certificate of appealability, Freeman 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, 120 S. Ct. 1595, 1600-01, 146 L. Ed. 2d 542 (2000). Freeman's motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

UNITED STATES CIRCUIT JUDGE

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 2:18-CV-14088-ROSENBERG/WHITE**

ALLISTER FREEMAN,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

**FINAL JUDGMENT**

**THIS MATTER** is before the Court upon its Order Adopting Magistrate's Report and Recommendation. DE 11. Pursuant to Federal Rule of Civil Procedure 58, and in accordance with the Court's denial of Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [DE 1], **FINAL JUDGMENT** is hereby **ENTERED** in favor of Respondent.

**DONE AND ORDERED** in Chambers, West Palm Beach, Florida, this 26th day of April, 2018.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Allister Freeman

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 2:18-CV-14088-ROSENBERG/WHITE**

ALLISTER FREEMAN,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

**ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION**

**THIS MATTER** is before the Court upon Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [DE 1], which was previously referred to the Honorable Patrick A. White for a Report and Recommendation on any dispositive matters. *See* DE 2. On April 6, 2018, Magistrate Judge White issued a Report and Recommendation [DE 6] recommending that the Petition be denied with prejudice as time-barred. The Court has conducted a *de novo* review of Magistrate Judge White's Report and Recommendation, has reviewed Petitioner's Objections thereto [DE 10], and is otherwise fully advised in the premises.

Upon review, the Court finds Magistrate Judge White's recommendations to be well reasoned and correct. The Court agrees with the analysis in Magistrate Judge White's Report and Recommendation and concludes that the Petition should be denied for the reasons set forth therein.

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Magistrate Judge White's Report and Recommendation [DE 6] is **ADOPTED**;

2. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [DE 1] is **DENIED WITH PREJUDICE**;

3. A certificate of appealability **SHALL NOT ISSUE**;

4. The Clerk of Court is directed to **CLOSE THIS CASE**; and

5. The Court will separately enter Final Judgment for Respondent.

**DONE AND ORDERED** in Chambers, West Palm Beach, Florida, this 26th day of April, 2018.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Allister Freeman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-14088-CV-ROSENBERG
MAGISTRATE JUDGE P.A. WHITE

ALLISTER FREEMAN,

Petitioner,

vs.

SEC'Y FLA. DEP'T OF CORRS.,

Respondent.
_____/

REPORT OF
MAGISTRATE JUDGE

## I. INTRODUCTION

This matter is before the court on petitioner's *pro se* petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. His habeas petition attacks the constitutionality of his judgment of conviction in Case No. 2011CF001413A, Nineteenth Judicial Circuit of Florida, Indian River County.

This case has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts ("Rules Governing § 2254 Cases").

The undersigned has reviewed the entire record, including the operative § 2254 petition (DE#1). As discussed below, the petition should be dismissed with prejudice.

## II. BACKGROUND

### A. State Court

On January 4, 2013, "[f]ollowing a jury trial, [petitioner] was adjudicated guilty of one count of battery, one count of trespass, and one count of robbery." Freeman v. State, 165 So. 3d 695, 695 (Fla. Dist. Ct. App. 2015). "The [trial] court sentenced him to time served on the battery and trespass counts and to concurrent Prison Releasee Reoffender (fifteen years with credit for time served) and Habitual Felony Offender (fifteen years six months with credit for time served) sentences on the robbery count." Id.; see also DE#1 at 1.[1] The trial court imposed this sentence on February 19, 2013. DE#1 at 1; DE#4-1.[2]

The following day, petitioner filed a notice of appeal. DE#4-1. On April 29, 2015, the Fourth District Court of Appeals ("Fourth District") affirmed. Freeman, 165 So. 3d at 695; see also DE#1 at 2. The Fourth District issued its mandate on June 6, 2015. DE#4-1; DE#4-2.

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[1] Unless otherwise noted, all page citations for docket entries refer to the page stamp number located at the top, right-hand corner of the page.

[2] The court takes judicial notice of this and other state court judicial records. See Fed. R. Evid. 201(b)-(c); McBride v. Sharpe, 25 F.3d 962, 970 (11th Cir. 1994) (en banc) (federal habeas court may *sua sponte* consider state court records when the petitioner was a party to the proceedings and there is no indication that the state records are "inaccurate, incomplete, or misleading"); compare Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) (when ruling on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "courts [may] consider . . . matters of which a court may take judicial notice" (citation omitted)), with Day v. Crosby, 391 F.3d 1192, 1194 (11th Cir. 2004)(suggesting that Rule 4 of the Rules Governing § 2254 Cases gives federal courts as much, if not more, leeway than Federal Rule of Civil Procedure 12(b)(6) to consider records outside the pleadings when ruling on a motion to dismiss or dismissing a complaint *sua sponte*), aff'd sub nom. Day v. McDonough, 547 U.S. 198 (2006).

On July 7, 2015, petitioner filed a notice of discretionary jurisdiction in the Florida Supreme Court. DE#4-3; DE#4-2. On December 3, 2015, the Florida Supreme Court declined to accept jurisdiction. DE#4-3; see also DE#1 at 2. Petitioner did not file a petition for certiorari in the U.S. Supreme Court. DE#1 at 3.

There was no action in the state courts until June 19, 2017. On this date, petitioner filed a motion for postconviction relief. DE#4-1; DE#1 at 3. The trial court denied this motion on or about August 21, 2017. DE#4-1; DE#1 at 3.

On October 5, 2017, petitioner filed a notice of appeal in the Fourth District. DE#4-1; DE#4-4. The Fourth District affirmed on November 30, 2017, issuing its mandate on February 2, 2018. DE#4-4. The record does not reflect that petitioner sought review in the Florida Supreme Court. See DE#4-4 at 2.

**B. Federal Court**

The instant § 2254 petition was docketed on March 13, 2018. DE#1. Petitioner acknowledges that his petition is untimely absent equitable tolling. See id. at 26, 28-30. However, he "requests equitable tolling from the period of January 2015 thru December 2016[,] when he was transferred to an institution with a law library." Id. at 30. During this period, petitioner contends that he was housed at "Liberty South Unit (LSU) (work camp)[,] in which no law library is located." Id. at 29.

To support his contention that he lacked access to the law library from January 2015 to December 2016, petitioner submits a series of inmate requests for legal materials, along with a

letter to the warden. Id. at 32-39.[3]

The first inmate request is dated April 5, 2016. Id. at 32. In it, petitioner requests "case law needed for appeal." Id. The document reflects that petitioner received the Fourth District case he requested. Id.

The second inmate request is dated April 11, 2016. Id. at 33. In it, petitioner requests a "template for Federal Motion of [Certiorari] . . . and any instructions regarding such." Id. The response states that petitioner could "write the clerk of the U.S. Supreme Court and request a petition for writ of [certiorari]." Id.

The third inmate request is dated April 17, 2016. Id. at 34. In it, petitioner asks for the Florida Supreme Court decision deciding whether to review the Fourth District case that he asked for in the first inmate request. See id. The third inmate request reflects that petitioner received this information. See id.

The fourth inmate request is dated June 2, 2016. Id. at 35. In it, petitioner requests: "[I]nfo about 'Williams Rule' pertaining to clear & convincing evidence of the intent to steal at time of handling/taking any property as well as any force. Also send most current case law citing such fact argument with lower court/DCA, overturning judgment on this merit [sic]." Id. The fourth request indicates that petitioner received this information. Id.

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[3] The court must consider these documents when screening the instant § 2254 petition. Rule 12, Rules Governing § 2254 Cases ("If it plainly appears from the petition and any attached exhibits that the petition is not entitled to relief . . . , the judge must dismiss the petition . . . .").

The fifth inmate request is dated August 8, 2016. Petitioner asks for Robinson v. State, 680 So.2d 481 (Fla. Dist. Ct. App. 1996), as well as the Florida Supreme Court decision quashing it, 692 So. 2d 883 (Fla. 1997). He also requests caselaw citing these cases. DE#1 at 36. This document indicates that petitioner received the requested information. Id.

The final inmate request is dated August 8, 2016. Id. at 37. In it, petitioner seems to ask for statutes and caselaw authorizing trial courts to use "findings that [the] victim of a crime was an initiator, willing participant, aggressor, or provoker" to mitigate a sentence, even if the victim is a child. See id. This document reflects that petitioner received the information he sought. See id.

Petitioner wrote the warden a letter dated September 8, 2016. Id. at 38. In it, he states:

> I am fighting for freedom in [a] criminal case . . . . Unfortunately, [LSU] does not have a law library on its compound. . . . [I]n order to perform legal research, requests [sic], make copies, or type up documents there's a delay [hindrance]. The protocol for legal services here is to submit [a] request to [the] main unit law library. This process takes 3 weeks for any response and often cause[s] [inconvenience] in time restraints of court system [sic]. Surely, [being transferred] to above Institutions that [have] law [libraries] would conveniently [accommodate] my pursuits & needs.

Id.

## III. DISCUSSION

Rule 4 of the Rules Governing § 2254 Cases provides that, "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief. . . , the judge must dismiss the petition . . . ." Consistently, the Supreme Court has stated that "[f]ederal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face[.]" McFarland v. Scott, 512 U.S. 849, 856 (1994) (citing Rule 4, Rules Governing § 2254 Cases). Likewise, the Supreme Court has "h[e]ld that district courts are permitted . . . to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." Day v. McDonough, 547 U.S. 198, 209 (2006); accord Borden v. Allen, 646 F.3d 785, 810 (11th Cir. 2011). In reviewing a petition under Rule 4, courts must construe it liberally. Enriquez v. Fla. Parole Comm'n, 227 F. App'x 836, 837 (11th Cir. 2007) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972)).

AEDPA imposes a one-year statute of limitations on the filing of federal habeas petitions. 28 U.S.C. § 2244(d)(1). The year commences on "the date on which the judgment became final by . . . the expiration of the time for seeking such review." Id. § 2244(d)(1)(A). Under this clause, "the judgment becomes final . . . when the time for pursuing direct review in [the Supreme] Court, or in state court, expires." Gonzalez v. Thaler, 565 U.S. 134, 150 (2012). "[A] petition for a writ of certiorari to review a judgment in any case . . . entered by a state court of last resort . . . is timely when it is filed with the [U.S. Supreme Court] within 90 days after entry of the judgment." U.S. Sup. Ct. R. 13(1).

Here, the record shows that the Fourth District issued its mandate on June 6, 2015. Then, on December 3, 2015, the Florida

Supreme Court declined to accept jurisdiction. And petitioner did not file a cert petition in the U.S. Supreme Court. Therefore, petitioner's judgment of conviction became final 90 days after this date (i.e., on or around March 2, 2016). However, he filed the instant petition on or around March 13, 2018, which is approximately two years later. Consequently, absent tolling, the instant petition is untimely.

"The 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 any period of limitation under [§ 2244(d)]." 28 U.S.C. § 2244(d)(2); see also Pace v. DiGuglielmo, 544 U.S. 408, 410 (2005).

Here, petitioner filed his motion for postconviction relief on June 19, 2017. The court will assume that he "properly filed" this petition and the corresponding appeal within the meaning of § 2244(d)(2). Still, for § 2244(d)(2)'s toll to apply, the application must be "pending."

"[A]n application remains pending until it 'has achieved final resolution through the State's post-conviction procedures.'" Hernandez-Alberto v. Sec'y, Fla. Dep't of Corr., 840 F.3d 1360, 1364 (11th Cir. 2016) (per curiam) (quoting Carey v. Saffold, 536 U.S. 214, 220 (2002)). This rule includes "those intervals between one state court's judgment and the filing of an appeal with a higher state court." Matos v. Sec'y, Fla. Dep't of Corr., 603 F. App'x 763, 766 (11th Cir. 2015) (per curiam) (citing Carey, 536 U.S. at 219-20).

Here, the record shows that petitioner's motion for state

postconviction relief was pending from June 19, 2017 until February 2, 2018 (i.e., the date when the Fourth District issued its mandate). Furthermore, while the instant petition was not docketed until March 13, 2018, the court will assume that the time from February 2, 2018 until March 13, 2018 should be tolled as well. Thus, all of the time from June 19, 2017 until the filing of the instant petition was tolled.

As noted, however, petitioner's judgment of conviction became final on or around March 2, 2016. Roughly one year and 3.5 months come between this date and June 19, 2017 (i.e., the date on which § 2244(d) started tolling). Thus, as petitioner correctly notes, his petition is time-barred unless at least 3.5 months of this time is equitably tolled.

Again, petitioner "requests equitable tolling from the period of January 2015 thru December 2016[,] when he was transferred to an institution with a law library[.]" DE#1 at 30. Preliminarily, the court disregards the request to equitably toll the period from January 2015 until March 2, 2016. As noted, petitioner's conviction did not become final until March 2, 2016. Therefore, any tolling of the period from January 2015 until March 2, 2016 would not help him overcome § 2244(d)'s one-year time limit. Thus, the issue is whether any/all of the time between March 2, 2016 and December 2016 should be equitably tolled.

Section 2244(d) "is subject to equitable tolling in appropriate cases." Holland v. Fla., 560 U.S. 631, 645 (2010) (collecting cases). But equitable tolling is proper only if the petitioner shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in

his way and prevented timely filing." Id. at 649 (citation omitted).

"As an extraordinary remedy, equitable tolling is limited to rare and exceptional circumstances and typically applied sparingly." Cole v. Warden, 768 F.3d 1150, 1158 (11th Cir. 2014) (citation omitted). Indeed, Cole stated that, "[i]n analyzing habeas petitions, [the Eleventh Circuit has] applied equitable tolling in few situations." Id. at 1158 n.17 (citing cases).

"Equitable tolling is assessed on a case-by-case basis, considering the specific circumstances of the subject case." Id. at 1158. "[A]n inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence." Brown v. Barrow, 512 F.3d 1304, 1307 (11th Cir. 2008) (per curiam) (citation omitted); cf. McFarland, 512 U.S. at 856 ("Habeas corpus petitions must meet heightened pleading requirements . . . ." (citing Rule 2(c), Rules Governing § 2254 Cases)).

"The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence[.]" Holland, 560 U.S. at 653 (citations omitted). Taking steps "to ensure that [the] petition [is] timely filed" may constitute reasonable diligence. See McBee v. Warden, 671 F. App'x 763, 764 (11th Cir. 2016) (per curiam) (citing Holland, 560 U.S. at 653). Conversely, "nearly complete inaction" between the time the conviction becomes final and the time the petitioner files his petition "is insufficient to establish reasonable diligence." Melson v. Comm'r, Ala. Dep't of Corr., 713 F.3d 1086, 1090 (11th Cir. 2013).

"Determining whether a factual circumstance is extraordinary [enough] to satisfy equitable tolling depends not on how unusual the circumstance alleged to warrant tolling is among the universe of prisoners, but rather how severe an obstacle it is for the prisoner endeavoring to comply with AEDPA's limitations period." Cole, 768 F.3d at 1158 (citation omitted). "A habeas petitioner is not entitled to equitable tolling simply because he alleges constitutional violations at his trial or sentencing." Id. (citation omitted).

A seminal Eleventh Circuit case, Akins v. United States, 204 F.3d 1086 (11th Cir. 2000), "suggests that lockdowns and periods in which a prisoner is separated from his legal papers are not 'extraordinary circumstances' in which equitable tolling is appropriate." Dodd v. United States, 365 F.3d 1273, 1283 (11th Cir. 2004). Consistent with Akins, Dodd declined to equitably toll "the limitations period . . . during the period [when the inmate] he was detained . . . and did not have access to his papers[.]" 365 F.3d at 1283. The court could not "discern sufficient evidence in this record to establish that the circumstances were truly extraordinary." Id. The court reasoned that the inmate "does not suggest, let alone argue that his detention was unconstitutional or somehow inappropriate, or that the transfer of a prisoner from one facility to another is anything but a routine practice." Id.

A later Eleventh Circuit case so read Akins and Dodd: an inmate's "transfer to [another] jail and denial of access to his legal papers and the law library [does] not constitute extraordinary circumstances" supporting the equitable tolling of § 2244(d)'s one-year time period. Paulcin v. McDonough, 259 F. App'x 211, 213 (11th Cir. 2007) (per curiam). Likewise, the

Eleventh Circuit rejected an inmate's argument that "his inability to access the law library was an extraordinary circumstance beyond his control, justifying equitable tolling of the limitations period." Bell v. Sec'y, Dep't of Corr., 248 F. App'x 101, 104 (11th Cir. 2007) (per curiam). In part, Bell reasoned that "there [was] no record evidence that[,] before the limitations period expired, [the inmate] diligently attempted to determine the applicable limitations period (by, for example, attempting to access the prison law library) or that prison officials thwarted his efforts." Id.

More recently, the Eleventh Circuit has stated in at least two unpublished orders that "restricted access to a law library, lock-downs, and solitary confinement do not qualify as extraordinary circumstances to warrant equitable tolling." Jackson v. McLaughlin, No. 17-11474-B, 2017 WL 4844624, at *2 (11th Cir. July 12, 2017) (order) (citing Atkins, 204 F.3d at 1089-90); accord Bland v. State, No. 16-17144-J, 2017 WL 5668005, at *3 (11th Cir. Sept. 7, 2017) (order) ("Caselaw is clear that an inadequate prison law library or limited access to the library or prison law clerks does not establish extraordinary circumstances for equitable tolling." (citing Atkins, 204 F.3d at 1089-90)).[4]

Here, petitioner is not entitled to equitable tolling for the time that he was in LSU and lacked direct access to the law library. For starters, the above Eleventh Circuit cases propose that restricted access to the law library, without more, does not constitute an extraordinary circumstance warranting equitable

[4] The undersigned's research did not reveal an Eleventh Circuit case holding that restricted access to a prison law library warranted equitable tolling.

tolling. As in Dodds, petitioner has not argued, much less shown, that "that his detention was unconstitutional or somehow inappropriate, or that [his] transfer . . . to [LSU was] anything but a routine practice." 365 F.3d at 1283.

Furthermore, petitioner's own evidence indicates that his placement at LSU did not prevent him from filing a § 2254 petition or a state motion for postconviction relief. True, his evidence supports a reasonable finding that he lacked direct access to the law library while housed at LSU. However, the inmate requests discussed above show that he requested and received legal materials on several occasions between April and August 2016, during which time he seeks equitable tolling. Furthermore, he does not complain in any of these requests that his placement prevented him from pursuing litigation, much less explain how it did so. Likewise, petitioner does not appear to allege, and the record does not reflect, that being at LSU made it impossible or impracticable to pursue litigation.

True, petitioner submitted his letter to the warden to support his assertion that his placement at LSU stopped him from filing lawsuits. But the letter belies this inference. In it, he simply states that being at LSU caused a "delay [hindrance]" in his legal efforts. DE#1 at 38. He adds: "The protocol for legal services here is to submit [a] request to [the] main unit law library. This process takes 3 weeks for any response and often cause[s] inconvenience in time restraints of court system [sic]. [A transfer to an institution] that has [a] law library would conveniently [accommodate] my pursuits & needs." Id. Thus, petitioner's own evidence compels the conclusion that his placement at LSU did not prevent him from pursuing litigation or meeting court deadlines, but rather, merely inconvenienced him.

Petitioner has cited no authority for the proposition that mere inconvenience supports a finding of "extraordinary circumstances," and the undersigned knows of none.

Nor can petitioner show that he pursued his rights diligently. Petitioner appears to argue that he was diligent because he attempted to access the law library during the period in question. This argument fails. For starters, petitioner did have access to the law library, albeit limited, during the period in question. Furthermore, petitioner does not allege that he used this limited access to attempt "to determine the applicable limitations period." See Bell, 248 F. App'x at 104. Indeed, his own inmate request forms show that, while he requested various legal materials in connection with his "fight[] for freedom in [the underlying] criminal case," DE#1 at 38, none of these materials were related to the applicable limitations period. See supra pp. 4-5.

In short, petitioner does not clearly allege, and the record does not reflect, that he took any steps to ensure that the petition was timely filed." See McBee, 671 F. App'x at 764. Rather, the record reflects "nearly complete inaction" between the time the conviction became final (March 2016) and the time petitioner filed his state motion for postconviction relief (June 2017). See Melson, 713 F.3d at 1090.

Moreover, petitioner states that he was transferred to a prison with a law library in December 2016. Yet the record shows that he did not file his state motion for postconviction relief until June 19, 2017. If his placement at LSU thwarted his ability to pursue litigation, petitioner has not explained why he waited six months to file this motion despite being in a prison with a

law library. See DE#1 at 3, 30 (petitioner's acknowledging, without explanation, that he waited six months to file his state postconviction motion after his transfer from LSU). This observation, likewise, undermines the inference that petitioner was pursing his rights diligently.

In sum, it plainly appears that the instant § 2254 petition is untimely. It also plainly appears that petitioner is not entitled to equitable tolling. Accordingly, said petition should be dismissed with prejudice.

## IV. EVIDENTIARY HEARING

"In a habeas corpus proceeding [t]he burden is on the petitioner . . . to establish the need for an evidentiary hearing." Chavez v. Sec'y Fla. Dep't of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011) (alterations in original) (citations omitted). "'In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.'" Id. (quoting Schriro v. Landrigan, 550 U.S. 465, 474 (2007)). "That means that if a habeas petition does not allege enough specific facts that, if they were true, would warrant relief, the petitioner is not entitled to an evidentiary hearing." Id. (citations omitted). Regarding equitable tolling, "[t]he question is whether the alleged facts, when taken as true, show both extraordinary circumstances and reasonable diligence entitling [petitioner] to enough equitable tolling to prevent [her] petition from being time-barred under § 2244(d)." Id. at 1070.

Here, as noted, petitioner failed to allege enough specific

facts that, taken as true, would warrant a finding of equitable tolling. In short, no matter how liberally construed, his allegations do not support a plausible inference of either extraordinary circumstances or reasonable diligence. Accordingly, he is not entitled to an evidentiary hearing.

## V. CERTIFICATE OF APPEALABILITY

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Cases. "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." Id. "If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." Id. "A timely notice of appeal must be filed even if the district court issues a certificate of appealability." Rule 11(b), Rules Governing § 2254 Cases.

"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). When a district court rejects a petitioner's constitutional claims on the merits, "a petitioner must show that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). By contrast, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of

appealability] should issue when the prisoner shows . . . 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, 529 U.S. at 484.

Here, in view of the entire record, the undersigned denies a certificate of appealability. If petitioner disagrees, he may so argue in any objections filed with the district court. See Rule 11(a), Rules Governing § 2254 Cases ("Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue.")[5]

[5] "If the district court considers the timeliness of the [habeas] petition *sua sponte*, it must give the [petitioner] 'fair notice and an opportunity to present [her] position[].'" Aureoles v. Sec'y, D.O.C., 609 F. App'x 623, 623 (11th Cir. 2015) (per curiam) (quoting Day, 547 U.S. at 210). This report and recommendation serves as fair notice. Cf. Fharmacy Records v. Nassar, 465 F. App'x 448, 458 (6th Cir. 2012) (per curiam); Ferreira-Plasencia v. Ruginski, 34 F. App'x 3, 4 (1st Cir. 2002) (per curiam). Furthermore, if he feels that his habeas petition is timely and/or that equitable tolling and/or some other exception to §2244(d)'s time bar applies, he will have an opportunity to present his position in any objections to this report. See Manzini v. The Fla. Bar, 511 F. App'x 978, 983 (11th Cir. 2013) (per curiam).

## VI. RECOMMENDATIONS

Based on the foregoing, it is recommended that petitioner's habeas petition (DE#1) be DENIED with prejudice; that no certificate of appealability issue; that final judgment be entered; and that this 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 6th day of April, 2018.

UNITED STATES MAGISTRATE JUDGE

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