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NO._____

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IN THE SUPREME COURT
OF THE
UNITED STATES

_____

2019-2020 TERM

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WESLEY DORCELUS

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

_____

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QUESTIONS PRESENTED

I.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT DENIED DORCELUS' MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, WESLEY DORCELUS (hereinafter "DORCELUS"), by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceedings on May 14, 2019.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered a non-published opinion affirming the District Court's Order of Detention, *United States of America v. Wesley Dorcelus,* on May 14, 2019. *Appendix 1*.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals denying DORCELUS' Motion for Issuance of Certificate of Appealability was entered on May 14, 2019.

The Eleventh Circuit Court of Appeals entered its Order Denying DORCELUS' Petition for Rehearing and Petition for Rehearing *En Banc* on July 2, 2019 *Appendix 2*. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254 and Rule 10.1, Rules of the Supreme Court. This Petition for Writ of Certiorari is filed pursuant to Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

The Fifth Amendment to the Constitution provides, in relevant part that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person … be deprived of life, liberty, or property, without

due process of law…."

UNITED STATES CONSTITUTION, AMENDMENT VI

The Sixth Amendment to the Constitution provides in relevant part that: "In all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

On March 5, 2010, DORCELUS was sentenced to life in prison with a mandatory minimum term of 25 years in prison for the first count and 25 years in prison for the second count. The judgment was filed on March 29, 2010. DORCELUS filed his Notice of Appeal on April 1, 2010. The Fourth District Court of Appeal affirmed the conviction without an opinion and the Mandate was issued on February 21, 2012.

On July 16, 2013, DORCELUS, through counsel filed his Motion for Post-Conviction Relief pursuant to Florida Rules of Criminal Procedure 3.850(b)(1) – newly discovered evidence. On September 9, 2013, DORCELUS, through counsel filed his Amended Motion for Post-Conviction Relief pursuant to Florida Rules of Criminal Procedure 3.850(b)(1) – newly discovered evidence. DORCELUS argues that the newly discovered evidence consists of the affidavits and further testimony

of Tymere Jones ("Jones"), Damion Richardson ("Richardson") and Aaron Shuman ("Shuman"), whose affidavits corroborate DORCELUS' theory of self-defense and directly contradicts the state's theory of the case and the evidence introduced at trial.

The Trial Court entered an order requesting the State to file a response. The State filed their response on September 5, 2014 alleging that DORCELUS' statement to the police contradicts the affidavits of the witnesses and that the statements made by two of the witnesses in their affidavits are hearsay.

On September 12, 2014, the Trial Court summarily denied DORCELUS' Motion and merely attached the State's Response to the Order. DORCELUS filed his Notice of Appeal of the denial of his Motion on September 28, 2014. On January 22, 2015, the Fourth District Court of Appeal for the State of Florida affirmed the Circuit Court's denial of DORCELUS' Rule 3.850(b)(1) Motion *per curiam.*

On July 23, 2015, DORCELUS filed his Petition for Writ Of Habeas Corpus Pursuant To 28 U.S.C. §2254 on September 17, 2018.

The Magistrate Judge, without an evidentiary hearing entered her Report Recommending Denial of Petition for Writ Of Habeas Corpus Pursuant To 28 U.S.C. §2254 on September 17, 2018. DORCELUS timely filed his Objections to the Magistrate's Report on September 24, 2018. The District Court in its Opinion and Order denied DORCELUS' objections, affirmed and adopted the Magistrate's Report and as such denied DORCELUS' Petition for Writ Of Habeas Corpus

Pursuant To 28 U.S.C. §2254. The District Court's Opinion and Order also denied DORCELUS' certificate of appealability. DORCELUS timely filed his Motion for Issuance of Certificate of Appealability.

On May 14, 2019, the Eleventh Circuit denied DORCELUS' Motion for Issuance of Certificate of Appealability in a five (5) page opinion.

DORCELUS filed his Petition for Rehearing and Rehearing *En Banc*. The Eleventh Circuit denied DORCELUS' Petition for Rehearing and Rehearing *En Banc* on July 2, 2019.

2. <u>Statement of the Facts</u>.

On or about July 15, 2006, a fight ensued at a hotel stairwell that was outside of the building. The fight was between DORCELUS and the victims Elvin Holmes ("Holmes") and Jermaine Paul ("Paul") due to racial tension between Haitians and African-Americans. The fight was witnessed by Tymere Jones ("Jones") – who was also going to fight DORCELUS but did not.

During the fight, DORCELUS, in self-defense, shot Holmes and Jones once. Both Holmes and Jones went to the hospital. Holmes died from his injuries days thereafter. As a result of the above, DORCELUS was arrested shortly thereafter and charged as stated herein.

On or about December 1, 2006, a grand jury in the 17th Judicial Circuit in and for Broward County, Florida issued a two count indictment against DORCELUS

charging him with Murder in the Second Degree in violation of *Fla.Stat*. §782.04(2) (Count 1) and Attempted Murder in the Second Degree in violation of *Fla.Stat*. §782.04(2) (Count 2).

The jury trial commenced on or about January 25, 2010 and lasted until January 28, 2010. DORCELUS' theory throughout the trial was that he was defending himself because he was attacked by the victims, Holmes and Paul. At the trial, Paul refuted DORCELUS' claim of self-defense and DORCELUS had no witnesses, other than himself, to discredit Paul's testimony. The jury returned a verdict of guilty for each offense as charged.

On March 5, 2010, DORCELUS was sentenced to life in prison with a mandatory minimum term of 25 years in prison for the first count and 25 years in prison for the second count. The judgment was filed on March 29, 2010. DORCELUS filed his Notice of Appeal on April 1, 2010. The Fourth District Court of Appeal affirmed the conviction without an opinion and the Mandate was issued on February 21, 2012.

3. <u>Facts Pertaining to DORCELUS' 3.850 Motion in State Court.</u>

On July 16, 2013, DORCELUS, through counsel filed his Motion for Post-Conviction Relief pursuant to Florida Rules of Criminal Procedure 3.850(b)(1) – newly discovered evidence. On September 9, 2013, DORCELUS, through counsel filed his Amended Motion for Post-Conviction Relief pursuant to Florida Rules of

Criminal Procedure 3.850(b)(1) – newly discovered evidence. DORCELUS argues that the newly discovered evidence consists of the affidavits and further testimony of Jones, Damion Richardson ("Richardson") and Aaron Shuman ("Shuman"), whose affidavits corroborate DORCELUS' theory of self-defense and directly contradicts the state's theory of the case and the evidence introduced at trial.

The Trial Court entered an order requesting the State to file a response. The State filed their response on September 5, 2014 alleging that DORCELUS' statement to the police contradicts the affidavits of the witnesses and that the statements made by two of the witnesses in their affidavits are hearsay.

On September 12, 2014, the Trial Court summarily denied DORCELUS' Motion and merely attached the State's Response to the Order. DORCELUS filed his Notice of Appeal of the denial of his Motion on September 28, 2014. On January 22, 2015, the Fourth District Court of Appeal for the State of Florida affirmed the Circuit Court's denial of DORCELUS' Rule 3.850(b)(1) Motion *per curiam.*

4. <u>Facts Pertaining to DORCELUS' 2254 Petition.</u>

On July 23, 2015, DORCELUS filed his Petition for Writ Of Habeas Corpus Pursuant To 28 U.S.C. §2254 on September 17, 2018.

The Magistrate Judge, without an evidentiary hearing entered her Report Recommending Denial of Petition for Writ Of Habeas Corpus Pursuant To 28 U.S.C. §2254 on September 17, 2018. The Magistrate found that DORCELUS' 28 U.S.C. §2254 Petition is untimely.

DORCELUS timely filed his Objections to the Magistrate's Report on September 24, 2018. The District Court in its Opinion and Order denied DORCELUS' objections, affirmed and adopted the Magistrate's Report and as such denied DORCELUS' Petition for Writ Of Habeas Corpus Pursuant To 28 U.S.C. §2254. The District Court's Opinion and Order also denied DORCELUS' certificate of appealability. DORCELUS timely filed his Motion for Issuance of Certificate of Appealability.

DORCELUS filed his Motion for Issuance of Certificate of Appealability with the Eleventh Circuit. In DORCELUS' Petition for Writ Of Habeas Corpus Pursuant To 28 U.S.C. §2254 and his objections DORCELUS presented substantial issues that were in fact "'adequate to deserve encouragement to proceed further,'" to wit:

First: DORCELUS clearly identified the grounds for relief and showed equivocally how the state court erred and that said error clearly denied DORCELUS of his constitutional rights. In particular, DORCELUS identified the errors in the state court's factual findings and showed that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error

well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 786-87 (2011). DORCELUS demonstrated in his Petition for Writ Of Habeas Corpus Pursuant To 28 U.S.C. §2254 that he was entitled to habeas relief on his claims. *Breedlove v. Moore*, 279 F.3d 952 (11th Cir. 2002); *see also Dickson v. Wainwright*, 683 F.2d 348 (11th Cir. 1982).

Second: The denial of DORCELUS' 3.850 by the State Court not only undermined the legality of the detention but also the conviction itself and therefore DORCELUS' constitutional right to a fair and just trial was denied. After all, new evidence, by itself, is not a ground for relief in a motion to vacate unless that new evidence establishes an error of constitutional proportions or a fundamental defect which inherently results in a complete miscarriage of justice. *Stoufflet v. United States*, 757 F.3d 1236 (11th Cir. 2014). It is quite clear that had the jury heard the testimony of Jones, Shuman and Richardson, that the jury would not have convicted DORCELUS of the charges and found that DORCELUS did act in self-defense. Said testimony clearly would have "weaken[ed] the case against [DORCELUS] so as to give rise to a reasonable doubt as to his culpability." *Jones v. State*, 709 So.2d 512, 526 (Fla. 1998) (quoting *Jones v. State*, 678 So.2d 309, 315 (Fla.1996)). As such, this clearly supports a finding that DORCELUS' challenge as to the newly discovered evidence did in fact "undermine the legality of the detention . . . [and]

the conviction itself" *Alston v. Dep't of Corr*., 610 F.3d 1318, 1325-1326 (11th Cir. 2010).

Third: Again, DORCELUS clearly has argued and shown that the newly discovered evidence would have supported DORCELUS' defense of self-defense and clearly had the jury been made aware of said defense, the jury would not have found him guilty of the charges. Therefore, DORCELUS has shown and argued that said newly discovered evidence would have "weaken[ed] the case against [DORCELUS] so as to give rise to a reasonable doubt as to his culpability." *Jones v. State,* 709 So.2d at 526 (quoting *Jones v. State,* 678 So.2d 309, 315 (Fla.1996)).

Fourth: The crux of the denial of DORCELUS' Petition for Writ Of Habeas Corpus Pursuant To 28 U.S.C. §2254 by the District Court was that the Petition was insufficient because DORCELUS did not claim that "a constitutional violation occurred at his trial". DORCELUS could not raise the claim of actual innocence at his trial or that a constitutional violation occurred at his trial because the evidence was not discovered until after his trial, when the affiants came forward and admitted they withheld information and were willing to sign the affidavits clearly supporting DORCELUS' claim that the shooting was in self-defense and therefore he was "innocent of the charges".

On May 14, 2019, the Eleventh Circuit denied DORCELUS' Motion for Issuance of Certificate of Appealability in a five (5) page opinion.

DORCELUS filed his Petition for Rehearing and Rehearing *En Banc*. The Eleventh Circuit denied DORCELUS' Petition for Rehearing and Rehearing *En Banc* on July 2, 2019.

A. ***The Denial Of DORCELUS' Motion for Issuance of Certificate of Appealability Was A Fundamental Miscarriage of Justice***

The Antiterrorism and Effective Death Penalty Act ("AEDPA") permits District and Circuit Court Judges to issue Certificates of Appealability. *See, United States v. Hunter*, 101 F.3d 1565 (11th Cir. 1996) (*en banc*).

28 U.S.C. §2253(c)(1) provides, in relevant part, that an appeal may not be taken from a District Court's final order in a 28 U.S.C. §2255 proceeding without the issuance of a Certificate of Appealability. However, if the District Court denies the certificate, the defendant "may request a circuit court judge to issue the certificate." Federal Rule of Appellate Procedure 22(b)(1).

A Certificate of Appealability may be issued if the applicant "shows, at least, 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 v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604 (2000). DORCELUS "must demonstrate

that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (*quoting Slack v. McDaniel* 529 U.S. at 484). In other words, if DORCELUS can show that "the issues presented were 'adequate to deserve encouragement to proceed further,'" a certificate of appealability must be issued. *Miller-El v. Cockrell*, 537 U.S. 322, 225-336 (2003). DORCELUS must also make a substantial showing that he was denied a constitutional right. 28 U.S.C. §2252(c)(2). DORCELUS has met this standard and therefore the denial of his Motion for Issuance of Certificate of Appealability was a fundamental miscarriage of justice. Accordingly, DORCELUS' Petition for Writ of Certiorari must be granted.

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT DENIED DORCELUS' MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY

28 U.S.C. §2244(d)(1) provides that Petitions for the writ of habeas corpus filed pursuant to 28 U.S.C. §2254 are governed by the one-year filing limitation period established by 28 U.S.C. §2244(d); the limitations period runs 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 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)(2) also provides that "[t]he time during which a properly filed application for State post-conviction ... review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation." 28 U.S.C. §2244(d)(1)(A) also authorizes equitable tolling when extraordinary circumstances have worked to prevent an otherwise diligent petitioner from timely filing his petition.

Accordingly, if a defendant files a petition for a federal writ of habeas corpus beyond the one-year limitation period, the District Court may still review an untimely petition filed by a petitioner entitled to equitable tolling. The United States Supreme Court has held that the time period specified in 28 U.S.C. §2244 is

a statute of limitations, not a jurisdictional bar, and therefore 28 U.S.C. §2244 does not bar the application of equitable tolling in an appropriate case. *Holland v. Florida,* 560 U.S. 631, 130 S.Ct. 2549 (2010).

"[A] petitioner is entitled to equitable tolling . . .. [when] he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 130 S.Ct. at 2562. *See also Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1999) (holding that equitable tolling is available "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence"). "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence." *Holland v. Florida*, 130 S.Ct. at 2565.

Again, DORCELUS could not file his 3.850 petition within the one year period stated in 28 U.S.C. §2244 due to the fact that the basis for the Fla.R.Crim. P. 3.850, i.e., newly discovered evidence, was not known, even with due diligence, until May or June, 2013. Based on the above facts, DORCELUS has shown extraordinary circumstances and therefore met the requirement of equitable tolling. Accordingly, the District Court should have found that DORCELUS' Petition for Writ of Habeas Pursuant to 28 U.S.C. §2254 by a Person in State Custody was filed timely. Because the District Court erred in its ruling, the Eleventh Circuit should have found that the denial of DORCELUS' Petition For Writ of Habeas Pursuant to

28 U.S.C. §2254 by a Person in State Custody was a fundamental miscarriage of justice and therefore should have granted DORCELUS' Motion for Certificate of Appealability.

Furthermore, case law is clear that a Court may consider an untimely 28 U.S.C. §2254 Petition if, by refusing to consider the petition for untimeliness, this Court would thereby be endorsing a "fundamental miscarriage of justice". *See Johnson v. Alabama,* 256 F.3d 1156, 1171 (11th Cir. 2001). Because DORCELUS could not file his 3.850 Petition any earlier than he did, DORCELUS' Petition for Writ of Habeas Pursuant to 28 U.S.C. §2254 by a Person in State Custody was timely filed. Accordingly, the denial of same was in fact a "fundamental miscarriage of justice". *See Johnson v. Alabama,* 256 F.3d 1156, 1171 (11th Cir.2001). Accordingly, the District Court's conclusion that DORCELUS failed to state a cognizable claim under 28 U.S.C. §2254 is incorrect under the facts of this case and case law. Therefore, in the interest of justice, a certificate of appealability should have been issued by the Eleventh Circuit. *Miller-El v. Cockrell,* 537 U.S. 322, 225-336 (2003). Therefore, in the interest of justice, DORCELUS' Petition for Writ of Certiorari must be granted.

The Eleventh Circuit erred in denying DORCELUS' Motion for Issuance of Certificate of Appealability by not considering DORCELUS' arguments. In his Petition for Writ Of Habeas Corpus Pursuant To 28 U.S.C. §2254 and his Motion

for Issuance of Certificate of Appealability, DORCELUS clearly identified the grounds for relief and showed equivocally how the state court erred and that said error clearly denied DORCELUS his constitutional right to a fair and just trial. DORCELUS identified the errors in the state court's factual findings and showed that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 786-87 (2011). DORCELUS demonstrated in his Petition for Writ Of Habeas Corpus Pursuant To 28 U.S.C. §2254 that he was entitled to habeas relief on his claims. *Breedlove v. Moore*, 279 F.3d 952 (11th Cir. 2002); *see also Dickson v. Wainwright*, 683 F.2d 348 (11th Cir. 1982). Therefore DORCELUS' Motion for Certificate of Appealability should have been granted.

The Eleventh Circuit further erred in finding that the denial of DORCELUS' 3.850 Motion by the State Court did not fail to undermine not only the legality of the detention but also the conviction itself and therefore the Panel failed to find that DORCELUS' constitutional right to a fair and just trial was denied. Said denial clearly warranted the granting of his 28 U.S.C. §2254 Petition and for sure, his Motion for Issuance of Certificate of Appealability.

The Eleventh Circuit further erred finding that DORCELUS' claims were not "cognizable in a federal habeas corpus petition". The Eleventh Circuit should have

found that the denial by the State Court of DORCELUS' 3.850 Motion was a violation of his due process rights and fairness to a just trial. It was clear that the newly discovered evidence would have supported DORCELUS' defense of self-defense and clearly had the jury been made aware of said newly discovered evidence, the jury would not have found him guilty of the charges. Therefore, DORCELUS did show, in State Court, that said newly discovered evidence would have "weaken[ed] the case against [DORCELUS] so as to give rise to a reasonable doubt as to his culpability." *Jones v. State*, 709 So.2d 512, 526 (Fla. 1998) (quoting *Jones v. State*, 678 So.2d 309, 315 (Fla.1996)). But because the State Court denied his claim, his constitutional rights were in fact denied and therefore, DORCELUS' Petition for Writ Of Habeas Corpus Pursuant To 28 U.S.C. §2254 should have been granted by the District Court. But since same was not, the Eleventh Circuit should have granted DORCELUS' Motion for Issuance of a Certification of Appealability. And, since the Eleventh Circuit erred and denied DORCELUS' Motion for Issuance of a Certification of Appealability, DORCELUS' Petition for Writ of Certiorari must be granted.

Finally, the Eleventh Circuit erred in denying DORCELUS' Motion for the Issuance of a Certificate of Appealability because DORCELUS could not claim that "a constitutional violation occurred at his trial" prior to filing his 3.850 in State Court because the evidence was not discovered until after his trial; when the affiants came

forward and admitted they withheld information and were willing to sign the affidavits clearly supporting DOCELUS' claim that the shooting was in self-defense and therefore he was "innocent of the charges". Accordingly, the District Court's conclusion that DORCELUS failed to state a cognizable claim under 28 U.S.C. §2254 is incorrect under the facts of this case and case law and because of this and in the interest of justice, a certificate of appealability should have been issued by the Eleventh Circuit. *Miller-El v. Cockrell,* 537 U.S. 322, 225-336, 123 S.Ct. 1029 (2003). However, because it was not, DORCELUS' Petition for Writ of Certiorari must be granted.

The Eleventh Circuit's denial of DORCELUS' Motion for Issuance of Certificate of Appealability is affirming the denial of DORCELUS' due process rights and is clearly a fundamental miscarriage of justice. Said denial by the Eleventh Circuit seriously affects the fairness, integrity and public reputation of the judicial proceedings. Therefore, DORCELUS' Petition for Writ of Certiorari must be granted.

CONCLUSION

This Court should explicitly adopt DORCELUS' position based upon law and equity. The upholding of the denial of his Motion for Issuance of Certificate of Appealability by the Eleventh Circuit seriously affects the fairness, integrity and public reputation of the judicial proceedings. *See generally, United States v.*

Rodriguez, 398 F.3d 1291 (11th Cir. 2005); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). For all of these reasons and in the interest of justice, the Petitioner, WESLEY DORCELUS, prays that this Court will issue a Writ of Certiorari and reconsider the decision below.

Respectfully submitted,

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By /s/ David J. Joffe
DAVID J. JOFFE, ESQUIRE
Florida Bar No. 0814164

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of November 2019, to the SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

By /s/ David J. Joffe
DAVID J. JOFFE, ESQUIRE

APPENDIX

1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-61505-CIV-WILLIAMS/SIMONTON

WESLEY DORCELUS,

Petitioner,

v.

WARDEN FELICIA NOBLES, et al.,

Respondents.
_____/

REPORT RECOMMENDING DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254

This matter is before the Court upon Petitioner Wesley Dorcelus' Second Amended Petition pursuant to 28 U.S.C. §2254 attacking his conviction and sentence in a Florida state court, ECF No. [12]. The matter has been referred to the undersigned by the Honorable Kathleen M. Williams to issue a Report and Recommendation on all dispositive matters, ECF No. [8]. The State has filed a Response, together with a series of exhibits and the transcripts of Dorcelus' trial and sentencing hearing, ECF Nos. [18], [19], [20], and Dorcelus has filed a Reply, ECF No. [22]. Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts. The undersigned further concludes that the pleadings and attachments before the Court show that Petitioner is not entitled to federal habeas relief, and that the Petition should be denied.

In sum, the undersigned concludes that the Petition was timely filed within one year from the date that the Petitioner discovered the new evidence that forms the basis of his claims; however, he has failed to establish that a constitutional violation tainted his conviction, or that he is actually innocent of the charges for which he was convicted even assuming a "freestanding" actual innocence claims is cognizable under 28 U.S.C. § 2254.

I. INTRODUCTION

Following a jury trial, Mr. Dorcelus was convicted of the second-degree murder of Elvin Holmes and the attempted second-degree murder of Jermaine Paul, ECF No. [19-1] at 9, 18. He received a sentence of life in prison, with a minimum-mandatory term of 25 years for the second-degree murder conviction and a concurrent 25-year sentence for his conviction for attempted second-degree murder, ECF No. [12] at 3-4. His conviction was affirmed without a written opinion by the Fourth District Court of Appeal.[1] Petitioner then filed a motion with the trial court pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, seeking to vacate, set aside or correct his sentence based on newly discovered evidence. Petitioner asserted that the testimony of three witnesses, whose affidavits he attached to his motion, would corroborate Petitioner's theory, espoused at trial, that he shot the victims in self-defense. The trial court entered an order denying Dorcelus' 3.850 motion without conducting an evidentiary hearing and Petitioner's appeal from that order was denied by the Fourth District Court of Appeal, again without a written opinion.[2]

In the Petition at bar, Dorcellus asserts that the state trial court erred in denying his 3.850 motion without conducting an evidentiary hearing, ECF No. [12] at 12.[3] For the reasons set forth below, the undersigned finds that Petitioner's habeas corpus petition should be denied, where he has failed to allege the existence of any constitutional violation which contributed to his conviction, and failed to exhaust his state court remedies by neglecting to raise any federal constitutional claims in state court. His claim

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[1] ***State v. Dorcelus***, **77 So.3d 1273 (Fla. Dist. Ct. App. 2011).**

[2] ***State v. Dorcelus***, **158 So.3d 596 (Fla. Dist. Ct. App. 2015).**

[3] **Dorcelus actually makes two claims: First, he asserts that the trial court erred in denying his motion for post-conviction relief without an evidentiary hearing, ECF No. [12] at 12. Second, he asserts that the trial court erred in denying his motion for post-conviction relief based upon subsection (b)(1) of Rule 3.850, dealing with newly-discovered evidence. Id. at 13. The undersigned will treat these two claims as one.**

for relief, both in state court and here; that the trial court violated Rule 3.850 and Florida case law construing that rule when it denied his motion for post-conviction relief, is not cognizable in a federal habeas petition.

II. THE POSITIONS OF THE PARTIES

Petitioner's Amended Petition for Writ of Habeas Corpus, ECF No. [4] stated in conclusory terms that the petition was filed timely, and that the undersigned directed him to supplement his Petition with facts or a legal analysis to support a basis upon which to compute the one-year time limitation set forth in 28 U.S.C. §2244(d), ECF No. [9]. In his Supplement and again in his Second Amended Petition, Petitioner asserts that he is entitled to equitable tolling of Section 2244's time limitation where his state court collateral attack was timely filed under Fla. R. Crim. P. 3.850, because the testimony of his exculpatory witnesses was unknown to him prior to the filing of that motion, ECF No. [12] at 6-8. Dorcelus states that he has pursued his rights diligently and that extraordinary circumstances prevented him from timely filing his Petitioner under Section 2244, so that a denial of his Petition based on a finding that it was untimely filed would amount to a fundamental miscarriage of justice. ECF No. [12] at 6-8.

Petitioner asserts in his Second Amended Petition that the affidavits of his three witnesses raise a reasonable doubt as to his innocence. ECF No. [12] at 27. Treating this as a potential claim of actual innocence, the State argues that Dorcelus has failed to make a case for equitable tolling so as to overcome a procedural default, where the information he presented to the state court was not new, was unreliable, and did not meet the threshold showing of actual innocence, ECF No. [18] at 17-21.

Petitioner's substantive claim of error is that the state trial court erred in denying his 3.850 motion to vacate, set aside or correct his sentence based on newly discovered evidence without conducting an evidentiary hearing, ECF No. [12] at 12-13. Intertwined with this argument is Petitioner's claim that he is actually innocent, where the affidavits

of his witnesses raise reasonable doubt as to whether he shot the victims in self-defense, ECF No. [22] at 6, 9. Again, the State argues that the affidavits are unreliable and fail to establish actual innocence. The State further responds that even if Petitioner has made a showing of actual innocence, he is not entitled to federal habeas relief absent an independent constitutional violation in his state court trial, ECF No. [18] at 22-23.

III. BACKGROUND

A. State Court Proceedings

1. *Background*[4]

Petitioner was indicted in Broward Country, Florida for the second-degree murder of Elvin Holmes and the attempted second-degree murder of Jermaine Paul, ECF No. [19-8] at 8. It is undisputed that Petitioner shot both Holmes and Paul on September 24, 2006 - his defense at trial was that he acted in self-defense. Petitioner's jury trial ended with his conviction on January 28, 2010. ECF No. [19-8] at 8. Petitioner filed a motion for new trial, based in part on the newly-discovered evidence of a witness who claimed in an affidavit that that she had been present in Paul's hospital room when Paul admitted that he and Holmes had struck Petitioner prior to the shooting. Id. at 41. This witness, Jaleesa Johnson, testified at a hearing on Petitioner's motion for new trial but was found not to be credible by the trial court, ECF No. [20-1] at 992-93, 95, 1014. On March 5, 2010, the trial court imposed a sentence of life in prison, with a minimum-mandatory term of 25 years for the second-degree murder conviction and a concurrent 25-year sentence for the conviction for attempted second-degree murder, ECF No. [12] at 3-4.

Mr. Dorcelus appealed his conviction, asserting as one of his grounds that the trial court had erred in denying his motion for new trial based upon newly-discovered

[4] **The underlying criminal record from the state court proceedings and the trial transcripts have been filed into the record in this action and are referenced in this Report and Recommendation, as ECF No. [19-1] and ECF No. [20-1], respectively.**

evidence. ECF No. [19-1] at 44. On December 14, 2011, the Fourth District Court of Appeal affirmed his conviction without a written opinion. ECF No. [19-1] at 88. The Fourth District denied Petitioner's *pro se* motion for rehearing on February 1, 2012 and issued its mandate on February 17, 2012. ECF No. [19-1] at 95, 97.

On July 16, 2013, Petitioner, represented by an attorney, filed a motion for post-conviction relief under Fla. R. Crim. P. 3.850, based on newly-discovered evidence. ECF No. [19-1] at 99. Attached to the motion were three affidavits, executed between May 30, 2013 and June 5, 2013. ECF No. [19-1] at 111, 114, 117. An amended motion for post-conviction relief, identical to the first but this time sworn to by Dorcelus, was filed September 9, 2103. ECF No. [19-1] at 119. Pursuant to the trial court's order, the State filed its response, and on September 12, 2014, the state court (although not the judge who presided over Petitioner's trial) denied the motion without an evidentiary hearing based upon the State's response, attaching a copy of the State's response to its order. ECF No. [19-1] at at 136.

Mr. Dorcelus, now represented by his present attorney, appealed the denial of his Rule 3.850 motion. On January 22, 2015, the Fourth District Court of Appeal affirmed the lower court ruling, Id. at 163, and issued its mandate on February 20, 2015. ECF No. [19-1] at at 165. Petitioner filed his Petition for a Writ of Habeas Corpus in this case on July 23, 2015, ECF No. [1].

2. *Evidence Presented at State Court Trial*

On Sunday, September 24, 2006, at approximately 2:15 in the morning, Deputy Ira Marrich of the Broward County Sheriff's Office was on road patrol when he was instructed to respond to the LaQuinta Hotel on West Hillsborough Boulevard in Deerfield Beach, ECF No. [20-1] at 375. He found Elvin Holmes laying on the ground on the first floor. Holmes was unresponsive and his breath was shallow. Deputy Marrich saw that he had a gunshot wound to his abdomen. ECF No. [20-1] at 376-78. Marrich waited with

Holmes until paramedics arrived, and then went to the hotel parking lot, where he found Jermaine Paul, who appeared to have gunshot wounds to his left hand and shoulder area. Paul was in pain but conscious, and told Marrich that he had been shot by "Wesley." ECF No. [20-1] at 374-76.

Joseph Langois, a rescue lieutenant with Deerfield Beach Fire Rescue, began treating Holmes at 2:22 a.m. Holmes was unresponsive and did not react to a medical assessment which included a painful stimulus. ECF No. [20-1] at 412-14. Holmes was transported to the emergency room at North Broward Hospital, Id. at 417 where, according to Broward County Deputy Sheriff Ignacio Vila, he was immediately rushed into surgery. ECF No. [20-1] at 420. Homicide Detective David Nicholson testified that Holmes died that same day at 12:40 p.m. Id. at 538. An autopsy was conducted the following day. ECF No. [20-1] at 659. The medical examiner testified that Holmes had undergone surgery in an effort to repair the damage to his intestines and blood vessels from the bullet. She observed that tubes and catheter lines were left in Holmes' body, and that the incision made by the surgeons to access his abdomen had not been closed. ECF No. [20-1] at at 662.

Endia Spann testified that she was having intimate relations with Holmes in a room on the third floor of the hotel when an acquaintance of Holmes knocked on the door and told Holmes that the people who had shot at him the previous week were downstairs. ECF No. [20-1] at 473-74, 484. Holmes dressed and left the room and Spann heard gunshots about a minute later. ECF No. [20-1] at 479-80. Spann left the hotel but was interviewed by police the following day. ECF No. [20-1] at 483-84. She picked Petitioner's photograph out of a photo lineup which Detective Nicholson showed her, identifying it as the photograph of a person she had seen at the hotel on way to the room. ECF No. [20-1] at 481, 535.

Detective Nicholson obtained an arrest warrant for Petitioner and arrested him on October 24, 2006. ECF No. [20-1] at 542-43. Petitioner gave a videotaped statement, which was played for the jury. Petitioner told Detective Nicholson that he had been in a room on the first floor of the hotel with a woman named Jessica and then walked upstairs. ECF No. [20-1] at 561-62. While on the third-floor balcony, he saw two men walking up the stairs looking at him. Petitioner then saw eight or nine people, including the two men who'd walked upstairs, to his right. Two of them walked passed him and hit him, and Petitioner drew his gun and shot at them twice. As Petitioner was walking away, he shot again at one of the men and then ran. ECF No. [20-1] at 565-67, 570-71. Petitioner said he thought the men were about to kill him. ECF No. [20-1] at 578. Petitioner, who is Haitian, said there was conflict between Haitians and African Americans but didn't know if the conflict had anything to do with this incident. ECF No. [20-1] at 572-73.

Jermaine Paul, the surviving victim, testified that he knew Petitioner from Deerfield High School. ECF No. [20-1] at 596. Paul was sitting on the steps leading to the third floor of the hotel when Petitioner walked by him heading upstairs. ECF No. [20-1] at 598. Paul later met up with his friends Tymere Jones and Lewis Walker, a/k/a Lewis McNeil, outside Holmes' room on the third floor. ECF No. [20-1] at 603-5. The four of them were walking to the vending machine to get a soda when Paul saw Petitioner coming up the stairs. After they passed him, Paul turned to see Dorcelus fire his weapon from about six feet away. Paul testified that no one took a swing at Petitioner. ECF No. [20-1] at 607-10, 614.

Petitioner elected not to testify in his own defense. He called Lewis Walker, who testified that he was one of six individuals, including Jermaine Paul and Tymere Jones, who met Holmes outside his third-floor hotel room. ECF No. [20-1] at 700-701, 712. Walker testified that the group walked around the corner and that he was nearing an individual leaning on the rail when he heard gunshots. ECF No. [20-1] at 713-14. Holmes,

who was in the front, had already passed the individual. Walker did not see Holmes or anyone else do anything to the shooter. ECF No. [20-1] at 718-19. Petitioner attempted to call Tymere Jones as a witness. Jones, who had pending criminal charges against him, elected to assert his Fifth Amendment privilege and did not testify. ECF No. [20-1] at 722, 726.

3. *Petitioner's State Court Post-Conviction Relief Motion*

In support of his motion under Fla. R. P. Crim. 3.850, Petitioner submitted the affidavits of Tymere Jones, Damien Richardson and Aaron Shuman. Jones, who had refused to testify at Petitioner's trial, stated that he, Holmes and Paul were planning to fight Petitioner, because Petitioner, whom Jones had known from junior high school, was in the wrong part of town, ECF No. [19-1] at 110. Jones stated that as he came around the corner of a walkway at the hotel, he saw Holmes and Paul trying throw Petitioner over the railing. Jones was going to help Holmes and Paul throw Petitioner over the railing but heard gunshots. Jones concluded that Petitioner shot Holmes and Paul in self-defense. Id. Jones admitted in his affidavit that because he did not want to mess up the plea bargain in his own criminal case, he had previously stated that he had been around the corner when the shots were fired. ECF No. [19-1] at 111.

Damien Richardson stated that he was a friend of Paul's and was living with him at the time of the shooting. He said that he was visiting Paul at the hospital the day of the shooting when Paul told him that he, Holmes and Tymere Jones were going to jump Petitioner for being in the wrong part of town. Paul told him that Jones had gone to get something from a car and that that he and Holmes jumped Petitioner and were going to throw him off the stairs when Petitioner shot them. Paul told him that Richardson said that at the time, there was a growing war between Haitians and Americans. ECF No. [19-1] at 113. Richardson said that he was never contacted by anyone on Petitioner's behalf and that he was always available. ECF No. [19-1] at 114.

Aaron Shuman stated that Holmes and Paul were his friends and that he knew Petitioner from school. He said that when he visited Paul in the hospital, Paul told him that he and Holmes had jumped Petitioner because he was in the wrong part of town and that Petitioner had only shot in order to defend himself. Shuman also stated that "Elvin" [Holmes] told him that "he had swung at Wesley first, and during the fight, while all three guys were trying to flip Wesley over the railing of the stairs to throw him off the building, Wesley shot back in an attempt to stop them." ECF No. [19-1] at 116. Shuman said he was never asked by anyone to give a statement, and "after hearing what Elvin told me, I thought I needed to help Wesley as best I could." ECF No. [19-1] at 117.

Notwithstanding Mr. Richardson's declaration that he was never contacted by anyone and was always available, and Mr. Shuman's declaration that no one had asked him to give a statement, Petitioner's sworn Amended Motion for Post-Conviction Relief alleged that they and Jones, being African-American, "would not have spoken with Defendant Dorcelus [a Haitian], or his trials counsel(s), much less cooperated with them whatsoever, in Dorcelus' defense." ECF No. [19-1] at 126. Due to what Petitioner said were the "extremely volatile" relations between African-Americans and Haitians that existed from the date of the shooting through his trial, "neither trial counsel nor Dorcelus himself could have called, stopped by, or even sent an investigator to these witnesses' homes to speak with them." ECF No. [19-1] at 126.

IV. LEGAL FRAMEWORK

The resolution of this case is governed by the standards promulgated by Congress in the Antiterrorism and Effective Death Penalty Act ("AEDPA") enacted on April 24, 1996, and codified in Title 28, United States Code, Section 2254. Among other things, that statute governs the determination of whether to grant an evidentiary hearing, the scope of a district court's review, and the standard of review of the state court's determination of the issues presented.

AEDPA limits the power of a federal court to grant an application for a state prisoner's writ of habeas corpus. Section 2254(a) permits a federal court to entertain only those applications alleging that a person is in state custody "in violation of the Constitution or laws or treaties of the United States." To obtain relief, the applicant must show that the violation rises to the level of a "fundamental defect which inherently results in a complete miscarriage of justice." *Reed v. Farley*, 512 U.S. 339, 348, (1994) (quoting Hill v. U.S., 368 U.S. 424, 428, (1962)). As the Supreme Court explained in *Cullen v. Pinholster*, 563 U.S. 170 (2011), "This is a 'difficult to meet,' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Id.* at 181 (citations omitted). To that end, the statute provides,

> **An application for a writ of habeas corpus ... shall not be granted with respect to any claim that was adjudicated on the merits in State Court ... unless adjudication of the claim-**
>
> **(1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or**
>
> **(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.**

28 U.S.C. § 2254(d).

As to the first §2254(d) prong, a state court's decision is "contrary to" the Supreme Court's clearly established law if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." *Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). "Clearly established Federal law, includes only the holdings, as opposed to the dicta, of the Supreme Court's decisions." *Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015) (citation

omitted). A state court's decision is not contrary to or an unreasonable application of Supreme Court precedent unless that precedent "squarely addresses the issue" or gives a "clear answer to the question presented" in the case before the state court. *Wright v. Van Patten*, 552 U.S. 120, 125–26 (2008). The standard for an unreasonable application inquiry is "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

Thus, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold*." Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "In determining whether a state court's decision represents an unreasonable application of clearly established federal law, a federal court conducting habeas review 'may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.'" *Gill v. Mecusker*, 633 F.3d 1272, 1287 (11th Cir. 2011) (quoting *Williams*, 529 U.S. at 411).

With respect to the second basis for relief under AEDPA--an "unreasonable determination of the facts in light of the evidence presented in the state court proceedings"--the Supreme Court has rejected such claims where there is evidence in the record that supports the state court's determination of the facts. *See, Schriro*, at 475-477; *Rice v. Collins*, 546 U.S. 333, 338-42 (2006). If "[t]he parties do not dispute the underlying facts, ... respondent is ... entitled to habeas relief only if he can meet one of the two bases for relief provided in § 2254(d)(1)." *Price v. Vincent*, 538 U.S. 634, 639-40 (2003).

When performing its review under § 2254(d), the federal court must bear in mind that any "determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner bears "the burden of rebutting the presumption of

correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The Supreme Court has stated, "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003) (*dictum*).

Moreover, the writ of habeas corpus under 28 U.S.C. § 2254 "was not enacted to enforce State-created rights." *Cabberiza v. Moore*, 217 F.3d 1329, 1333 (11th Cir. 2000) (citing *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988). The Eleventh Circuit has made clear that only in cases of federal constitutional error will a federal writ of habeas corpus be available. *See Jones v. Goodwin,* 982 F.2d 464, 471 (11th Cir. 1993); *Krasnow v. Navarro*, 909 F.2d 451, 452 (11th Cir. 1990). Consequently, federal habeas relief does not lie for errors of state law. It is certainly not the province of federal courts to reexamine state-court determinations on issues of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). "This limitation on federal habeas review is of equal force when a petition, which actually involves state law issues, is 'couched in terms of equal protection and due process.'" *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988) (quoting *Willeford v. Estelle*, 538 F.2d 1194, 1198 (5th Cir. 1976)).

In addition, sections 2254(b) and (c) provide that generally, a federal court may not grant such applications unless the applicant has exhausted state remedies. With these principles in mind, the undersigned turns to the merits of the Petitioner's claims.

V. ANALYSIS

A. Petitioner is not Entitled to an Evidentiary Hearing

At the outset, the undersigned notes that the Petitioner requested that the Court hold an evidentiary hearing on his Petition, ECF No. [3] at 22. Section 2254(e)(2) provides,

> **[i]f the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—**
>
> **(A) the claim relies on—**
>
> **(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or**
>
> **(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and**
>
> **(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.**

28 U.S.C. § 2254(e)(2).

Thus, the circumstances under which an evidentiary hearing can be granted are governed by 28 U.S.C. § 2254(e). Under subsection (e)(1), the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. Under subsection (e)(2), if the factual record has not been developed in state court proceedings, the court is nevertheless precluded from holding an evidentiary hearing unless the claim relies on (i) a new rule of constitutional law; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the petitioner guilty of the underlying offense.

Thus, in a habeas corpus proceeding, the burden is on the petitioner to establish the need for an evidentiary hearing. *See Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011); *Dickson v. Wainwright*, 683 F.2d 348, 351 (11th Cir. 1982) ("We emphasize that the burden is on the petitioner in a habeas corpus proceeding to allege sufficient facts to support the grant of an evidentiary hearing and that this court will not

blindly accept speculative and inconcrete claims as the basis upon which a hearing will be ordered." (quotation marks 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." *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." *Chavez*, 647 F.3d at 1060; see also *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 763 (11th Cir. 2010) ("Having alleged no specific facts that, if true, would entitle him to federal habeas relief, Allen is not entitled to an evidentiary hearing."). The allegations must be factual and specific; conclusory allegations are simply not enough to warrant a hearing. *See Chavez*, 647 F.3d at 1061; see also *San Martin v. McNeil*, 633 F.3d 1257, 1271 (11th Cir. 2011) ("'An evidentiary hearing may be necessary where the material facts are in dispute, but a petitioner is not entitled to an evidentiary hearing when his claims are merely conclusory allegations unsupported by specifics.'") (*quoting Pugh v. Smith*, 465 F.3d 1295, 1300 (11th Cir. 2006)); *Boyd v. Allen*, 592 F.3d 1274, 1306–07 (11th Cir. 2010) ("On this scant record, we cannot say that Boyd's allegations amount to anything more than the merely conclusory, nor that the district court has abused its considerable discretion in failing to hold a hearing on his claim."(citations omitted)). Even if an evidentiary hearing is not precluded by § 2254(e)(2), a federal evidentiary hearing is not required unless a petitioner demonstrates that he would be entitled to habeas relief on his claim(s) if his factual allegations are proven. *Breedlove v. Moore*, 279 F.3d 952, 960 (11th Cir.2002).

The undersigned finds that the record is sufficiently developed and that an evidentiary hearing is not necessary for resolution of this matter.[5]

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[5] In this case, in *per curiam* summary affirmances, the Florida appellate court affirmed a) Petitioner's conviction, and b) the denial, without an evidentiary hearing, of Petitioner's

B. Petitioner Timely Filed his Habeas Corpus Petition

The AEDPA imposes a one-year statute of limitations for filing a § 2254 petition. 28 U.S.C. § 2244(d)(1). The one-year time for filing begins to run on 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 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.**
>
> **(2) 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 this subsection.**

Here, following its *per curiam* affirmance of Petitioner's conviction, the Fourth District Court of Appeal denied his motion for rehearing on February 1, 2012. Petitioner's judgment became final ninety days later – when the time to seek review in the United States Supreme Court expired. *See Nix v. Sec'y for the Dep't of Corr.*, 393 F.3d 1235,

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motion pursuant to Fla. R. Crim. Pro. 3.850. These *per curiam* affirmances are considered to be decisions on the merits entitled to deference by this Court. *See*, *Harrington v. Richter*, *supra*, 562 U.S. at 98 (2011) ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief."); *Shelton v. Sec'y, Dept. of Corr.*, 691 F.3d 1348 (11th Cir. 2012) (Court of Appeals would presume Florida appellate court rulings in petitioner's case were "adjudications on the merits" entitled to AEDPA deference, even though they were one-word summary affirmances, where the state court on direct appeal did not apply a procedural bar.); *Wright v. Sec'y for the Dep't of Corrections*, 278 F.3d 1245, 1254 (11th Cir. 2002) (Agreeing with six circuits that "the summary nature of a state court's decision does not lessen the deference that is due"); *Crittenden v. State*, 67 So.3d 1184, 1185 n. 1 (Fl. Dist. Ct. App. 2011) ("We reiterate that a *per curiam* affirmance without opinion is not an indication that the case was not considered on the merits. Each and every appeal receives the same degree of attention.").

1236–37 (11th Cir. 2004); *United States v. Chavers*, 468 F.3d 1273 (11th Cir. 2006) (one-year statute of limitations under AEDPA begins to run 90 days after Florida appellate court affirms petitioner's conviction).

Petitioner obtained the affidavits of Tymere Jones, Damien Richardson and Aaron Shuman between May 30, 2013 and June 5, 2013, ECF No. [19-1] at 111, 114, 117, and filed his initial motion for post-conviction relief under Fla. R. Crim. P. 3.850 on July 16, 2013. An amended motion for post-conviction relief, identical to the first but this time sworn to by Dorcelus, was filed September 9, 2013. ECF No. [19-1] at 119. The state court denied the motion on September 12, 2014. ECF No. [19-1] at 136.

On September 28, 2014, Petitioner filed his notice of appeal from the lower court's order. On January 22, 2015, the Fourth District Court of Appeal affirmed the lower court ruling, Id. at 163, and issued its mandate on February 20, 2015. Id. at 165. Petitioner filed his Petition for a Writ of Habeas Corpus in this case on July 23, 2015, ECF No. [1].

Petitioner asserts that his present Petition was filed timely for two reasons: First, the motion to vacate he filed in state court, which was based upon the newly-discovered testimony of Jones, Richardson and Shuman, was timely under Fla. R. Crim. P. 3.850. Subsection (b)(1) of Rule 3.850 prohibits the filing of a motion to vacate unless the motion alleges that, "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, and the claim is made within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence…"

Petitioner further asserts that the "extraordinary circumstances surrounding the facts of this case require the application of the doctrine of "equitable tolling," ECF No. [12] at 6-8; ECF No. [22] at 4-5.[6] The State responds by arguing that equitable tolling is

[6] Equitable tolling can be applied to prevent the application of AEDPA's statutory deadline, but only if a petitioner "shows '(1) that he has been pursuing his rights

unavailable where Petitioner has failed to make the requisite showing of actual innocence which would allow this court to consider the merits of an otherwise untimely § 2254 petition ECF No. [18] at 15-19.

The parties' respective positions regarding the timeliness of the instant Petition warrant little discussion, because the issue is governed, not by the time constrictions imposed by Rule 3.850 or by the doctrine of equitable tolling, but rather by the straightforward application of 28 U.S.C. § 2244(d)(1)(D) and (d)(2).

Subsection 2244(d)(1)(D) provides that the one-year statute of limitations begins to run on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Thus, the issue to first be determined is whether Petitioner exercised due diligence in discovering the factual predicate for his claim. *See Frederick v. McNeil*, 300 F. App'x 731, 734 (11th Cir. 2008).

Due diligence means the Petitioner must show some good reason why he or she was unable to discover the facts at an earlier date. Merely alleging that an applicant "did not actually know the facts underlying his or her claim does not pass the test." Instead, the inquiry focuses on "whether a reasonable investigation ... would have uncovered the facts the applicant alleges are 'newly discovered.' " *See Barringer v. Sec'y, Dep't of Corr.*, 8:15-CV-2458-T-23TGW, 2016 WL 3667936, at *1 (M.D. Fla. July 11, 2016) (quoting *In re Siefken v. Shephard*, No. CV 314-046, 2015 WL 106259, at *4–5 (S.D. Ga. Jan. 7, 2015).

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diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida,* 560 U.S. 631, 649, (2010) (quoting *Pace v. DiGuglielmo,* 544 U.S. 408, 418, (2005)); *see also Lawrence v. Florida,* 549 U.S. 327, 336, (2007). Nevertheless, equitable tolling is typically applied sparingly, *Steed v. Head,* 219 F.3d 1298, 1300 (11th Cir.2000), and is available "only in truly extraordinary circumstances." *Johnson v. United States,* 340 F.3d 1219, 1226 (11th Cir.2003). The petitioner bears the burden of proving his entitlement to equitable tolling, *San Martin v. McNeil,* 633 F.3d 1257, 1267–68 (11th Cir.2011), and will not prevail based upon a showing of either extraordinary circumstances or diligence alone; the petitioner must establish both. *See Chavez v. Sec'y Fla. Dep't of Corr.,* 647 F.3d 1057, 1072 (11th Cir.2011); *Arthur v. Allen,* 452 F.3d 1234, 1252 (11th Cir.2006).

***Boshears*, 110 F.3d 1538 (11th Cir. 1997). Due diligence, however, "does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts." *Aron v. United States,* 291 F.3d 708, 712 (11th Cir.2002); *Frederick v. Sec'y Dept. of Corr.*, 481 F. App'x 472, 474 (11th Cir. 2012).**

At the outset, the undersigned is somewhat unconvinced by Petitioner's general claim that tensions between the African-American and Haitian communities prevented him and his trial counsel from contacting potential African-American witnesses. Petitioner fails to present any facts showing what, if any, efforts were made to reach out to such witnesses. The undersigned notes that Mr. Richardson's declaration states that he was "always available" and both he and Mr. Shuman state that they were never contacted by anyone regarding this case.

This is a close decision; however the record reflects that the trial counsel made diligent efforts to locate witnesses to support the Petitioner's claim of self-defense and to impeach the contrary testimony of Paul, and was partially successful although hampered in his attempts by at least one witness who refused to disclose others. For example, witness Jaleesa Johnson testified at a hearing on Petitioner's Motion for New Trial that she had been in Paul's hospital room when he stated that he and Holmes had struck the Petitioner before the shooting, but she refused to divulge the identity of others in the room, ECF No. [19-1] at 41.[7] Petitioner unsuccessfully attempted to obtain the trial testimony of Tymere Jones[8], and Petitioner called Lewis Walker as a witness at his trial.

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[7] The trial court's refusal to grant a new trial on the basis of this testimony was upheld on direct appeal, and is not part of the present petition.

[8] It is questionable whether the testimony of Tymere Jones, who refused to testify at Petitioner's trial due to his own pending criminal proceedings, can be considered "newly discovered" as opposed to "newly available." *See U.S. v. DiBernardo*, 880 F. 2d 1216, 1223-25 (11th Cir. 1989) regarding this distinction. The State has not relied upon this distinction, however, and therefore the undersigned treats all three affidavits in the same manner.

The undersigned thus concludes that the Petitioner has established due diligence sufficient to satisfy Section 2244(d)(1)(D), albeit barely.

Accordingly, the Petitioner had one year from June 5, 2013, or until June 5, 2014, in which to file the instant Petition. Section 2244(d)(2), however, provides that 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 tolls the one-year deadline. Petitioner filed his 3.850 motion on July 16, 2013, and thus the time that motion was pending is excluded from the one year period of limitation. The denial of the Petitioner's appeal from the state court's denial of his 3.850 motion was issued on January 22, 2015, and the mandate issued on February 20, 2015. Thus, the Petitioner still had over ten months remaining on his one year period of limitation in which to file the instant petition, which he did on July 23, 2015. Thus his 2254 petition was timely filed.

C. Summary of Petitioner's Claim

Petitioner's claim in this case is that the state court erred in denying his 3.850, generally, as well as denying the motions without conducting an evidentiary hearing. This is exactly the claim he made in his unsuccessful appeal to the Fourth District Court of Appeal. Petitioner's habeas corpus petition should be denied for a number of reasons. First, claims of error in the process afforded Dorcelus in his state court post-conviction proceeding are not cognizable in federal habeas corpus review. Second, assuming Petitioner is asserting that the affidavits attached to his 3.850 motion demonstrate that he is actually innocent, he has failed to identify the existence of any independent constitutional violation occurring at his trial. A claim of actual innocence based on newly discovered evidence absent an independent constitutional violation is not a ground for federal habeas corpus relief. Even had Dorcelus alleged in his Petition that his conviction was grounded in a constitutional violation, he failed to raise this claim in either his 3.850 motion or his appeal from the denial of that motion; relying instead exclusively on his

perceived violation of Florida law. As such, he failed to exhaust his state court remedies because he failed to raise any constitutional error in state court and is therefore procedurally defaulted. Finally, Petitioner's claim should be denied on the merits, where his newly discovered evidence fails to raise sufficient doubt about his guilt to as to undermine confidence in his conviction.

D. Analysis of Petitioner's Claims

1. *The Petitioner has failed to state a cognizable claim under §2254 based on alleged errors in collateral proceedings*

A prisoner's challenge to the process afforded him in a state post-conviction proceeding is not a cognizable claim for habeas corpus relief. Such a claim represents an attack on a proceeding collateral to the prisoner's confinement and not the confinement itself. *Alston v. Dep't of Corr., Fla.*, 610 F.3d 1318, 1326 (11th Cir. 2010) (holding that habeas petitioner's challenge to state post-conviction proceeding—the state court's ruling that petitioner waived his state collateral proceedings—was not cognizable on federal habeas review). The Eleventh Circuit explained in *Alston*:

> **Federal habeas relief is available to remedy defects in a defendant's conviction and sentence, but "an alleged defect in a collateral proceeding does not state a basis for habeas relief." *Quince v. Crosby*, 360 F.3d 1259, 1262 (11th Cir. 2004); *see also Carroll v. Sec'y, DOC*, 574 F.3d 1354, 1365 (11th Cir. 2009) (collecting cases), *cert. denied*, 558 U.S. 995, 130 S.Ct. 500, 175 L.Ed.2d 355 (2009). There is a valid reason behind this principle: "[A] challenge to a state collateral proceeding does not undermine the legality of the detention or imprisonment—i.e., the conviction itself—and thus habeas relief is not an appropriate remedy." *Carroll*, 574 F.3d at 1365. Furthermore, such challenges often involve issues of state law, and "[a] state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992).**

***Id*. at 1325–26. The Eleventh Circuit "has repeatedly held defects in state collateral proceedings do not provide a basis for habeas relief." *Carroll v. Sec'y, DOC*, 574 F.3d 1354, 1365 (11th Cir. 2009) ((holding that habeas petitioner's claim—that the state court violated his due process rights when it summarily denied his post-conviction claim**

without an evidentiary hearing—did not state a claim on which federal habeas relief could be granted); *Quince v. Crosby*, 360 F.3d 1259, 1261–62 (11th Cir. 2004) (explaining that "while 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."); *Spradley v. Dugger*, 825 F.2d 1566, 1568 (11th Cir.1987) (holding that habeas petitioner's claim that errors in Rule 3.850 proceeding violated his right to due process did not state a basis for habeas relief because the claim "[went] to issues unrelated to the cause of petitioner's detention."). Finally, the federal habeas corpus court will be bound by the Florida court's interpretation of its own laws unless that interpretation breaches a federal constitutional mandate. *McCoy v. Newsome*, 953 F.2d 1252, 1264 (11th Cir. 1992).

Here, Petitioner's claims, which arise from the alleged erroneous manner in which the state court handled his 3.850 motion, do not present a basis for relief in habeas corpus. This reason in and of itself warrants denial of his Petition. Indeed, it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. *Estelle v. McGuire*, 112 S.Ct. 475, 480 1991). A violation of state law is not a ground for federal habeas relief. *See Lewis v. Jeffers*, 110 S.Ct. 3092, (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law...."); *Pulley v. Harris*, 104 S.Ct. 871, (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."). *Hays v. State of Alabama*, 85 F.3d 1492, 1501 (11th Cir. 1996) ("the state courts' alleged misinterpretation of Alabama law gives rise to no ground on which the writ might issue").

2. *Petitioner's claims of Actual Innocence do not entitle him to relief*

The Petitioner contends that he is entitled to relief because he is actually innocent of the crimes for which he was convicted as established by the affidavits that he has obtained from several witnesses.

In *Rozzelle v. Sec'y, Florida Dep't of Corr*., 672 F.3d 1000, 1010–12 (11th Cir. 2012), the Eleventh Circuit discussed the three ways in which federal habeas petitioners raise claims of "actual innocence. The court in *Eato v. Jones*, No. 14-22793-CIV-LENARD/WHITE, 2016 WL 10646328, *1, (S.D. Fla. July 15, 2016), summed up the Eleventh Circuit's analysis of "actual innocence" claims as follows:

> **The first type of actual innocence claim is raised when the Petitioner's innocence serves as the constitutional basis of the habeas petition. *See* R*ozzelle v. Sec'y, Florida Dep't of Corr.*, 672 F.3d 1000, 1010 (11th Cir. 2012) (citing H*errera v. Collins*, 506 U.S. 390, 400 (1993)). This type of petition can only be granted in capital cases. See J*ordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007) ("[O]ur precedent forbids granting habeas relief based upon a claim of actual innocence, anyway, at least in non-capital cases.").**
>
> **The other two types of actual innocence claims are not "freestanding," but instead serve "as a 'gateway' to get the federal court to consider claims that the federal court would otherwise be barred from hearing."**
>
> **The second type of actual innocence applies when "[the] petitioner's actual innocence serves as a gateway to consideration of constitutional claims procedurally defaulted in state court, such as failure to exhaust state remedies [and] failure to satisfy state filing requirements." *Rozzelle*, 672 F.3d at 1011 (citing *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001)).**
>
> **. . .**
>
> **In the third type of actual innocence claim, "a habeas petitioner claims his actual innocence should serve as a gateway to consideration of constitutional claims time-barred under AEDPA's one-year limitation period." *Rozzelle*, 672 F.3d at 1011 (citing *Johnson v. Florida Dep't of Corr.*, 513 F.3d 1328, 1333 (11th Cir. 2008)). The actual innocence exception**

> **to the AEDPA's statute of limitation requires a Petitioner: (1) to present "new reliable evidence ... that was not presented at trial," *Arthur v. Allen*, 452 F.3d 1234, 1245 (11th Cir. 2006), opinion modified on reh'g, 459 F.3d 1310 (11th Cir. 2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 322 (1995)), and (2) to show "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" in light of the new evidence. *Johnson*, 513 F.3d at 1334 (quoting Schlup, 513 U.S. at 327). A petitioner must show "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623–24 (1998).**

***Id.* at *2. Here, Dorcelus never explicitly states in his Second Amended Petition for Writ of Habeas Corpus that he is "actually innocent". Rather, relying on *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. 2001), Petitioner argues this court's failure to consider his Petition based upon its untimely filing would amount to a "fundamental miscarriage of justice," ECF No. [12] at 8. Petitioner further claims that, "had the jury heard the testimony of Jones, Shuman and Richardson, … Dorcelus' defense of self-defense would have been found by the jury and therefore the jury would not have convicted Dorcelus of the charges," and that these affidavits conclusively raise reasonable doubt as to whether Dorcelus was acting in self-defense," ECF No. [12] at 25, 27. In his Reply to the State's Response, Petitioner asserts that he does in fact have a claim of actual innocence, because the affidavits of his witnesses raise a reasonable doubt as to whether Petitioner was acting in self-defense when he shot Holmes and Paul. ECF No. [22] at 9. Notwithstanding the lack of clarity regarding his "actual innocence" claims, for the following reasons, the undersigned concludes that the Petitioner is unable to establish that he is entitled to relief under any of the scenarios set forth in *Rozzelle*.**

a. Petitioner's free standing claim of actual innocence is insufficient to state a constitutional claim under 2254

First, the Supreme Court has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (citing *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993)). However,

the Eleventh Circuit "forbids granting habeas relief based upon a claim of actual innocence, anyway, at least in non-capital cases." *Jordan v. Sec'y Dep't of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007) (citations omitted); *see also* C*unningham v. Dist. Attorney's Office for Escambia Cty.*, 592 F.3d 1237, 1272 (11th Cir. 2010) (recognizing that "this Court's own precedent does not allow habeas relief on a freestanding innocence claim in non-capital cases.").

Moreover, in *Herrera v. Collins*, 506 U.S. 390 (1993), a petitioner asserted a "freestanding" claim of actual innocence based on newly discovered evidence. The Court rejected the claim in part by holding that the narrow actual innocence exception is only applicable when the petitioner asserts it in order to bring an independent claim of constitutional error at trial. In so doing, the Court stated,

> **Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.**

Id*. at 400. Indeed, the function of federal habeas corpus is to redress constitutional errors, not to relitigate state criminal cases. *Id.* Consequently, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.

Here, the Petitioner has not claimed that a constitutional violation occurred at his trial. As Respondent noted in its Response: "Even if the petition was not time-barred, Petitioner would not be entitled to habeas corpus relief on any freestanding claim of actual innocence that Petitioner may be asserting," ECF No. [18] at 22. In his Reply, Petitioner, citing *Herrera v Collins, supra*, insisted that "he was imprisoned in violation of his constitutional rights," but failed to allege that any constitutional errors occurred at his trial. Thus, the Petitioner has not presented a cognizable federal habeas claim where

he has only made vague references to a constitutional violation, and only asserts a right to relief based on his "actual innocence."

Even assuming that a freestanding actual innocence claim is cognizable in this *non-capital* case, Dorcelus has not demonstrated his actual innocence. As stated by the Eleventh Circuit:

> **The Supreme Court, of course, has never decided what the precise burden of proof for a freestanding actual innocence claim would be. However, the Court has indicated that it would necessarily be more difficult to establish a freestanding actual innocence claim than it is to establish actual innocence under the fundamental miscarriage of justice exception to the procedural default doctrine. *See House v. Bell*, 547 U.S. 518, (2006). To satisfy this lesser standard (which itself applies only in the extraordinary case,. . .), [the petitioner] would have to demonstrate that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). In other words, he would have to show it is probable that, given the new evidence, no reasonable juror would have convicted him.**

***Mize v. Hall*, 532 F.3d 1184, 1195 (11th Cir. 2008); *Accord Magluta v. United States*, 660 F. App'x 803, 807 (11th Cir. 2016).**

Dorcelus has fallen far short of establishing that he is actually innocent. His newly-discovered evidence fails to even meet the relatively looser *Schlup v. Delo* standard, and thus cannot establish a freestanding actual innocence claim. *See Mize v. Hall, sup*ra, 532 F.3d 1184, 1196. In *Schlup*, the newly discovered evidence consisted of, among other things, numerous affidavits of "black inmates attesting to the innocence of a white defendant in a racially motivated killing," and affidavits of the inmate housing clerk and prison lieutenant that showed Schlup's activities were incongruous with the time-line of events for the murder. *Schlup*, 513 U.S. 298 (1995)". In the case *sub judice*, the affidavits submitted on Petitioner's behalf do not come close to meeting the "new reliable evidence" standard established by *Schlup*, where they do not raise "sufficient doubt about [his] guilt to undermine confidence in the result of the trial." *Schlup*, 513 U.S. at 317.

The affidavits of Jones, Richardson and Shuman were signed within a one-week period more than three years after Petitioner's trial and almost seven years after the shooting of Holmes and Paul. These affidavits, to the effect that Holmes and Paul were attempting to throw Petitioner over the third-floor railing when they were shot, are inconsistent with the version of events which Petitioner gave to law enforcement. They are inconsistent with the testimony of Petitioner's trial witness Lewis Walker, who testified that he did not see Holmes or anyone else do anything to the Petitioner prior the shooting, ECF No. [20-1] at 718-19. They are inconsistent with the testimony of Jalessa Johnson, who testified in support of Petitioner's motion for new trial that she had been present in the hospital when Paul stated that he and Holmes had taken a swing at Petitioner, ECF No. [20-1] at 1001-02.

The affidavit of Aaron Shuman in particular lacks credibility where he stated that both Paul and Holmes had told him in the hospital that they had tried to push Petitioner over the railing. Holmes was found unconscious at approximately 2:15 a.m. on September 24, 2006 within minutes of being shot. He underwent unsuccessful emergency surgery and died at 12:40 that same afternoon. His autopsy, performed the following day, revealed that the doctors who performed the emergency surgery elected not to close the surgical incision. Holmes' mother testified at Petitioner's sentencing that she took her son off life support on September 24th, ECF No. [20-1] at 1009. The undersigned finds it highly unlikely that Holmes made the statement attributed to him by Shuman.

In *Herrera v. Collins*, *supra*, 506 U.S. 390, a capital case, the newly discovered evidence consisted of affidavits of the defendant's since-deceased brother's former attorney and cell-mate stating the brother told them he committed the murders for which Herrera had been convicted ten years earlier. The affidavits contained inconsistencies and contradicted both the testimony of two eyewitnesses and Herrera's own written

admission to the crime. *Id*. at 869-870. The Supreme Court found the affidavits insufficient to support a claim of actual innocence.

In *Arthur v. Allen*, 452 F.3d 1234, 1244-45 (11th Cir. 2006), the petitioner submitted the affidavits of two witnesses who stated that the petitioner was in their store at the time the murder he was convicted of was being committed. The state submitted affidavits by the same witnesses who later said that they could not remember exactly what day the petitioner had visited the store. *Id*. at 1245. The Eleventh Circuit held that the there was insufficient evidence of actual innocence because: (1) the doubt created by the affidavits does not "undermine[ ] confidence in the result of [petitioner's] trial"; (2) 11th-hour exculpatory affidavits are suspect, especially when "certain important details of the affidavits were subsequently disavowed by the affiants themselves"; and (3) the affiants' "revised testimony would [have], at best, attack[ed] the credibility of [another witness], whose own statements were corroborated." *Id*. at 1246. *See also Ray v. Mitchem*, 272 F. App'x 807, 810 (11th Cir. 2008) (affidavit from a man claiming responsibility for the offense of domestic violence, an affidavit from a woman claiming the victim told her that she had "made up" the fact that Ray had beaten her, and a letter purportedly from the victim, failed to satisfy burden to show actual innocence); *Romero v. Buss*, No. 3:10CV531/MCR/MD, 2011 WL 4435261, at *6–8 (N.D. Fla. Aug. 24, 2011), report and recommendation adopted, No. 3:10CV531/MCR/MD, 2011 WL 4542338 (N.D. Fla. Sept. 23, 2011) (affidavit of co-defendant confessing to crime for which Romero was convicted was inconsistent with the trial testimony of other witnesses and with Romero's own trial testimony.)

In this case, even assuming that the Petitioner was able to bring a freestanding "actual innocence" claim, it is clear that the "new evidence" introduced by the Petitioner is insufficient to establish that in light of all the evidence it is more likely than not that no reasonable juror would have convicted him. Rather, the "new evidence" consists of

affidavits that lack the reliability to establish that the Petitioner is "actually innocent." *See e.g. Taite v. Stewart*, No. 13-00322-CG-N, 2016 WL 4154257, *13 (S.D. Ala. June 28, 2016) (collecting cases discussing unreliability of post-trial affidavits in actual innocence cases). As such he is not entitled to relief on this basis.

b. Petitioner's "actual innocence" claims do not excuse his procedural default

The Petitioner also is not entitled to relief under the second *Rozzelle* scenario based upon his "actual innocence" claims. Under this scenario a claim of "actual innocence" is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits. *Herrera v. Collins*, 506 U.S. 390, 404 (1993). Before reaching the issue of whether Dorcellus' claim of actual innocence claims excuse his procedural default, the undersigned first assesses whether Dorcelus, did, in fact, fail to exhaust his state court remedies thereby procedurally defaulting his claims.

Pursuant to 28 U.S.C. § 2254(b)(1), a petitioner must exhaust all available state court remedies for challenging his conviction before bringing a § 2254 habeas action in federal court. "In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). The exhaustion prerequisite requires a petitioner to "fairly present" his claim in each appropriate state court, alerting that court to the federal nature of the claim. *Duncan v. Henry*, 115 S. Ct. 887, 888 (1995).

In this case, Petitioner's amended motion for post-conviction relief under Rule 3.850 alleged only that the affidavits of Jones, Richardson and Shuman corroborated his theory of defense and contradicted the prosecution's evidence. ECF No. [19-1] at 121. Relying on *Nordelo v State*, 93 So. 3d 178 (Fla. 2012) and other Florida case law,

Petitioner argued in his 3.850 motion that his newly-discovered evidence would probably produce an acquittal on retrial. ECF No. [19-1] at 122. In his brief to the Fourth District Court of Appeal, Petitioner relied exclusively on Florida case law construing Rule 3.850 in support of his claim that the state court had erred when it denied his motion without an evidentiary hearing. ECF No. [19-1] at 141. Petitioner's request for relief was a remand to the lower court with instructions to grant an evidentiary hearing on his amended Rule 3.850 motion. ECF No. [19-1] at 160.

The specific constitutional claim raised by a petitioner under Section 2254 must be brought to the attention of the state courts. *Picard v. Connor,* 92 S. Ct. 509, (1971). The Eleventh Circuit discussed the exhaustion requirement in *Zeigler v. Crosby*, 345 F.3d 1300 (11th Cir. 2003), stating:

> **To present a federal constitutional claim properly in state court, 'the petitioner must make the state court aware that the claims asserted present federal constitutional issues.' *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998). 'If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.' *Duncan v. Henry*, 513 U.S. 364 (1995); *see also Isaacs v. Head*, 300 F.3d 1232, 1254 (11th Cir. 2002) (*Seriatim* Opinions) (Opinion of Anderson J.). 'It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made.' *Anderson v. Harless*, 459 U.S. 4, (1982) (citations omitted). '[T]o exhaust state remedies, petitioners must do more than present 'the state courts only with the facts necessary to state a claim for relief' and must additionally articulate the constitutional theory serving as the basis for relief.' *Henry v. Dept. of Corr.*, 197 F.3d 1361, 1366 (11th Cir. 1999) (quoting *Gray v. Netherland*, 518 U.S. 152 (1996)).**

***Id*. at 1307. "[A] state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so. *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). An issue that was not properly presented to the state court and which can no longer be litigated under state procedural rules is considered procedurally defaulted, that is, procedurally barred from**

federal review. *See O'Sullivan*, 526 U.S. at 848; *Bailey v. Nagle*, 172 F.3d 1299, 1302 (11th Cir. 1999) ("A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default." (*citing Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)).

Here, Petitioner's sole reference in his brief to decisions of the U.S. Supreme Court was this:

> **In ruling on this matter, this Court must remember, that officers of the court "must always be faithful to [the] overriding interest that 'justice shall be done'" and "the 'twofold aim'" of the law, which is that "'guilt shall not escape nor innocence suffer'". *United States v. Agurs*, 427 U.S. 97, 110-11, 96 S.Ct. 2392 (1976) [*quoting, Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 (1935)]. "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system*".***

***Schlup v. Delo*, 513 U.S. 298, 325, 115 S.Ct. 851 (1995). Federal courts hearing § 2254 petitions do not require a verbatim restatement of the claims brought in state court, but do require that a petitioner presented his claims to the state court "such that a reasonable reader would understand each claim's particular legal basis and specific factual foundation. *See, McNair v. Campbell*, 416 F.3d 1291, 1302 (11th Cir. 2005). In *McNair*, the petitioner claimed that the jury improperly considered extraneous evidence during its deliberations. *Id.* at 1301. Before the Alabama Supreme Court, the petitioner couched his argument in terms of state law, with only two references to federal law: a single federal district court case, found in a seven-case string citation, and a blanket statement in closing that both his federal and state constitutional rights were violated. *Id*. at 1303. He did not mention "the federal standard that extraneous evidence is presumptively prejudicial," nor did he cite "any United States Supreme Court or federal appellate court case dealing with extraneous evidence." *Id*. at 1303–04. Because the gravamen of his claim, as presented to the state courts, dealt with state law, the Eleventh**

Circuit held that the petitioner failed to exhaust his federal claim. Quoting *Kelley v. Sec'y for Dept. of Corr.*, 377 F.3d 1317, 1345 (11th Cir.2004), the court held that " '[t]he exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record.'" *McNair* at 1302.[9] Thus, the undersigned concludes that the Petitioner failed to exhaust his state court remedies by failing to present any type of federal claim to the state court.

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[9] The undersigned has considered the Eleventh Circuit's decision in *Darity v. Sec'y, Dep't of Corr.*, 244 F. App'x 982 (11th Cir.2007), where the court concluded that a district court had erred by determining that Darity's ineffective assistance claims were procedurally barred for failure to appeal the denial of his Rule 3.850 claim. Relying on *Webb v. State,* 757 So. 2d 608, 609 (Fla. Dist. Ct. App. 2000) and Rule 9.141(b)(2)(C) of the Florida Rules of Appellate Procedure, the Eleventh Circuit concluded that "a petitioner who does file a brief in an appeal of the summary denial of a Rule 3.850 motion does not waive any issues not addressed in the brief." *Darity*, 244 F. App'x at 984.

Rule 9.141(b)(2)(C) of the Florida Rules of Appellate Procedure provides that briefs are not required in an appeal from the summary denial of a 3.850 motion without an evidentiary hearing. Several district courts have called the continuing viability of *Darity* into doubt, where *Webb v. State*, the Florida case upon which the Eleventh Circuit relied on in *Darity* is no longer the decisional law of the Fifth District Court of Appeals, having been receded from in *Ward v. State*, 19 So. 3d 1060, 1061 (Fla. Dist. Ct. App. 2009) (*en banc*) (where all of appellant's post-conviction claims were summarily denied, but appellant chose to file initial brief on appeal (even though not required to do so under Fla R. App. P. 9.141(b)(2)), appellant abandoned any issues not addressed in initial brief); *See, e.g.*, *Daniels v. Crews*, No. 3:13CV149/MCR/EMT, 2014 WL 4409877, at 9 (N.D. Fla. Sept. 8, 2014). The First District Court of Appeals held similarly in *Watson v State*, 975 So.2d 572 (Fla. Dist. Ct. App. 2008) ("Traditionally, when a defendant submits a brief in an appeal from a summary denial of a postconviction motion, this Court may review only those arguments raised and fully addressed in the brief. *See Cooper v. State*, 856 So.2d 969, 977 n. 7 (Fla.2003) (finding "speculative, unsupported" arguments raised in a brief addressing a summary denial to be improper); *Marshall v. State,* 854 So.2d 1235, 1252 (Fla. 2003) (noting issues raised in an appellate brief addressing a summary denial must be supported by "definitive arguments").

In *Hammond v. State*, 34 So. 3d 58, 59 (Fla. Dist. Ct. App. 2010), the trial court summarily denied four of the claims raised in Hammond's 3.850 motion and held an evidentiary hearing on one. The judge denied the remaining claim after the hearing. Hammond filed an initial brief in which he argued that the trial court erred in summarily denying two of his claims. The Fourth District Court of Appeals concluded that claim for which appellant did not present argument, or for which he provided only conclusory argument, was insufficiently presented for appellate review, regardless of whether claim was among those claims litigated at evidentiary hearing or among those claims summarily denied by trial court.

Moreover, Dorcellus' "actual innocence claims" are insufficient to excuse his procedural default under the facts of this case.[10] In *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001), the reviewing court held that a habeas petitioner may survive a procedural bar by demonstrating that this Court's failure to hear the merits of his claim would result in a "fundamental miscarriage of justice." The miscarriage-of-justice exception applies "only in the extraordinary case" when "the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration." *House v. Bell*, 547 U.S. 518 (2006) (internal quotations omitted). The scope of this exception is exceedingly narrow since it concerns a petitioner's "actual" innocence rather than his "legal" innocence. *Johnson*, 256 F.3d at 1171. Petitioners who assert actual innocence to overcome defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id*. at 537 (*quoting Schlup v. Delo*, 115 S.Ct. 851 (1995)). This must be based on reliable evidence that was not presented at trial. *Id*. To satisfy this exception, the petitioner must "'show that it is more likely than not that no reasonable juror would have convicted him' of the underlying offense." *Id*.

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[10] The Petitioner appears to be arguing, at least initially, that his actual innocence serves as a basis to raise equitable tolling as a solution to his perceived untimely filing of his Petition for Habeas Corpus. "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, (citations omitted) or, as in this case, expiration of the statute of limitations." *McQuiggin v. Perkins,* 569 U.S. 383, 386 (2013). Although the undersigned has concluded that the Petitioner was not untimely in filing his Petition pursuant to the AEDPA statute of limitations, the Petitioner failed to exhaust his state remedies, and thus, the same analysis applies to his "actual innocence" claims.

As discussed above, the Petitioner's claims in this case fall far short of meeting this standard.[11] Simply put, the Petitioner's claims of "actual innocence" are insufficient to establish a constitutional violation that would entitle him to relief pursuant to § 2254.

VI. CONCLUSION

Petitioner has not demonstrated a basis upon which this Court may grant habeas relief. Accordingly, for the reasons stated herein, is hereby RECOMMENDED **that the Petitioner's Second Amended Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus ECF No. [12] be** DENIED**.**

CERTIFICATE OF APPEALABILITY

This Court may issue a certificate of appealability "only if the applicant has a made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 120 S. Ct. 1595, 1604 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (internal quotations omitted). This Court finds Petitioner's claims do not satisfy either standard.

The parties will have until September 24, 2018 to file written objections to this Report and Recommendation for consideration by the United States District Judge to whom this case is assigned. Any response to those objections shall be filed within seven (7) days of those objections being filed. Any request for an extension of this deadline

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[11] The undersigned notes that, as observed by the Eleventh Circuit in *Rozzelle*, the Tenth Circuit held in *Ellis v. Hargett*, 302 F.3d 1182, 1186 n. 1 (10th Cir. 2002) that the requirement of "factual" versus "legal" innocence renders claims of actual innocence based on affirmative defenses, including self-defense, insufficient under *Schlup*. *Rozzelle*, 672 F. 3d, at 1014.

must be made within three calendar days from the date of this Report and Recommendation. Pursuant to Eleventh Circuit Rule 3-1, and accompanying Internal Operating Procedure 3, the parties are hereby notified that failure to object in accordance with 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions.

DONE AND SUBMITTED **in chambers in Miami, Florida, this 17th day of September, 2018.**

Andrea M. Simonton

ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 15-61505-CIV-WILLIAMS

WESLEY DORCELUS,

Plaintiff,

vs.

WADEN FELICIA NOBLES, *et al.*,

Defendants.
_____/

ORDER

THIS MATTER is before the Court on (DE 25) Magistrate Judge Simonton's Report & Recommendation. In her Report, Judge Simonton recommends that the Court deny (DE 12) Petitioner Wesley Dorcelus's second amended petition under 28 U.S.C. § 2254 attacking his conviction and sentence in a Florida state court. Petitioner filed objections to the Report. (DE 26).

After a *de novo* review of the record and applicable law, the Court agrees with Judge Simonton that the Petition should be denied. As explained in the Report, Petitioner is not entitled to relief for many reasons. First, his claim that his post-conviction collateral proceeding was defective—because he was not granted a hearing—does not state a basis for federal relief. *See* (Report at 20) (citing *Alston v. Dep't of Corr., Fla.*, 610 F.3d 1318, 1326 (11th Cir. 2010)). Second, his freestanding "actual innocence" claim fails under Supreme Court and Eleventh Circuit precedent, because "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." (Report at 24) (quoting *Herrera v. Collins*, 506 U.S.

390 (1993)). Petitioner does not identify any independent constitutional violation. Third, even if "actual innocence" were a freestanding claim, Petitioner has fallen fall short of showing "it is probable that, given the new evidence, no reasonable juror would have convicted him." (Report at 25) (quoting *Mize v. Hall*, 532 F.3d 1184, 1195 (11th Cir. 2008)). That is because the affidavits he relies on (i) lack credibility and (ii) contradict both his own confession given soon after the incident and other testimony adduced at trial. Fourth, Petitioner failed to exhaust his administrative remedies because he never identified a constitutional violation in his state court post-conviction proceedings, and this failure is not excused based on his "actual innocence."

For these reasons, as explained more fully in Judge Simonton's Report, the Court **ORDERS AND ADJUDGES** that:

1. Petitioner's Second Amended Petition is **DENIED.**
2. No certificate of appealability shall issue.
3. Judge Simonton's Report (DE 25) is **AFFIRMED AND ADOPTED.**
4. This case is **DISMISSED.**
5. The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in chambers in Miami, Florida, this 24 day of September, 2018.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14213-E

WESLEY DORCELUS,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee,

U.S. ATTORNEY,
Wilfredo A. Ferrer,

Respondent.

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

ORDER:

Wesley Dorcelus, a Florida prisoner serving a life sentence for second-degree murder and second-degree attempted murder, seeks a certificate of appealability for the District Court's denial of his 28 U.S.C. § 2254 habeas corpus petition. In his petition, Mr. Dorcelus asserted that: (1) the state court erred in failing to hold an evidentiary hearing before ruling on his Florida Rule of Criminal

Procedure 3.850(b)(1) motion for post-conviction relief; and (2) the state court erred in denying his Rule 3.850(b)(1) motion on the merits because he had established an entitlement to relief.

In his Rule 3.850(b)(1) motion for post-conviction relief, Mr. Dorcelus asserted that newly discovered evidence showed he was innocent and had acted in self-defense. He attached affidavits of three people, which corroborated his statement that he acted in self-defense. The state responded that the motion should be denied because Mr. Dorcelus's post-arrest statement to police contradicted the affidavits. The state also argued the evidence in one of the affidavits was not newly discovered because Mr. Doreclus had the opportunity to present it at trial and the remaining two affidavits were inadmissible hearsay. The state court denied Mr. Dorcelus's Rule 3.850(b)(1) motion "for the reasons given in the State's Response." Mr. Dorcelus appealed, arguing that the state court erred by refusing to hold an evidentiary hearing and in denying the motion. The state appellate court summarily affirmed.

Mr. Dorcelus then filed his § 2254 petition, arguing the state post-conviction court erred in ruling on his Rule 3.850(b)(1) motion without conducting an evidentiary hearing to determine the credibility of the new witnesses. Specifically, he argued that an evidentiary hearing is required under Florida law if the petitioner meets the burden of establishing that the evidence was previously unknown and

would probably result in an acquittal or retrial. He also asserted that the state court erred in denying his motion because the evidence was newly discovered, material, and would result in an acquittal or new trial.

A magistrate judge issued a report and recommendation ("R&R"), recommending the § 2254 petition be denied. It concluded that (1) claims of error in a state post-conviction proceeding are not cognizable in a federal habeas petition; (2) to the extent that Mr. Dorcelus intended to raise an actual innocence claim based on newly discovered evidence, it was not a ground upon which federal habeas relief could be granted absent an independent constitutional violation; (3) even if Mr. Dorcelus had alleged an independent constitutional violation, he would have failed to exhaust his state court remedies as to that claim because he never raised a federal constitutional issue in state court; and (4) the claim failed on the merits because the newly discovered evidence failed to raise sufficient doubt about his guilt to undermine confidence in his conviction. Over Mr. Dorcelus's objections, the District Court adopted the R&R, denied the § 2254 petition, and denied a COA.

Mr. Dorcelus now seeks a COA from this Court. He argues he showed that the state court's error deprived him of his constitutional rights and the denial of his Rule 3.850(b)(1) motion undermined the legality of his detention and his convictions. He also maintains that the newly discovered evidence severely

undermines the state's theory of the case. Last, Mr. Dorcelus asserts that he could not have raised a claim that a constitutional violation occurred at his trial because he did not become aware of the exculpatory evidence until after trial.

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 marks omitted). "[N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation marks omitted).

"This Court has repeatedly held defects in state collateral proceedings do not provide a basis for habeas relief." Carroll v. Sec'y, DOC, 574 F.3d 1354, 1365 (11th Cir. 2009) ("It is 'beyond debate' that a state court's failure to conduct an evidentiary hearing on a post-conviction motion does not constitute a cognizable claim for habeas relief."). This is because a challenge to the state collateral proceeding does not undermine the legality of a conviction and, as a result, habeas relief is not an appropriate remedy. Id.

Reasonable jurists would not debate the District Court's denial of Mr. Dorcelus's § 2254 petition. Mr. Dorcelus's challenge to the state court's denial of his Rule 3.850(b)(1) motion and its decision to do so without an evidentiary hearing is not cognizable in a federal habeas corpus petition. See Carroll, 574 F.3d at 1365. Neither is Mr. Dorcelus's innocence claim cognizable under our precedent. Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351, 1356; Stoufflet v United States, 757 F.3d 1236, 1240–41. Because reasonable jurists are assumed to follow precedent, they would not debate the denial of Mr. Dorcelus's § 2254 petition. Hamilton, 793 F.3d at 1266. As a result, Mr. Dorcelus's motion for a COA is **DENIED**.

Barry B. Martin
UNITED STATES CIRCUIT JUDGE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14213-E

WESLEY DORCELUS,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee,

U.S. ATTORNEY,
Wilfredo A. Ferrer,

Respondent.

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

Before: MARTIN and ROSENBAUM, Circuit Judges.

BY THE COURT:

Wesley Dorcelus has filed a motion for reconsideration of this Court's order dated May 14, 2019, 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, Mr. Dorcelus's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.