APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15701-F

ELBERT WALKER,

Petitioner-Appellant,

versus

JOHNSON SP WARDEN,

Respondent-Appellee.

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

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Elbert Walker has filed *pro se* a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's June 28, 2018, order denying his motions for a certificate of appealability, leave to proceed *in forma pauperis* on appeal, and to take judicial action. Upon review, Walker's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief. *See* Fed. R. App. P. 40(a)(2).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15701-F

ELBERT WALKER,

Petitioner-Appellant,

versus

JOHNSON SP WARDEN,

Respondent-Appellee.

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

ORDER:

Elbert Walker moves for a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") in order to appeal the dismissal of his 28 U.S.C. § 2254 habeas corpus petition as time-barred. 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because he has not made the requisite showing, Walker's motion for a COA is DENIED. Additionally, his motion for IFP status is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX C

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

ELBERT WALKER, Petitioner,	::	HABEAS CORPUS 28 U.S.C. § 2254
v.	::	
ARTIS SINGLETON, Respondent,	::	CIVIL ACTION NO. 1:17-CV-0149-LMM

ORDER

This matter is before the Court on petitioner Elbert Walker's objections [35] to the Magistrate Judge's Final Report and Recommendation ("R&R) [29], which recommends that respondent's motion to dismiss this 28 U.S.C. § 2254 petition as untimely [14; 28] be granted and that petitioner's motion for stay and abeyance [5], motion to vacate order denying motion for new trial [8], and motion to vacate order acknowledging valid waiver of counsel [9] be denied as moot. Also before the Court are petitioner's motion for evidentiary hearing and fact development procedure [31], motion for leave to file a traverse and a supporting brief [32], and request for an extension of time to file a certificate of appealability and notice of appeal [36].

In reviewing a Magistrate Judge's Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C.

§ 636(b)(1). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." United States v. Schultz, 565 F.3d 1353, 1361 (11th Cir. 2009) (per curiam) (quoting Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988)) (internal quotation marks omitted). Absent objection, the district judge "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(1), and "need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation," Fed. R. Civ. P. 72, advisory committee note, 1983 Addition, Subdivision (b). Further, "the district court has broad discretion in reviewing a magistrate judge's report and recommendation" – it "does not abuse its discretion by considering an argument that was not presented to the magistrate judge" and "has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge." Williams v. McNeil, 557 F.3d 1287, 1290-92 (11th Cir. 2009).

On March 6, 2006, a Fulton County jury convicted petitioner of malice murder, three counts of felony murder, aggravated assault, armed robbery, two counts of theft by taking, possession of a firearm by a convicted felon, and possession of a firearm

during the commission of a felony. Walker v. State, 702 S.E.2d 415, 416 n.1 (Ga. 2010). The trial court initially imposed a total sentence of life plus ten years of imprisonment without the possibility of parole, but re-sentenced petitioner on May 13, 2009, to life with the possibility of parole on the malice murder conviction. Id. On November 8, 2010, the Georgia Supreme Court affirmed the trial court's judgment. Id. at 420. Petitioner did not seek certiorari in the United States Supreme Court. (Doc. 1 at 2.) Petitioner's appellate counsel moved to withdraw on June 2, 2011. (Doc. 24-1 at 2.)

On August 4, 2011, petitioner filed a motion for recusal; and on October 14, 2011, he filed motions for a de novo hearing, to vacate void judgment, and in arrest of judgment, all of which challenged the validity of his convictions. (Doc. 22 at 1; Doc. 23 at 2; Doc. 24 at 4; Doc. 24-3 at 18; Doc. 26 at 1.) The trial court denied petitioner's motions on April 5, 2012. (Doc. 22 at 2; Doc. 23 at 2; Doc. 24 at 4; Doc. 24-3 at 19; Doc. 26 at 1.)

Petitioner next filed motions to vacate void judgment, to dismiss for lack of subject matter jurisdiction, and for de novo investigation in the trial court on June 26, 2012 (Doc. 22 at 2; Doc. 23 at 3; Doc. 24 at 4; Doc. 24-3 at 19; Doc. 26 at 2), all of which the trial court denied on February 8, 2013 (Doc. 22 at 2; Doc. 23 at 3; Doc. 24

at 4; Doc. 24-3 at 20; Doc. 26 at 2). On November 11, 2013, petitioner filed a pro se state habeas corpus petition in the Superior Court of Lee County (Doc. 15-2), which the state habeas court denied (Doc. 15-3). On December 8, 2016, the Georgia Supreme Court denied petitioner's application for a certificate of probable cause to appeal the denial of habeas corpus. (Doc. 15-4.)

Petitioner filed this § 2254 petition on January 7, 2017.[1] (Doc. 1 at 15.) Respondent moves to dismiss the petition as untimely. (Docs. 14; 28.) Petitioner opposes respondent's motion to dismiss, arguing, in pertinent part, that: he has filed over one hundred motions in the trial court, which tolled the one-year limitations period and which demonstrate that he has diligently pursued his rights; his appellate counsel's failure to timely withdraw constituted an impediment to his ability to file pro se pleadings in the Georgia Supreme Court; and he is entitled to equitable tolling because he "knew nothing of AEDPA's 1 year limitation statute." (Doc. 23 at 2-4; Doc. 24 at 2-5; Doc. 26 at 1-3.)

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[1] Pursuant to the "mailbox rule," a pro se prisoner's federal habeas petition is deemed filed on the date it is delivered to prison authorities for mailing. 28 U.S.C. foll. § 2254, Rule 3(d); Adams v. United States, 173 F.3d 1339, 1341 (11th Cir. 1999) (per curiam).

The Magistrate Judge noted that the late withdrawal of petitioner's appellate counsel likely did not constitute an impediment to filing this § 2254 petition, but nevertheless gave petitioner the benefit of that later date and found that petitioner filed this § 2254 petition approximately four years and seven months after the one-year limitations period expired. (Doc. 29 at 6-7, 12.) The Magistrate Judge further found that: petitioner's post-judgment motions for recusal, for a de novo hearing, to vacate void judgment, and in arrest of judgment did not qualify as statutory applications under 28 U.S.C. § 2244(d)(2); all of petitioner's remaining post-conviction pleadings did not toll the limitations period because they were filed after it expired; petitioner failed to meet his burden to show that he is entitled to equitable tolling; and petitioner did not contend that he is actually innocent. (Id. at 7-12.) In his objections, petitioner maintains that he is actually innocent and reasserts his argument that his numerous post-conviction pleadings tolled the one-year limitations period and demonstrate that he has diligently pursued his rights. (Doc. 35.)

A plea of actual innocence, if proved, can overcome the one-year limitations period for filing a federal habeas corpus action. McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013). "'To be credible,' a claim of actual innocence must be based on reliable evidence not presented at trial." Calderon v. Thompson, 523 U.S. 538, 559

(1998) (citing Schlup v. Delo, 513 U.S. 298, 324 (1995)). To establish his actual innocence, a petitioner must persuade "the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Schlup, 513 U.S. at 329. "The [actual innocence] gateway should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" McQuiggin, 133 S.Ct. at 1936 (citing Schlup, 513 U.S. at 316). Petitioner presents no new evidence to support his assertion of innocence and fails to meet Schlup's demanding standard.

Furthermore, the Court agrees with the Magistrate Judge that petitioner's post-judgment motions for recusal, for a de novo hearing, to vacate void judgment, and in arrest of judgment did not qualify as statutory applications under § 2244(d)(2). See Neal v. McNeil, No. 3:09cv23/MCR/EMT, 2010 WL 298294, at *5 (N.D. Fla. Jan. 15, 2010) ("Disqualification of a trial judge assigned to a case is not an attack on the constitutionality or legal correctness of a sentence or judgment, in contrast to a direct appeal, habeas action, or proceeding to set aside a conviction or correct an illegal sentence."), report and recommendation adopted at, *1; Jones v. State, 777 S.E.2d 477, 478 (Ga. 2015) ("A motion in arrest of judgment must be filed in the term

of court in which the judgment was entered.") (citing O.C.G.A. § 17-9-61(b)); Harper v. State, 686 S.E.2d 786, 787 (Ga. 2009) (A motion "to vacate or modify a judgment of conviction is not an appropriate remedy in a criminal case."). Petitioner's remaining post-conviction pleadings did not toll the limitations period because they were filed after it expired. See Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir. 2001) ("[A] state court petition . . . that is filed following the expiration of the federal limitations period 'cannot toll that period because there is no period remaining to be tolled.'") (citation omitted).

Having conducted a careful review of the R&R and petitioner's objections thereto, the Court finds that the Magistrate Judge's factual and legal conclusions were correct and that petitioner's objections have no merit. Therefore, the Court **ADOPTS** the Magistrate Judge's Report and Recommendation [29], **GRANTS** respondent's motion to dismiss this action as untimely [14; 28], **DISMISSES** this action as time barred, **DENIES** petitioner's various motions [5; 8-9; 31-32; 36], and **DECLINES** to issue a certificate of appealability.

Petitioner is advised that he has thirty days from the entry date of this order to file a notice of appeal. See Fed. R. App. P. 4(a)(1)(A). Additionally, petitioner "may seek a certificate [of appealability] from the court of appeals under Federal Rule of

Appellate Procedure 22." Rule 11(a), Rules Governing § 2254 Cases in the United States District Courts.

The Clerk is **DIRECTED** to close the case.

IT IS SO ORDERED this 2nd day of June, 2017.

Leigh Martin May

LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE

APPENDIX D

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

ELBERT WALKER,	::	HABEAS CORPUS
Petitioner,	::	28 U.S.C. § 2254
	::	
v.	::	
	::	
ARTIS SINGLETON,	::	CIVIL ACTION NO.
Respondent,	::	1:17-CV-0149-LMM-RGV

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate Judge made in accordance with 28 U.S.C. § 636(b)(1) and this Court's Local Rule 72. Let the same be filed and a copy, with a copy of this order, be served upon counsel for the parties, or if a party is not represented, then directly upon said party.

Each party may file written objections, if any, to the report and recommendation within fourteen (14) days of receipt of this order. 28 U.S.C. § 636(b)(1). Should objections be filed, they shall specify with particularity the alleged error(s) made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and on appeal, the Court of Appeals will deem waived

any challenge to factual and legal findings to which there was no objection, subject to interests-of-justice plain error review. 11th Cir. R. 3-1.

The Clerk is **DIRECTED** to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

IT IS SO ORDERED this 10th day of May, 2017.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

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

ELBERT WALKER,	::	HABEAS CORPUS
Petitioner,	::	28 U.S.C. § 2254
	::	
v.	::	
	::	
ARTIS SINGLETON,	::	CIVIL ACTION NO.
Respondent,	::	1:17-CV-0149-LMM-RGV

FINAL REPORT AND RECOMMENDATION

Petitioner Elbert Walker, an inmate at the Johnson State Prison in Wrightsville, Georgia, has filed this 28 U.S.C. § 2254 petition to challenge his March 6, 2006, convictions in the Superior Court of Fulton County. This matter is currently before the Court on the petition, [Doc. 1], as supplemented, [Docs. 4; 22]; petitioner's motion for stay and abeyance, [Doc. 5], motion to vacate order denying motion for new trial, [Doc. 8], and motion to vacate order acknowledging valid waiver of counsel, [Doc. 9]; respondent's motion to dismiss the petition as untimely, [Docs. 14; 28]; and petitioner's responses in opposition to respondent's motion to dismiss, [Docs. 23-24; 26]. For the reasons that follow, it is **RECOMMENDED** that respondent's motion to dismiss, [Docs. 14; 28], be **GRANTED** and that this action be **DISMISSED** as time barred. In light of this recommendation, it is further **RECOMMENDED** that

petitioner's motions, [Docs. 5; 8-9], which concern the merits of his grounds for relief, be **DENIED** as moot.

I. PROCEDURAL HISTORY

On March 6, 2006, a Fulton County jury convicted petitioner of malice murder, three counts of felony murder, aggravated assault, armed robbery, two counts of theft by taking, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony. Walker v. State, 702 S.E.2d 415, 416 n.1 (Ga. 2010). The trial court initially imposed a total sentence of life plus ten years of imprisonment without the possibility of parole, but re-sentenced petitioner on May 13, 2009, to life with the possibility of parole on the malice murder conviction. Id. On November 8, 2010, the Georgia Supreme Court affirmed the trial court's judgment. Id. at 420. Petitioner did not seek certiorari in the United States Supreme Court. [Doc. 1 at 2]. The Georgia Supreme Court's remittitur was filed in the trial court on November 29, 2010. [Doc. 24-3 at 17]. Petitioner's appellate counsel moved to withdraw on June 2, 2011. [Doc. 24-1 at 2].

On August 4, 2011, petitioner filed a motion for recusal; and on October 14, 2011, he filed motions for a de novo hearing, to vacate void judgment, and in arrest of judgment, all of which challenged the validity of his convictions. [Doc. 22 at 1; Doc. 23 at 2; Doc. 24 at 4; Doc. 24-3 at 18; Doc. 26 at 1]. The trial court denied

petitioner's motions on April 5, 2012. [Doc. 22 at 2; Doc. 23 at 2; Doc. 24 at 4; Doc. 24-3 at 19; Doc. 26 at 1].

Petitioner next filed motions to vacate void judgment, to dismiss for lack of subject matter jurisdiction, and for de novo investigation in the trial court on June 26, 2012. [Doc. 22 at 2; Doc. 23 at 3; Doc. 24 at 4; Doc. 24-3 at 19; Doc. 26 at 2]. The trial court denied these motions on February 8, 2013. [Doc. 22 at 2; Doc. 23 at 3; Doc. 24 at 4; Doc. 24-3 at 20; Doc. 26 at 2].

On November 11, 2013, petitioner filed a pro se state habeas corpus petition in the Superior Court of Lee County. [Doc. 15-2]. Following evidentiary hearings on April 24, 2014, and July 23, 2014, the state habeas court entered a written order on February 19, 2016, denying the petition. [Doc. 15-3]. On December 8, 2016, the Georgia Supreme Court denied petitioner's application for a certificate of probable cause to appeal the denial of habeas corpus. [Doc. 15-4]. The remittitur was returned on January 24, 2017. [Doc. 15-5].

Petitioner filed this § 2254 petition on January 7, 2017.[1] [Doc. 1 at 15]. As grounds for relief, petitioner argues that: (1) the trial court lost its jurisdiction due to

[1] Pursuant to the "mailbox rule," a pro se prisoner's federal habeas petition is deemed filed on the date it is delivered to prison authorities for mailing. 28 U.S.C. foll. § 2254, Rule 3(d); Adams v. United States, 173 F.3d 1339, 1341 (11th Cir. 1999) (per curiam).

an invalid waiver of counsel; (2) the trial court abused its discretion when it found that petitioner's waiver of counsel was valid and that the defense expert used the wrong standard; (3) appellate counsel was ineffective for failing to (a) present case law showing the trial court's duty to inquire into conflicts of interest, (b) effectively argue that the Faretta[2] waiver was invalid, (c) argue that the trial court lost its jurisdiction due to an invalid waiver of counsel, (d) file a petition for certiorari review to the United States Supreme Court, and (e) timely withdraw so that petitioner could file pro se pleadings in the Georgia Supreme Court; (4) the trial court misused county funds after falsely finding that the defense expert used the wrong standard; (5) the state habeas court failed to rule on petitioner's notarized "family affidavit";[3] (6) the state habeas court failed to rule on petitioner's exhibit "Y"; (7) the trial court's jury instruction on "plain error" was erroneous; (8) the trial court erred when it overruled petitioner's objection to firearm ballistic reports; (9) the trial court's order acknowledging a valid waiver of counsel is void; and (10) the trial court's order denying petitioner's motion

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[2] Faretta v. California, 422 U.S. 806 (1975).

[3] Alleged errors made by the state habeas court are not cognizable on federal habeas review. See Quince v. Crosby, 360 F.3d 1259, 1262 (11th Cir. 2004) ("[W]hile habeas relief is available to address defects in a criminal defendant's conviction and sentence, an alleged defect in a collateral proceeding does not state a basis for habeas relief.").

for a new trial is void because the trial court wrongly found that the defense competency expert had used the incorrect standard. [Doc. 1 at 11-12; Doc. 4 at 1-2; Doc. 22 at 4-5].

Respondent moves to dismiss the petition as untimely. [Docs. 14; 28]. Petitioner opposes respondent's motion to dismiss, arguing, in pertinent part, that: he has filed over one hundred motions in the trial court, which tolled the one-year limitations period and which demonstrate that he has diligently pursued his rights; his appellate counsel's failure to timely withdraw constituted an impediment to his ability to file pro se pleadings in the Georgia Supreme Court; and he is entitled to equitable tolling because he "knew nothing of AEDPA's 1 year limitation statute." [Doc. 23 at 2-4; Doc. 24 at 2-5; Doc. 26 at 1-3].

II. DISCUSSION

A § 2254 petition is subject to a statutory one-year limitation period, which runs from the latest of the following:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). In this case, petitioner's conviction became final on Monday, February 7, 2011. See Nix v. Sec'y for Dep't of Corr., 393 F.3d 1235, 1236-37 (11th Cir. 2004) (per curiam) (holding that a state prisoner's conviction becomes final, for purposes of the one-year limitations period, when the ninety-day period for seeking certiorari review in the United States Supreme Court expires); Sup. Ct. R. 30(1) (providing that when the last day of the time period falls on a weekend or federal legal holiday, the period is extended until the next business day). Petitioner does not contend that subparagraphs (C) and (D) of § 2244(d)(1) apply. Petitioner argues that appellate counsel's late withdrawal from his case constituted an impediment to filing under subparagraph (B). [Doc. 24 at 2-3]. "The Eleventh Circuit has held that the actions of a petitioner's attorney is not the type of State impediment envisioned in § 2244(d)(1)(B), even if the attorney was appointed." Bennett v. McNeil, No. 3:10cv118/LC/MD, 2010 WL 5169084, at *2, n.4 (N.D. Fla. Nov. 8, 2010) (citations omitted), report and recommendation adopted, 2010 WL 5173693, at *1 (N.D. Fla.

Dec. 13, 2010). However, assuming that appellate counsel's failure to withdraw sooner did, in fact, constitute an impediment to filing under subparagraph (B), the limitations period began to run on June 2, 2011, when counsel withdrew and the impediment was thus removed. See 28 U.S.C. § 2244(d)(1)(B) (providing that the one-year limitations period begins to run when the state created impediment to filing is removed). Giving petitioner the benefit of this later date, he had, absent tolling, until Monday, June 4, 2012, to file this § 2254 petition. See Fed. R. Civ. P. 6(a)(1)(C) (providing that when the last day of the time period falls on a weekend or federal legal holiday, the period continues to run until the next business day).

Statutory tolling applies when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). After the Georgia Supreme Court's remittitur issued, petitioner's appellate counsel withdrew, and the limitations period began to run, petitioner filed a motion for recusal, and three motions challenging the validity of his convictions, namely, a motion for a de novo hearing, a motion to vacate void judgment, and a motion in arrest of judgment. [Doc. 22 at 1; Doc. 23 at 2; Doc. 24 at 4; Doc. 24-3 at 18; Doc. 26 at 1]. Petitioner's motion for recusal was not a tolling motion under § 2244(d)(2) because "[d]isqualification of a trial judge assigned to a case is not an attack on the constitutionality or legal correctness of a sentence or

judgment, in contrast to a direct appeal, habeas action, or proceeding to set aside a conviction or correct an illegal sentence." Neal v. McNeil, No. 3:09cv23/MCR/EMT, 2010 WL 298294, at *5 (N.D. Fla. Jan. 15, 2010), report and recommendation adopted at, *1. Petitioner's motion to vacate void judgment also does not qualify as a statutory application under § 2244(d)(2) because Georgia law provides that a motion "to vacate or modify a judgment of conviction is not an appropriate remedy in a criminal case." Harper v. State, 686 S.E.2d 786, 787 (Ga. 2009). Furthermore, petitioner's motion in arrest of judgment filed on October 14, 2011, more than five years after he was convicted and more than two years after he was re-sentenced was well outside the term of court[4] and, thus, was not a "properly filed" application for state post-conviction or other collateral review. See Jones v. State, 777 S.E.2d 477, 478 (Ga. 2015) ("A motion in arrest of judgment must be filed in the term of court in which the judgment was entered.") (citing O.C.G.A. § 17-9-61(b)). Thus, petitioner's motion seeking a de novo hearing on these motions, which did not qualify as statutory applications under § 2244(d)(2), also did not toll the limitations period.

Petitioner's state habeas petition and all of his remaining post-conviction pleadings were filed after the expiration of the statute of limitations on June 4, 2012.

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[4] Fulton County has six annual terms of court beginning on the first Monday of January, March, May, July, September, and November. See O.C.G.A. § 15-6-3(3).

See [Doc. 1 at 2, 6-9; Doc. 15-2; Doc. 22 at 2-3; Doc. 23 at 3; Doc. 24 at 4-5; Doc. 24-3 at 19-26; Doc. 26 at 2]. Accordingly, these pleadings also did not toll the limitations period. See Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir. 2001) ("[A] state court petition . . . that is filed following the expiration of the federal limitations period 'cannot toll that period because there is no period remaining to be tolled.'") (citation omitted).

Petitioner argues that he is entitled to equitable tolling because he "knew nothing of AEDPA's 1 year limitation statute." [Doc. 23 at 4]. The one-year limitations period set forth in "§ 2244(d) is subject to equitable tolling" when 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." Holland v. Florida, 560 U.S. 631, 649 (2010). "The burden of proving circumstances that justify the application of the equitable tolling doctrine rests squarely on the petitioner." San Martin v. McNeil, 633 F.3d 1257, 1268 (11th Cir. 2011) (citation omitted). Petitioner's "ignorance of the law is insufficient rationale for equitable tolling." Jones v. United States, 304 F.3d 1035, 1044 (11th Cir. 2002) (per curiam) (citation omitted); see also Perez v. Florida, 519 F. App'x 995, 997 (11th Cir. 2013) (per curiam) ("[A] lack of a legal education and related confusion or ignorance about the law" do not constitute extraordinary circumstances that warrant equitable tolling. Additionally,

"*pro se* litigants 'are deemed to know of the one-year statute of limitations.'") (citation omitted); Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000) ("Even in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted."). Thus, petitioner has not met his burden to show that he is entitled to equitable tolling.

Finally, petitioner does not contend that he is actually innocent. See McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013) (A plea of actual innocence, if proved, can overcome the one-year limitations period for filing a federal habeas corpus action.). Accordingly, this § 2254 petition, which petitioner filed on January 7, 2017, is untimely by at least four years and seven months.

III. CERTIFICATE OF APPEALABILITY

Under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, "the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Section 2253(c)(2) of Title 28 states that a certificate of appealability ("COA") shall not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." A substantial showing of the denial

of a constitutional right "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (internal quotation marks omitted).

Where, as here, a habeas petition is denied on procedural grounds without reaching the prisoner's underlying constitutional claim, "a certificate of appealability should issue only when the prisoner shows both that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Jimenez v. Quarterman, 555 U.S. 113, 118 n.3 (2009) (internal quotations marks omitted) (citing Slack, 529 U.S. at 484). Because petitioner cannot show that reasonable jurists could debate the dismissal of this habeas action as time barred, he should be denied a COA.

IV. CONCLUSION

For the reasons stated, **IT IS RECOMMENDED** that respondent's motion to dismiss, [Docs. 14; 28], be **GRANTED**, that this action be **DISMISSED** as time barred, that petitioner's motions, [Docs. 5; 8-9], be **DENIED** as moot, and that a COA be **DENIED**.

The Clerk is **DIRECTED** to terminate the referral to the Magistrate Judge.

SO RECOMMENDED, this 10th day of May, 2017.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

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