A

APPENDIX A: Decision of the 11th Circuit Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12460-E

ANTHONY J. DANNOLFO,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,
Secretary,

Respondent-Appellee.

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

ORDER:

Anthony Dannolfo, a Florida prisoner serving a 20-year sentence for trafficking oxycodone, seeks a certificate of appealability ("COA") in his appeal of the district court's denial of his 28 U.S.C. § 2254 petition, in which he asserted several claims that his trial counsel was ineffective. In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted).

To establish a claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient, and (2) the deficient performance resulted in

prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance means that counsel's representation fell below an objective standard of reasonableness, and "no competent counsel would have taken the action that his counsel did take." *Id.*; *United States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (quotations omitted). Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Where a defendant has rejected a plea offer, he must establish prejudice by demonstrating that: (1) he would have accepted the plea offer, and the prosecution would not have withdrawn it; (2) the court would have accepted the plea; and (3) the conviction or sentence, or both, would have been less severe. *Lafler v. Cooper*, 566 U.S. 156, 164 (2012).

Mr. Dannolfo's first claim was that his trial counsel was ineffective for improperly advising him about the strength of the state's case, which in turn caused him to reject a three-year plea deal. The state post-conviction court concluded that counsel had not performed deficiently, and Mr. Dannolfo had failed to establish prejudice.

Mr. Dannolfo has not demonstrated by clear and convincing evidence that the state court's factual finding that he would not have accepted the three-year plea deal, regardless of counsel's advice, was unreasonable. *See* 28 U.S.C. § 2254(e)(1) (stating that, where a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court decision was contrary to clearly established federal law, or was based on an unreasonable determination of the facts, and the state court's determination of the facts are presumed correct absent clear and convincing evidence to the contrary). In light of his statement to the trial court that he would not accept any plea offer because he was not guilty, his assertion that he would have accepted the deal, had he been properly advised, is insufficient to establish prejudice. *See*

Diaz v. United States, 930 F.2d 832, 835 (11th Cir. 1991) (explaining that, if a defendant was aware of a plea offer, "his after the fact testimony concerning his desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer").

As Mr. Dannolfo acknowledges in his COA motion, his remaining claims—that his counsel was ineffective for failing to present an independent act defense, have a police officer's testimony excluded as hearsay, and move for a new trial—are procedurally defaulted, as they were not raised in state court. Mr. Dannolfo has not demonstrated that his procedural default should be excused, as he has not shown cause for the default. Although, under *Martinez v. Ryan*, 566 U.S. 1, 14 (2012), ineffective assistance of counsel during initial-review collateral proceedings may constitute cause for a procedural default of ineffective assistance claims, this is only true if the underlying claims are "substantial," meaning that they have "some merit." Mr. Dannolfo's claims are not substantial.

First, trial counsel did not perform ineffectively by failing to pursue an independent act defense, as the principal instruction, which required that the jury find that Mr. Dannolfo intended the drug sale to occur and did some act to cause it to occur, encompassed his defense theory, and thus no independent act instruction was necessary. *See Williams v. State*, 34 So. 3d 768, 771 (Fla. Dist. Ct. App. 2010) (concluding that the principal instruction was "entirely adequate to encompass [the defendant's theory]" and "[t]he independent act instruction would not have added anything to his defense"). In addition, although counsel attempted to have it excluded, the police officer's testimony regarding the statement he heard his confidential informant make to Mr. Dannolfo on the phone was admissible as an adoptive admission. Finally, Mr. Dannolfo has

identified no basis for a new trial, and, therefore, cannot show that his counsel was ineffective for failing to seek one.

Because reasonable jurists would not debate the district court's rejection of Mr. Dannolfo's claims, his motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

B

APPENDIX B: Decision of the United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ANTHONY DANNOLFO,

Petitioner,

vs.

JULIE JONES,

Respondent.
_____/

CASE NO. 18-80239-CIV-DIMITROULEAS

FINAL JUDGMENT AND ORDER DENYING HABEAS PETITION, WITHDRAWING REFERENCE

THIS CAUSE is before the Court on Petitioner Dannolfo's February 23, 2018 Petition for Writ of Habeas Corpus [DE-1] and his February 23, 2018 Memorandum [DE-3]. The Court has considered the State's April 23, 2018 Response [DE-12] and Dannolfo's May 13, 2018 Reply [DE-13]. The Court finds as follows:

1. On March 10, 2009, Dannolfo and a co-defendant were charged by Information with Trafficking in Oxycodone and Possession of Cocaine. [DE-7-3, pp. 1-2]. The crimes occurred on February 19, 2009. An Amended Information was filed on January 4, 2011, deleting the cocaine count against Dannolfo. [DE-7-7]. It had been nolle prossed on December 28, 2010. [DE-12-4, p. 2].

2. On December 29, 2010, Dannolfo was found guilty, as charged, on the trafficking count. [DE-7-4]. On that date, he was sentenced to twenty (20) years in prison. [DE-7-6].

3. On October 10, 2012, the Fourth District Court of Appeal affirmed.[1] [DE-7-10, p. 2]. *Dannolfo v. State*, 103 So. 2d 170 (Fla. 4th DCA 2012). Rehearing was denied on December 20, 2012. Mandate issued on January 11, 2013. [DE-7-10, p. 1]. Dannolfo's conviction became final on April 11, 2013, when he did not file a petition for writ of certiorari in the U.S. Supreme Court. *Bond v. Moore*, 309 F. 3d 770, 774 (11th Cir. 2002).

[1] The issue on appeal was a denial of a Motion for Judgment of Acquittal for a due process violation in not supervising a confidential informant. [DE-12-2, p. 4].

4. On March 11, 2013, Dannolfo had filed a Motion to Mitigate. [DE-7-11]. It was denied on March 25, 2013. [DE-7-12].

5. After eighty-three (83) days of non-tolled time had elapsed Dannolfo, filed a habeas petition in the Fourth District Court of Appeal on July 3, 2013. [DE-7-16]. It was denied on August 26, 2013. [DE-12-2, p. 115]. Rehearing was denied on October 15, 2013. [DE-12-2, p. 125] [4D13-2467].

6. After another one hundred seventy-seven (177) days had elapsed, on April 11, 2014, Dannolfo filed his Motion for Post Conviction Relief. [DE-12-2, pp. 127-166]. He signed the motion. An amended motion was filed on February 20, 2015. [DE-12-2, pp. 183-193]. He also signed that motion. It was denied, in part, on May 21, 2015. [DE-12-2, pp 195-206]. An evidentiary hearing was held, and the Motion for Post-Conviction Relief was denied on December 5, 2016. [DE-12-2, pp. 209-220]. Rehearing was denied on January 5, 2017. [DE-12-2, p. 229]. The Fourth District Court of Appeal denied relief[2] on November 22, 2017. [DE-12-3, p. 18]. *Dannolfo v. State*, 236 So. 3d 1082 (Fla. 4th DCA 2017). [DE-7-19]. Rehearing was denied on January 3, 2018. [DE-12-3, p. 25]. Mandate issued on January 26, 2018. [DE-7-20].

7. Another fifty-one (51) days of non-tolled time elapsed before Dannolfo filed this federal habeas petition.

8. In this timely petition, Dannolfo complains about ineffective assistance of counsel regarding mis-advice about pleading guilty, ineffective assistance of counsel regarding an independent act of a co-defendant; ineffective assistance of counsel regarding hearsay about the number of pills, and ineffective assistance of counsel in not filing a motion for new trial.

9. The State contends that Dannolfo failed to exhaust the last three complaints in state court, so that those claims are procedurally barred. Dannolfo claims ineffective assistance of post conviction

[2] The issues were: Ineffective Assistance of Counsel regarding a plea offer; the trial court erred in finding that he had rejected the plea offer; and Ineffective Assistance of Counsel in opening the door to hearsay testimony given by Officer McCabe [DE-12-2, pp. 232-233].

counsel as an exception to a procedural bar. Yet, he signed the state post convictions motions also, *Martinez v. Ryan*, 566 U.S.1 (2012) will excuse a procedural default where post conviction counsel was ineffective for not raising a substantial claim of ineffective assistance at trial. Here, the last three (3) claims are not substantial. Nevertheless, on the merits, Dannolfo is not entitled to any relief.

A. An independent act instruction normally applies to a felony murder case.[3] Here, the jury was properly instructed on the law regarding principals. [DE-1, pp. 54-55]. Dannolfo's statement, "give it to him" made the issue one of whether he was a principal in the drug transaction, not whether other people independently acted outside the scope of some underlying felony. The defense was that Dannolfo did not sell any drugs. [DE-12-5, p. 111]. Defense counsel argued that Dannolfo's testimony that he did not know that a drug deal was going to occur, was credible [DE-12-7, p. 44]. The jury found otherwise, no prejudice has been shown. An independent act instruction would not have changed the outcome.

B. The statements made by the Defendant to the informant were admissible as admissions of a party opponent. [DE-12-6, p. 21]. The informant later testified at the trial and was subjected to cross-examination. Moreover, ninety-two (92) pills weighing 11.51 grams were seized. [DE-12-6, p. 91]. The amount seized was sufficient evidence of the amount intended to be trafficked in.

C. A New Trial motion would not have been granted. No prejudice has been shown. *Butcher v. U.S.*, 368 F. 3d 1290, 1300 (11th Cir. 2004). A de novo review on appeal would not have changed the outcome in this case. Here, there is no showing that a denial of a motion for new trial would have resulted in the appellate court's granting a due process dismissal for failure to supervise an informant.

[3] The independent act instruction applies "when one co-felon, who previously participated in a common plan, does not participate in acts committed by his co felon, which fall outside of the common design in the original collaboration. *Ray v. State*, 755 So. 2d 604, 609 (Fla. 2000). Here, Dannolfo denied knowledge of a deal of $500.00 for 120 Roxies. [DE-12-6]. He denied giving anyone permission to touch his pills [DE-12-6, p. 120]. Dannolfo stated that he took Oxycodone for his infirmities. [DE-23-6, p. 123]. An independent act instruction, even if given, would not have changed the outcome of the case. No prejudice has been shown.

10. As to the first issue, the state trial court conducted an evidentiary hearing and found that there was no competent, credible evidence that Dannolfo would have accepted the plea offer but for counsel's advice. [DE-12-2, pp. 218-219]. At the evidentiary hearing, the state trial judge heard the testimony of both Harris Prinz, Dannolfo's Assistant Public Defender, and Dannolfo, a twenty-three (23) time convicted felon. [DE-12-6, p. 107]. Before trial, the Court had conducted a colloquy with Dannolfo about the plea offer, and Dannolfo indicated that he wanted to go to trial.[4] The trial court concluded that there was competent and credible evidence that refuted Dannolfo's self-serving assertions. [DE-12-2, pp. 209-220]. Here, Dannolfo has not overcome the presumption of correctness, by clear and convincing evidence, in the trial court's findings after an evidentiary hearing. *Consolvo v. Sec'y D.O.C.*, 664 F. 3d 842, 845 (11th Cir. 2011) *cert. denied*, 568 U.S. 849 (2012).

Wherefore, Petitioner's habeas petition [DE-1] is Denied.

The Reference to Magistrate [DE-2] is Withdrawn.

The Clerk shall close this case and deny any pending motions as Moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of May, 2018.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Anthony J. Dannolfo, #W14878
c/o Avon Park Corr. Inst.
8100 County Road 64 East
Avon Park, FL 33825-6801

Honorable Patrick A. White, US Magistrate Judge

Richard Valuntas, AAG

[4] Dannolfo indicated that he knew he faced thirty (30) years, but he didn't do anything. [DE-12-4, p. 5]. He did not want to talk to Mr. Printz for a minute or two; he wanted to go to trial. [DE-12-4, pp. 7-8].

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ANTHONY DANNOLFO,

Plaintiff,

vs.

JULIE JONES,

Defendant.
_____/

CASE NO. 18-80239-CIV-DIMITROULEAS

FINAL JUDGMENT FOR RESPONDENT; ORDER DENYING CERTIFICATE OF APPEALABILITY

THIS CAUSE is before the Court upon the Final Judgment and Order Denying Habeas Petition signed today on May 22, 2018. Accordingly, pursuant to Rule 58(a) Fed. R. Civ. Proc. and Rule 11(a), Section 2254 Proceedings, it is

ORDERED AND ADJUDGED as follows:

1. Judgment is entered on behalf of Respondent, against the Petitioner, Anthony Dannolfo.

2. The Motion for Due Process Evidentiary Hearing [DE-34] is Denied.

3. On Consideration of a Certificate of Appealability, the Court will deny such certification as this Court determines that Petitioner has not shown a violation of a substantial constitutional right. The court notes that pursuant to Rule 22(b)(1), Federal Rules App. Proc. Petitioner may now seek a certificate of appealability from the Eleventh Circuit Court of Appeals.

4. The Clerk shall close this case and deny any pending motions as Moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of May, 2018.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Anthony Dannolfo, #W14878
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8100 Country Road 64 East
Avon Park, FL 33825-6801

Richard Valuntas, AAG

Honorable Patrick A. White, US Magistrate Judge

C

APPENDIX C: Recommendation of the United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 18-cv-80239-DIMITROULEAS
MAGISTRATE JUDGE P.A. WHITE

ANTHONY J. DANNOLFO,

Petitioner,

v.

JULIE L. JONES,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The *pro se* petitioner, **Anthony J. Dannolfo**, a convicted state felon, has filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, challenging the constitutionality of his conviction for trafficking in oxycodone (4G-14G) entered following a jury trial in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County **case no. 502009CF002263B.**

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

The Court has reviewed the petition (DE#1) together with the online state court criminal docket[1] (hereinafter referred to as

[1]The online state court criminal docket is located at the following web address: https://applications.mypalmbeachclerk.com/eCaseView/.

"Online Trial Docket") and certain documents[2] located therein,[3] and the online appellate dockets of the Fourth District Court of

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[2]The following documents were extracted from the Online Trial Docket and are now a permanent part of the instant record:

1. Jury verdict dated December 29, 2010. (OTD#113).
2. Judgment in **case no. 502009CF002269**. (OTD#114).
3. Sentence in **case no. 502009CF002269**. (OTD#116).
4. Amended Information. (OTD#124).
5. Defendant's notice of direct appeal dated January 6, 2011. (OTD#126).
6. Fourth DCA Acknowledgment of New Case 4D11-222. (OTD#131).
7. Fourth DCA Mandate in case no. 4D11-222. (OTD#147).
8. Motion for Reduction of Sentence dated March 11, 2013. (OTD#148).
9. The trial court's Order denying Motion for Reduction of Sentence dated March 25, 2013. (OTD#149).
10. Order Denying Defendant's Motion for Post Conviction Relief as to Grounds 2, 3, 4, and 5 and requiring an evidentiary hearing on ground 1 dated May 28, 2015. (OTD#166).
11. Order Denying Ground One of Dannolfo's Amended Motion for Post Conviction Relief dated December 5, 2016. (OTD#209).
12. Notice of Appeal of order denying Motion for Post Conviction Relief under Rule 3.850 dated January 12, 2017. (OTD#217).
13. Fourth DCA Acknowledgment of New Case 4D17-0197. (OTD#222).
14. Fourth DCA Mandate in case no. 4D17-0197. (OTD#234).

[3]References to documents extracted from the Online Trial Docket are identified with the citation "OTD#___." The document number assigned is identical to the docket entry number located on the Online Trial Docket.

Appeals[4] (Fourth DCA) for **case numbers 4D11-222, 4D13-2467, and 4D17-0197**, hereinafter referred to as "Appellate Docket ____."[5]

II. Claims

Because the petitioner is *pro se*, he has been afforded liberal construction under Haines v. Kerner, 404 U.S. 419 (1972). In this federal habeas petition, Petitioner raises several grounds for relief:

1. Counsel misadvised petitioner on the strength of the State's case since counsel incorrectly advised as to which police officers would testify and such misadvice prevented Petitioner from making a reasoned decision on accepting a three-year plea offer instead of the twenty year sentence imposed following trial. (DE#1:3).

2. Ineffective assistance of counsel for:

   A. Failing to investigate prepare and present a defense (Id. at 11);

   B. Failing to make a request for jury instructions that the codefendant acted independently

[4]The online appellate docket for the Fourth DCA is located at the following web address: http://www.4dca.org/.

[5]Copies of the state court criminal and appellate dockets can be found online. See Fed.R.Evid. 201; see also, United States v. Glover, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999)(finding the district court may take judicial notice of the records of inferior courts). The court also takes judicial notice of its own records in habeas proceedings, McBride v. Sharpe, 25 F.3d 962, 969 (11th Cir. 1994), Allen v. Newsome, 7985 F.2d 934, 938 (11th Cir. 1986), together with the state records, which can be found online. See Fed.R.Evid. 201; see also, United States v. Glover, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999)(finding the district court may take judicial notice of the records of inferior courts).

and outside any common plan involving petitioner (Id.);

C. Failing to request jury instructions as to Petitioner's lack of intent to sell pills so that he could have been convicted of a lesser offense. (Id.).

3. Ineffective assistance of counsel for failure to establish during Officer McCabe's proffer that any reference to an agreement for a specific quantity of pills was testimonial hearsay. (Id. at 17).

4. Ineffective assistance of counsel for failure to motion for a new trial on the grounds of substantial prejudicial error following the rebuttal witness testimony. (Id. at 23).

Petitioner seeks to vacate the judgment and sentence, release from State custody, a new trial or any other relief to which he may be entitled. (Id. at 32).

III. Procedural History

Petitioner was charged by Information with (Count 1) trafficking in oxycodone (4G - 14G), a first-degree felony in violation of F.S. 893.135(1)(C)(1)(A) and (Count 2) possession of cocaine, a third-degree felony in violation of F.S. 893.13(6)(A). (See OTD Entry 13). The State later nolle prossed Count 2.[6] (See Online Trial Docket Charges and Sentence).

Petitioner asserted his right to a jury trial, which commenced

[6]The state filed an amended information in the case on January 5, 2011, indicating that Petitioner was not charged in Count 2. (OTD#124).

on December 28, 2010. (See Online Trial Docket entries 106 and 107). On **December 29, 2010**, the jury returned a guilty verdict as to Count 1 as charged in the Information (OTD#113). Accordingly, on the same day, the court adjudicated Petitioner guilty and sentenced him to a term of twenty years in prison with a three-year mandatory minimum sentence. (OTD#s114, 116).

Petitioner filed a timely notice of appeal. (OTD#126). The appeal was transmitted to the Fourth DCA and assigned **case no. 4D11-222**. (OTD#131). On **October 10, 2012**, Petitioner's conviction was affirmed *per curiam* and without opinion.[7] Dannolfo v. State of Florida, 103 So.3d 170 (Fla. 4th DCA, 2012). The mandate issued January 11, 2013. (OTD#147). Petitioner filed no further appeal to his conviction. Thus, Petitioner's conviction became final on **January 8, 2013**, which is 90 days after the Fourth DCA affirmed his conviction. Therefore, absent any tolling motions, Petitioner had one year, until **January 8, 2014**, to file a federal habeas petition.

Two months later, **March 11, 2013**, Petitioner filed a motion to correct sentence. (OTD#148). The court denied the motion on **March 25, 2013**. (OTD#149). *More than three months after the denial*, on **July 3, 2013**, Petitioner filed a motion pursuant to Fla. R. App. P. 9.141(d) alleging ineffective assistance of appellate counsel.[8] (See Appellate Docket 4D13-2467). The Fourth DCA denied the motion, and, subsequently, Petitioner's motion for rehearing on **October 15, 2013**. (Id.).

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[7]Petitioner incorrectly asserts in the instant petition that the decision was issued on December 20, 2012, (DE#1::31); however, in his state motion to correct sentence, he correctly asserts that the Fourth DCA issued its opinion on October 10, 2012. (OTD#148).

[8]Petitioner asserts in the instant petition that this filing was made on this date, which is confirmed by the online trial docket. (DE#3:2).

Nearly six months later, on **April 11, 2014**, Petitioner filed a motion for post conviction relief pursuant to Rule 3.850.[9] (OTD entry 154). On May 28, 2015, the trial court issued an order denying Petitioner relief as to grounds 2, 3, 4, and 5 and required an evidentiary hearing as to ground 1. (OTD#166). After conducting an evidentiary hearing on April 18, 2016, (OTD entry 255), the trial court issued an order on **December 5, 2016**, denying Petitioner relief as to ground 1. (OTD#209).

Just over one month later, on **January 12, 2017**, Petitioner appealed the denial of his motion for post conviction relief, which was acknowledged by the Fourth DCA as case no. 4D17-0197. (OTD#s217, 222). Then, on **November 22, 2017**, the appellate court affirmed the denial of post conviction relief *per curiam* and without opinion. Dannolfo v. State of Florida, 2017 Fla App. LEXIS 17646, 2017 WL 5629544. The mandate was issued on January 26, 2018. (OTD#234).

Finally, *just over three months later*, on **February 23, 2018**, Petitioner filed the instant habeas petition asking this Court to vacate both his sentence and judgment. (DE#1).

IV. Discussion-Timeliness

Since Petitioner filed his federal habeas petition after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") governs this proceeding. See Wilcox v. Fla.Dep't of Corr., 158 F.3d 1209, 1210 (11th Cir. 1998)(*per curiam*). The AEDPA imposed for the first time a one-year statute of limitations on

[9]Petitioner asserts in the instant petition that this document was filed on this date, which is confirmed by the online trial docket. (DE#3:2).

petitions for writ of habeas corpus filed by state prisoners. See 28 U.S.C. §2244(d)(1)("A 1-year period of limitation shall apply to an application for a writ of habeas corpus....). Specifically, the AEDPA provides that the limitations period shall run from the latest of –

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

See 28 U.S.C. §2244(d)(1).

The limitations period is tolled, however, for "[t]he time during which a properly filed application for post-conviction or other collateral review with respect to the pertinent judgment or claim is pending...." 28 U.S.C. §2244(d)(2). Consequently, this petition is time-barred, pursuant to 28 U.S.C. §2244(d)(1)(A), unless the appropriate limitations period was extended by properly filed applications for state post-conviction or other collateral review proceedings. See 28 U.S.C. §2244(d)(2); see also, Rich v. Sec'y for Dep't of Corr's, 512 Fed.Appx. 981, 982-83 (11th Cir. 2013); Nesbitt v. Danforth, 2014 WL 61236 at *1 (S.D. Ga. Jan. 7, 2014).

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); see also, Rich, 512 Fed.Appx. at 983; Everett v. Barrow, 861 F.Supp.2d 1373, 1375 (S.D. Ga. 2012). Consequently, if the petitioner sat on any claim or created any time gaps in the review process, the one-year clock would continue to tick. Kearse v. Sec'y, Fla. Dep't of Corr's, 736 F.3d 1359, 1362 (11th Cir. 2013); Nesbitt v. Danforth, 2014 WL 61236 at *1.

Further, "[a]n application that is untimely under state law is not 'properly filed' for purposes of tolling AEDPAs limitations period." Gorby v. McNeil, 530 F.3d 1363, 1366 (11th Cir. 2008)(citation omitted), cert. den'd, 556 U.S. 1109, 129 S.Ct. 1592, 173 L.Ed.2d 684 (2009). A motion filed past the deadline for filing a federal habeas petition cannot toll the limitations period. See Hutchinson v. Florida, 677 F.3d 1097, 1098 (11th Cir. 2012)("In order for...§2244(d)(2) statutory tolling to apply, the petitioner must file his state collateral petition before the one-year period for filing his federal habeas petition has run."); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000); Nesbitt, 2014 WL 61236 at *1.

A. Statutory Tolling Under §2244(d)(1)(A)

Petitioner's conviction became final on **January 8, 2013**, which is 90 days after the Fourth DCA affirmed his conviction. Petitioner had until **January 8, 2014**, absent tolling motions, to file his federal habeas petition. As narrated above, Petitioner subsequently

filed a motion to correct sentence, on **March 11, 2013**, at which point **sixty-two (62) days** of the period elapsed. The motion was was dismissed by the state court on **March 25, 2013**. During this period (from March 11 through March 25), the statute of limitations was tolled. Next, Petitioner filed his motion with the Fourth DCA pursuant to Fla. R. App. P. 9.141(d) on **July 3, 2013**, at which point, an additional **one-hundred (100) days** of the period elapsed. That proceeding ended on **October 15, 2013**, when Petitioner's motion for rehearing was denied. During this period (July 3 through October 15), the statute of limitations was tolled. To this point, **one-hundred sixty-two (162) days** expired.

Petitioner then let an additional **one-hundred seventy-eight days** pass, until he filed his motion for post conviction relief pursuant to Rule 3.850 on **April 11, 2014**. This motion tolled the statute again. The state court denied relief on **December 5, 2016**, at which point the clock would restart. **Thirty-eight (38) days** later, Petitioner appealed the denial of his 3.850 motion on **January 12, 2017**. At this point, **three-hundred seventy-eight (378) days** of the federal limitations period had expired. Moreover, after the Fourth DCA affirmed the denial of relief on November 22, 2017, Petitioner waited an *additional* **ninety-three (93) days** to then file his instant habeas petition. Therefore, a total of **four-hundred seventy-one (471) days** have elapsed.

While it is true that Petitioner's federal limitations period would be tolled during the pendency of properly filed post-conviction proceedings in the state forum, there still remained well in excess of one year during which no state collateral proceedings were instituted or otherwise pending which would serve to toll or stop the federal limitations period from expiring.

Because there was well in excess of one year during which there were no state post-conviction proceedings pending, this federal habeas proceeding is due to be dismissed as time-barred.

B. Equitable Tolling

That, however, does not end the inquiry. Given the detailed procedural history narrated above, this federal habeas proceeding is due to be dismissed unless Petitioner can establish that equitable tolling of the statute of limitations is warranted.

The one-year limitations period set forth in §2244(d) "is subject to equitable tolling in appropriate cases." Holland v. Florida, 560 U.S. 631, 645 (2010). In that regard, the Supreme Court has established a two-part test for equitable tolling, stating that a petitioner "must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevent timely filing." Lawrence v. Florida, 549 U.S. 327, 336 (2007); Holland v. Florida, 560 U.S. at 649 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)); see also, Brown v. Barrow, 512 F.3d 1304, 1307 (11th Cir. 2008)(noting that the Eleventh Circuit "has held that an inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances that are both beyond his control and unavoidable with diligence, and this high hurdle will not be easily surmounted. Howell v. Crosby, 415 F.3d 1250 (11th Cir. 2005); Wade v. Battle, 379 F.3d 1254, 1265 (11th Cir. 2004)(citations omitted).

Equitable tolling "is an extraordinary remedy 'limited to rare and exceptional circumstances and typically applied sparingly.'" Cadet v. Fla. Dep't of Corr's, 742 F.3d 473, 477 (11th Cir. 2014)(quoting Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th Cir.

2009)). The petitioner bears the burden of establishing the applicability of equitable tolling by making specific allegations. See Cole v. Warden, Ga. State Prison, 768 F.3d 1150, 1158 (11th Cir. 2014)(citing Hutchinson v. Fla., 677 F.3d 1097, 1099 (11th Cir. 2012)).

"The diligence required for equitable tolling purposes is reasonable diligent, not maximum feasible diligence." Holland, 560 U.S. at 653 (citation and quotation marks omitted). Determining whether a circumstance is extraordinary "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 (quoting Diaz v. Kelly, 515 F.3d 149, 154 (2nd Cir. 2008)). Further, a petitioner must show a causal connection between the alleged extraordinary circumstances and the late filing of the petition." San Martin v. McNeil, 633 F.3d 1257, 1267 (11th Cir. 2011)(citing Lawrence v. Fla., 421 F.3d 1221, 1226-27 (11th Cir. 2005)); Drew v. Dep't of Corr's, 297 F.3d 1278, 1286 (11th Cir. 2002).

Petitioner has not demonstrated that he was diligent in pursuing post-conviction relief. While the record reveals that Petitioner was a proactive litigant during his direct appeal and some motions for post conviction relief in state court, here he has not established any fact to support a finding that he is "entitled to the rare and extraordinary remedy of equitable tolling." See Drew v. Dep't of Corr's, 297 F.3d 1278, 1289 (11th Cir. 2002). This Court is not unmindful that Petitioner pursued collateral relief in the state forum. However, it is evident that there was well over one year of untolled time during which no properly filed post-conviction proceedings were pending which would act to toll the

federal limitations period. As a result of Petitioner's failure to properly and diligently pursue his rights, he has failed to demonstrate that he qualifies for equitable tolling of the limitations period. See Webster v. Moore, 199 F.3d 1256, 1258-60 (11th Cir. 2000)(holding that even properly filed state court petitions must be pending in order to toll the limitations period), cert. den'd, 531 U.S. 991 (2000).

The time-bar is ultimately the result of Petitioner's failure to timely and properly pursue state post-conviction proceedings and then this federal habeas corpus proceeding. Since this habeas corpus proceeding instituted on **February 23, 2018**, is untimely, Petitioner's claim challenging the lawfulness of his judgment is now time-barred pursuant to 28 U.S.C. §2244(d)(1)-(2) and should not be considered on the merits.

C. Fundamental Miscarriage of Justice/Actual Innocence

No fundamental miscarriage of justice will result if the court does not review on the merits Petitioner's grounds for relief raised herein. The law is clear that a petitioner may obtain federal habeas review of a procedurally defaulted claim, without a showing of cause or prejudice, if such review is necessary to correct a fundamental miscarriage of justice. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Henderson v. Campbell, 353 F.3d 880, 892 (11th Cir. 2003). This exception is only available "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent." Henderson, 353 F.2d at 892.

As a threshold matter, the Eleventh Circuit has never held that Section 2244(d)'s limitations period carries an exception for

actual innocence; and it has declined to reach the issue whether the absence of such an exception would violate the Constitution. See Taylor v. Sec'y, Dep't of Corr's, 230 Fed.Appx. 944, 945 (11th Cir. 2007)("[W]e have never held that there is an 'actual innocence' exception to the AEDPA's one-year statute of limitations, and we decline to do so in the instant case because [the petitioner] has failed to make a substantial showing of actual innocence."); Wyzykowski v. Dep't of Corr's, 226 F.3d 1213, 1218-19 (11th Cir. 2000)(leaving open the question whether the §2244 limitation period to the filing of a first federal habeas petition constituted an unconstitutional suspension of the writ). But cf. United States v. Montano, 398 F.3d 1276, 1284 (11th Cir. 2000)("Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by appellant's failure to timely file his §2255 motion."). However, several other circuits have recognized such an exception. See, e.g., Souter v. Jones, 395 F.3d 577 (6th Cir. 2005); Flanders v. Graves, 299 F .3d 974 (8th Cir. 2002).

Even if there were an "actual innocence" exception to the application of the one-year limitations provisions of §2244, the Court would still be precluded from reviewing the claims presented in the instant petition on the merits. "To establish actual innocence, [a habeas petitioner] must demonstrate that ... 'it is more likely than not that no reasonable [trier of fact] would have convicted him.' Schlup v. Delo, 513 U.S. 298, 327-328, 115 S.Ct. 851, 867-868, 130 L.Ed.2d 808 (1995)." Bousley v. United States, 523 U.S. 614, 623 (1998). "[T]he Schlup standard is demanding and permits review only in the "'extraordinary' case." House v. Bell, 547 U.S. 518, 538 (2006).

Courts have emphasized that actual innocence means factual

innocence, not mere legal insufficiency. Id.; see also High v. Head, 209 F.3d 1257 (11th Cir. 2000); Lee v. Kemna, 213 F.3d 1037, 1039(8th Cir. 2000); Lucidore v. New York State Div. of Parole, 209 F.3d 107 (2nd Cir. 2000)(citing Schlup v. Delo, 513 U.S. 298, 299, (1995); Jones v. United States,153 F.3d 1305 (11th Cir. 1998)(holding that appellant must establish that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him). See also Bousley, 523 U.S. at 623-624; Doe v. Menefee, 391 F.3d 147, 162 (2nd Cir. 2004)("As Schlup makes clear, the issue before [a federal district] court is not legal innocence but factual innocence.").

To be credible, a claim of actual innocence requires the petitioner to "support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." Schlup v. Delo, 513 U.S. at 324. All things considered, the evidence must undermine the Court's confidence in the outcome of the trial. Id. at 316. No such showing has been made here. Even if such an exception exists, Petitioner has failed to make the requisite showing of actual innocence that would support consideration of his untimely §2254 petition on the merits.

Here, assuming, without deciding, that a claim of actual innocence might support equitable tolling of the limitation period, notwithstanding, Petitioner has failed to make a substantial showing of "actual innocence" of the crimes for which he was found guilty following a jury trial and the appellate court's affirmation of his conviction. In fact, he asserts that but for the errors of trial counsel, Petitioner would have been willing to accept a plea offer if he could receive in exchange a period of three years in

prison instead of the twenty years he received.

On the record before this court, no fundamental miscarriage of justice will result by time-barring the claims raised in this habeas proceeding. Petitioner's conviction of guilt rests on the verdict of the jury. In other words, Petitioner has not presented sufficient evidence to undermine the Court's confidence in the outcome of his criminal proceedings sufficient to show that a fundamental miscarriage of justice will result if the claim(s) are not addressed on the merits. See Milton v. Sec'y, Dep't of Corr's, 347 Fed.Appx. 528, 531-532 (11th Cir. 2009)(holding that affidavits proffered by *pro se* habeas petitioner were insufficient to establish actual innocence of murder, as would allegedly have created an exception to one-year limitations period, because affidavits were presented more than ten years after murder and eight years after petitioner's trial, the affiants were in most cases aware of the alleged facts to which they attested before petitioner's trial, the affidavits were either not new evidence or were of questionable reliability, and none of the evidence negated petitioner's confession or his taped conversation with the victim's mother wherein he implicated another individual in the murder)(unpublished).

Here, Petitioner is not demonstrating actual, factual innocence; therefore, his claim warrants no habeas corpus relief. See e.g., Scott v. Duffy, 372 Fed.Appx. 61, 63-64 (11th Cir. 2010)(rejecting habeas petitioner's actual innocence claim where no showing made of factual innocence of aggravated assault underlying his probation revocation and instead merely cited to evidence from probation revocation hearing and argued it did not support revocation of probation); see also, Bousley v. United States, 523 U.S. 614, 623 (1998).

It is evident that record refutes Petitioner's claims as raised in his petition. Consequently, under the totality of the circumstances present here, this federal petition is NOT TIMELY and should be dismissed as time-barred.

V. Evidentiary Hearing

To the extent petitioner requests an evidentiary hearing on this matter, the request must be denied. To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, show both extraordinary circumstances and reasonable diligence entitling a petitioner to enough equitable tolling to prevent his motion to vacate or habeas petition from being time-barred. See generally Chavez v. Sec'y Fla. Dep't of Corr's, 647 F.3d 1057, 1060-61 (11th Cir. 2011)(holding that an evidentiary hearing on the issue of equitable tolling of the limitations period was not warranted in a §2254 proceeding and further finding that none of the allegations in the habeas petition about what postconviction counsel did and failed to do came close to the serious attorney misconduct that was present in Holland, instead, were at most allegations of garden variety negligence or neglect). If so, he gets an evidentiary hearing and the chance to prove that those factual allegations are true. Id. As noted by the Eleventh Circuit, "[t]he allegations must be factual and specific, not conclusory. Conclusory allegations are simply not enough to warrant a hearing." Id. at 1061. Based upon the reasons stated above, this is not one of those cases where an evidentiary hearing is warranted on the limitations issue.

On the merits, an evidentiary hearing is also not warranted. As noted by the Supreme Court in Cullen v. Pinholster, 563 U.S. 170, 181 (2011), "review under §2254(d)(1) is limited to the record

that was before the state court that adjudicated the claim on the merits." Where, as here, the Court has already determined that habeas relief is barred by §2254(d) because the state courts reasonably decided Petitioner's claims in postconviction proceedings, no amount of new evidence in support of the underlying claims can impact the result.

VI. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability (COA") to do so. 28 U.S.C. §2253(c)(1); Harbison v. Bell, 556 U.S. 180 (2009).

This Court should issue a COA only if Petitioner makes a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Alternatively, when the district court has rejected a claim on procedural grounds, the petitioner must show 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." Id.

After review of the record, Petitioner is not entitled to a certificate of appealability. Nevertheless, as now provided by the

Rules Governing §2254 Proceedings, Rule 11(a), 28 U.S.C. §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.

VII. Recommendations

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, 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 7th day of March, 2018.

UNITED STATES MAGISTRATE JUDGE

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D

APPENDIX D: 11th Circuit Court of Appeals Order denying Motion for Reconsideration

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12460-E

ANTHONY J. DANNOLFO,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,
Secretary,

Respondent-Appellee.

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

Before WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Anthony J. Dannolfo has filed a motion for reconsideration of this Court's order dated September 19, 2018, denying his motion for a certificate of appealability in his appeal of the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Dannolfo's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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