No. 19-7043

IN THE

Supreme Court of the United States

JOHN A. TOTH,

Petitioner,

v.

MARK S. INCH, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether—assuming Petitioner did not abandon the issue by failing to properly litigate it in the court of appeals—the district court erred in taking judicial notice of certain state-court electronic dockets and records that established that Petitioner's 28 U.S.C. § 2254 petition was time-barred, without reviewing the complete, official state-court record.

II. Whether the Eleventh Circuit violated Petitioner's right to counsel under the Sixth Amendment when it declined to appoint an attorney to represent him on appeal from the denial of his § 2254 petition.

III. Whether the district court erred in finding that Petitioner had not shown that the state courts unreasonably applied clearly established federal law when they rejected his Fourth, Sixth, and Fourteenth Amendment claims.

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INTRODUCTION

Despite making a full confession to the arson of his ex-girlfriend's apartment, and despite pleading guilty to the charged offenses, Petitioner now seeks to challenge his state-court judgment and sentence. For three broad reasons, this case does not warrant certiorari.

First, several procedural problems render this case a poor vehicle for resolving the questions purportedly presented. Most notably, in the court of appeals Petitioner abandoned any argument as to the issues for which the Eleventh Circuit granted a certificate of appealability—issues that went to the core of whether Petitioner's federal habeas petition was time-barred. The court of appeals therefore unanimously concluded that Petitioner's waiver of that threshold question prevented it from granting any form of relief. As a concurring judge wrote, Petitioner's appellate pleadings presented "no way forward for his § 2254 petition." Pet. App. 12 (Martin, J., concurring). Nothing in the court of appeals' unpublished opinion, turning solely on basic appellate preservation rules, demands further review.

Second, Petitioner does not allege—and the State has not discovered—any split amongst the lower courts. Only two courts of appeals have considered the question for which the court of appeals granted a certificate of appealability: whether it is appropriate for a federal court to take judicial notice of select state-court electronic dockets and records without obtaining the complete, official state-court record. Both held that the practice is permissible. Likewise, no court of appeals has departed from

this Court's consistent precedents holding that an inmate has no constitutional right to counsel in postconviction proceedings.

Third, far from proving that his federal habeas petition was timely, Petitioner's own pleadings confirm the veracity of the state-court docket entries that formed the basis for the district court's dismissal on timeliness grounds. He has never disputed the timeline described by the district court, under which his January 16, 2018 petition was barred by AEDPA's 1-year statute of limitations. He has instead conceded that key state-court documents were filed on precisely the dates found by the district court—dates falling outside the limitations period and thus not tolling the time for filing Petitioner's federal habeas petition. And he has identified no portion of the state-court documentary record not reviewed by the district court that might have pointed to a different conclusion.

STATEMENT OF THE CASE

1. On October 17, 2012, Petitioner John A. Toth broke into his ex-girlfriend's West Palm Beach apartment and set it on fire. DE1:21, 25, 37–38 (Petition Pursuant to 28 U.S.C. § 2254, *Toth v. Jones*, No. 9:18-cv-80067 (S.D. Fla. Jan. 16, 2018)). As Petitioner later explained to police during his taped confession, he was angry that Peggy, the ex-girlfriend, cheated with another man, made derogatory remarks about Petitioner on Facebook, and was using him for his money. DE1:34–37, 39. Petitioner told police that Peggy was "basically a sociopath" with "no remorse for her past." DE1:39. He therefore forced his way into her apartment while she was away, doused it in transmission fluid, and lit her bed on fire. DE1:37–38, 41–42.

When the fire alarm went off, Petitioner ripped it from the ceiling and tossed the alarm in the street outside the apartment, along with the lighter he used to start the blaze. DE1:42. Law enforcement recovered both items where Petitioner left them. DE1:58. In his confession, Petitioner said he did not intend to set the entire building on fire; his goal was to "burn Peggy's area and that was it," and he believed the plaster walls would confine the fire to her apartment unit for "at least two hours." DE1:40–41. Several other apartments suffered fire, smoke, and water damage. DE1:57. No one was killed.

Peggy immediately identified Petitioner as a suspect. DE1:25. After attempting to contact Petitioner throughout the night, police were eventually able to get in touch with him by phone at 3 a.m. on the morning after the fire, *id.*, and reported to his home to speak with him. DE1:21, 25. Prior to obtaining his confession, police read Petitioner his *Miranda* rights and repeatedly emphasized that he was not under arrest. DE1:32–33, 39, 43. Petitioner agreed to speak to them and signed a consent form for a search of his home and clothing. DE1:21, 32–33. He provided the full confession described above. Law enforcement then left Petitioner's home without arresting him. *See* DE1:25. He was arrested later that day, *id.*, and charged with arson of a dwelling, burglary, and obstruction of extinguishment of a fire. Pet. App. 25.

2. On November 27, 2013, Petitioner pled guilty to all three counts, *id.* at 25, 112–13; Pet. 14, and was sentenced to 10 years in state prison. Pet. App. 25; Pet. 14. Principally at issue here is the timeliness of Petitioner's eventual federal habeas

corpus petition under 28 U.S.C. § 2254, filed on January 16, 2018. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") imposes a 1-year statute of limitations for the filing of § 2254 petitions, *see* 28 U.S.C. § 2244(d)(1), but provides that the limitations period is tolled for "[t]he time during which a properly filed application for post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . ." 28 U.S.C. § 2244(d)(2). The following events are therefore relevant.

Petitioner's first state postconviction motion was a timely motion to mitigate his sentence filed in late December 2013. Pet. App. 25, 35–36. That motion tolled the statute of limitations until May 8, 2014, when it was denied. *Id.* at 25, 114. Thus, for his federal habeas petition to qualify as timely filed under Section 2254, Petitioner should either have filed that petition by May 8, 2015 or have filed a timely state postconviction motion, thereby tolling the limitations period.

Petitioner filed neither type of document by that date. Instead, nearly 19 months later, on December 28, 2015, Petitioner filed a motion for postconviction relief in state court under Florida Rule of Criminal Procedural 3.850. *Id.* at 26, 36. In it, he argued that his conviction and sentence should be vacated for various reasons. That motion was denied by the state trial court on April 4, 2017, and Petitioner's appeal from that denial became final on November 2, 2017. *Id.* at 26, 36–37.

3. On January 16, 2018, Petitioner filed his federal habeas petition in the Southern District of Florida. *See* DE1.

a. He challenged his convictions on five grounds. Ground 1 alleged that Petitioner's confession was the product of a Fourth Amendment violation, DE1:4–6, and relied heavily on "[e]stablished law" allegedly requiring that police interrogations "be conducted at reasonable times" of the day. DE1:5. In Ground 2, Petitioner accused police of violating his Fifth Amendment right against self-incrimination by employing a "Two Step Interrogation Process." DE1:6. Ground 3 alleged a series of *Brady* violations, DE1:8–11, yet acknowledged that each of the purportedly "exculpatory" documents was disclosed to the defense in advance of entering his plea. DE1:8–9. Ground 4 asserted due process and equal protection violations because, in Petitioner's view, law enforcement, fire investigators, prosecutors, and judges conspired against him by concealing, falsifying, mishandling, and destroying exculpatory evidence. DE1:11–13. Finally, Ground 5 alleged that Petitioner's attorney was ineffective for failing to advance the aforementioned claims on his behalf before he entered his guilty plea. DE1:13–15.

b. In a 21-page report and recommendation, the magistrate judge recommended dismissing Petitioner's § 2254 petition as time-barred. *See* Pet. App. 30–50. Relying on the "online state court criminal docket" and "certain documents located therein,"[1] *id.* at 30–31, the magistrate explained that Petitioner pled guilty in state court on November 27, 2013, *id.* at 34; that the AEDPA 1-year statute of limitations began running on May 8, 2014, when Petitioner's motion to

[1] The Palm Beach Circuit Court's online docket is available at https://applications.mypalmbeachclerk.com/eCaseView/search.aspx. For ease of reference, the state-court case number is 2012-CF-011260.

mitigate sentence was denied by the state trial court, *id.* at 36; and that Petitioner did not file his Rule 3.850 state postconviction motion until "[m]ore than one and one-half years later, on December 28, 2015." *Id.* The documents it cited to ascertain those dates were "extracted from the Online Trial Docket and are now a permanent part of the instant record." *Id.* at 31 n.4; *see also* DE4-1–DE4-24 (compiling state-court documents).

The magistrate therefore found that there was "well in excess of one year during which no state collateral proceedings were instituted or otherwise pending which would serve to toll or stop the federal limitations period." Pet. App. 41. Thus, when Petitioner filed his federal habeas petition on January 16, 2018, it was untimely. *See id.* at 38–41. Despite that procedural failure, Petitioner had not attempted to "address the timeliness issue" or to "explain why the one-year statute of limitations does not bar his motion." *Id.* at 38.

The magistrate recommended that the district court dismiss the § 2254 petition as time-barred without an evidentiary hearing. Pet. App. 47–48, 50.

Petitioner filed objections to the report and recommendation but largely ignored the magistrate's conclusions as to timeliness. *See* DE6:1–5 (Ptr.'s Obj. to Magistrate's R&R, *Toth v. Jones*, No. 9:18-cv-80067 (S.D. Fla. Feb. 6, 2018)). Recognizing that the magistrate did "not address [the] Constitutional Claims," DE6:2, Petitioner reiterated his view that a "conspiracy of 1aw enforcement officers" violated his constitutional rights, DE6:3, and argued that he was entitled to an evidentiary hearing. DE6:3–4. With respect to timeliness, the basis for the

magistrate's recommended dismissal, Petitioner wrote only that "Equitable Tolling and 28 U.S.C. 2244(d)(1)(D) supports the Petitioner's Application for Writ of Habeas Corpus." DE6:2. Petitioner did not dispute any of the dates found by the magistrate or dispute the reliability or accuracy of the state-court online dockets and records used in its calculations.

c. The district court approved the report and recommendation and entered final judgment dismissing the petition. *See* Pet. App. 25–28. It found that Petitioner's federal habeas petition was untimely based on the same timeline laid out by the magistrate, *id.* at 25–26, and added, in the alternative, that Petitioner's claims failed on the merits. *Id.* at 26–28.

The district court denied Petitioner's motion for a certificate of appealability ("COA") under 28 U.S.C. § 2253. DE8:1 (Final Judgment for Respondent, *Toth v. Jones*, 9:18-cv-80067 (S.D. Fla. Feb. 14, 2018)).

4. Petitioner appealed to the U.S. Court of Appeals for the Eleventh Circuit.

a. In that court, Petitioner successfully applied for a COA. *See* Application for Issuance of COA, *Toth v. Jones*, No. 18-11087 (11th Cir. Apr. 20, 2018). Though his application focused exclusively on the merits of his federal habeas petition, *see id.* at *3–17, the court of appeals granted a COA limited to the procedural questions of whether, first, "the district court erred in determining *sua sponte* that Petitioner's 28 U.S.C. § 2254 petition was time-barred without reviewing the complete, official state court records" and, second, "the district court erred in alternatively determining *sua sponte* that Petitioner's claims failed on the merits without reviewing the complete,

official state court record." Pet. App. 20–21 (Martin, J.). The court did not authorize an appeal as to any other issue.

When Petitioner ultimately filed his initial brief, however, he made no mention of those two questions. *See* Appellant's Initial Br., *Toth v. Jones*, No. 18-11087 (11th Cir. Aug. 3, 2018). He elected instead to re-argue the merits of his underlying constitutional claims that the district court had found to be time-barred. It was not until the reply brief that Petitioner discussed the judicial notice question. *See* Appellant's Reply to St.'s Resp., *Toth v. Jones*, No. 18-11087, at *1–9 (11th Cir. Oct. 5, 2018). Even then, Petitioner did not explain why the district court erred as to the procedural issues that formed the sole basis for the COA. He instead alleged, among other things, that the magistrate and district judge were either "Co-conspirators to Deprive Constitutional Rights" or "Disabled to Hold their Positions." *Id.* at *6.

b. Prior to filing his initial brief, Petitioner asked the court of appeals to appoint counsel. *See* Mot. for Appointment of Counsel, *Toth v. Jones*, No. 18-11087 (11th Cir. July 11, 2018). In that motion, Petitioner stated that he had been granted *in forma pauperis* status, "lack[ed] the proper adequate resources to fully, fairly, and thoroughly address the complex issues related to this case," and invoked 18 U.S.C. § 3006A(a) as the basis for his entitlement to counsel. *Id.* at *1–2. That statute authorizes the appointment of counsel in § 2254 actions for "financially eligible persons" when a court finds that "the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B).

Petitioner did not contend that any provision of the Constitution conveyed a right to counsel on appeal from the denial of his federal habeas petition. Without waiting for the court of appeals to rule on his request for counsel, he filed his *pro se* initial brief.

The court of appeals subsequently denied Petitioner's motion. Order, *Toth v. Sec'y, Fla. Dep't of Corrections*, No. 18-11087 (11th Cir. Sept. 20, 2018). Citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), it found that "[t]here is no constitutional right to counsel in federal habeas proceedings." Order at *2. It instead evaluated Petitioner's request under the circuit's four-factor test for resolving requests under § 3006A: "(1) the type and complexity of the case, (2) whether the indigent is capable of adequately presenting his case, (3) whether the indigent is in a position to adequately investigate the case, and (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross examination." *Id.* (citing *Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir. 1990)). Under that standard, the court of appeals found that the interests of justice did not require appointment of counsel. *Id.* The case involved no conflicting testimony or evidence; the issues for which the court granted a COA were "not so novel or complex," and Petitioner had proved himself capable of adequately presenting legal arguments. *Id.*

c. In an unpublished opinion, the court of appeals unanimously affirmed, finding that Petitioner abandoned any argument as to the issues for which the court had granted a COA. *See* Pet. App. 7–12.

"Though we read *pro se* briefs liberally," the court wrote, "we must deem arguments not raised in an initial brief or raised for the first time in a reply brief abandoned." *Id.* at 9. "Upon careful review of Toth's initial brief on appeal," the court could "find only 'passing references'" to the argument that the district court erred in denying the federal habeas petition "without reviewing the official and complete state court record." *Id.* "[T]his does not preserve the issue for appellate review." *Id.*

The court of appeals therefore concluded that "Toth abandoned any argument challenging the district court's ruling that his § 2254 [petition was] time-barred." *Id.*

d. Judge Martin, who had issued the order granting Petitioner a COA, concurred in a written opinion. She agreed with the majority that "[o]ur precedent requires us to affirm the District Court's dismissal of Mr. Toth's habeas petition without fully considering the merits of his appeal." *Id.* at 10 (Martin, J., concurring). In hindsight, however, she would have appointed Petitioner counsel. *Id.* at 10–11 ("I regret that I did not seek to have counsel appointed for Mr. Toth at the time I granted his [COA]."). Judge Martin thought that the issues for which a COA had been granted were novel and that Petitioner displayed an inability to adequately litigate those questions. *Id.* at 11. For example, Petitioner's request for a COA "did not even identify the legal issue on which I granted him a COA," and his subsequent pleadings demonstrated that Petitioner "had clearly been unable to present the *only* arguments relevant to this appeal." *Id.* (emphasis in original).

"Nonetheless," Judge Martin wrote, "we must evaluate his *pro se* pleadings, and they present no way forward for his § 2254 petition." *Id.* at 12.

REASONS FOR DENYING THE PETITION

I. This Case Is a Poor Vehicle for Resolving the Questions Presented.

This case is poor vehicle for resolving the questions Petitioner urges the Court to take up. First, Petitioner has abandoned any argument as to the timeliness of his federal habeas petition, a threshold barrier to relief. Second, and even ignoring that problem, Petitioner has never denied that his habeas petition was untimely or that the records judicially-noticed by the district court were reliable. Third, Petitioner has waived any argument that the Sixth Amendment guarantees him a right to postconviction appellate counsel. And fourth, the court of appeals, because it resolved the case on waiver grounds, did not consider the merits of Petitioner's underlying constitutional claims.

A. None of the questions presented is properly before the Court because Petitioner waived any argument as to the threshold issue of timeliness.

1. The district court found that Petitioner's federal habeas petition was time-barred because he failed to file it within one year of his state conviction and sentence becoming final, and because that limitations period was not tolled. Pet. App. 26, *see also id.* at 38–46. The Eleventh Circuit granted a COA limited to whether the district court properly relied on state-court electronic dockets and "[un]official" records in deciding (1) that Petitioner's federal habeas petition was untimely and (2) that the habeas petition failed on the merits. In his initial appellate brief, however, Petitioner abandoned any argument as to those questions, *see id.* at 8–9 (holding of court of appeals that "Toth abandoned any argument challenging the district court's ruling

that his § 2254 petition was time-barred"), thereby waiving those issues for further review.

That should preclude certiorari. The timeliness of Petitioner's habeas petition was a threshold barrier to Petitioner's ability to challenge his state conviction. Where a state inmate fails to seek review within one year of a triggering event, any subsequent habeas petition is barred by the statute of limitations. *See* 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."). Thus, as a categorical matter, a district court should deny relief to a state inmate in that circumstance. The result is that if Petitioner did not first establish in the court of appeals that the district court erred in dismissing his petition as untimely, he had no avenue for litigating the merits of his constitutional claims.

Because Petitioner has waived the threshold question in his case—and, indeed, the only question upon which the Eleventh Circuit granted him a COA—this case is a poor vehicle for addressing whether the district court erred in relying on the state-court electronic docket and records. This Court has consistently refused to reach issues waived in the lower court. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) ("[f]inding no exceptional circumstances that would warrant reviewing a claim that was waived below, we adhere to our general practice and decline to address respondent's [argument not raised in the district court or court of appeals]"); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992) (declining to consider arguments raised for the first time before this Court and not raised or resolved in the

lower courts, absent unusual circumstances, because "allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart" the integrity of the certiorari procedure).

In the words of the circuit judge who granted the COA, Petitioner's pleadings in the court of appeals offered "no way forward for his § 2254 petition." Pet. App. 12 (Martin, J., concurring).

2. Any argument as to the timeliness of Petitioner's federal habeas petition was waived for yet another reason: In the district court, Petitioner failed to object either to the magistrate's timeliness findings themselves or its process for arriving at those findings.[2] *See* 11th Cir. R. 3-1 ("A party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation . . . waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object."). Accordingly, the court of appeals was further justified in refusing to address the propriety of the district court's procedure for resolving the timeliness question. *See Webb v. State*, 688 F. App'x 618, 622 n.1 (11th Cir. 2017); *cf. Thomas v. Arn*, 474 U.S. 140, 155 (1985) (holding that

[2] Petitioner objected to the magistrate's findings on unrelated grounds. *See* DE6:1–5 (Ptr.'s Obj. to Magistrate's R&R, *Toth v. Jones*, No. 9:18-cv-80067 (S.D. Fla. Feb. 6, 2018)). As to the timeliness issue, he offered only the vague and conclusory assertion that "Equitable Tolling and 28 USC 2244(d)(1)(D) supports the Petitioner's Application for Writ of Habeas Corpus." DE6:2; *see Adler v. Duval Cnty. Sch. Bd.*, 112 F.3d 1475, 1480 (11th Cir. 1997) (litigant's "cursory treatment" of an issue "is [in]sufficient to preserve" it for review).

courts of appeals may adopt rules conditioning appeal upon the filing of objections to a magistrate's R&R).

B. Petitioner does not dispute that his habeas petition was time-barred.

Setting aside Petitioner's abandonment of any argument that the district court erred in ruling that his habeas petition was time-barred, this case is a poor vehicle for deciding whether Federal Rule of Evidence 201 permits a district court to take judicial notice of state-court electronic dockets and records. Tellingly, Petitioner has never disputed the accuracy of those records.

Any sound vehicle for resolving the judicial notice question would involve a claim by the petitioner that he was prejudiced by the alleged procedural error—here, for example, that the judicially-noticed documents were inaccurate or unreliable, or that the district court failed to consider portions of the state-court record relevant to the inquiry. Yet Petitioner makes no such allegation. Rather than suggest that the dockets or records relied upon by the magistrate and district court were flawed in some way, each of his pleadings—both in the district court and the court of appeals—focused almost exclusively on the merits of his underlying constitutional claims. As the magistrate found, he simply ignored AEDPA's statute of limitations. Pet. App. 38. Put differently, Petitioner has never asserted that the state-court dockets at issue inaccurately reflect the date he moved for postconviction relief in state court under Florida Rule of Criminal Procedure 3.850, such that the 1-year limitations period for filing his federal habeas petition was tolled.

Not only has Petitioner never disputed the timeline found by the district court, he has affirmatively corroborated that the district court's dates were correct. His own pleadings admit, for instance, that he did not move for state postconviction relief until "December 28, 2015"—well outside the 1-year limitations period, and the same date credited by the district court. *Compare* Appellant's Initial Br., *Toth v. Jones*, No. 18-11087, at *4 (11th Cir. Aug. 10, 2018), *with* Pet. App. 26. Petitioner cannot, and does not, rely on tolling by any state postconviction motion.

This case is also a poor vehicle for resolving the judicial notice question because the Palm Beach County Circuit Court online docket is a robust source of information about state-court cases. *See* eCaseView, Palm Beach Clerk of Court (last visited Apr. 27, 2020), https://applications.mypalmbeachclerk.com/eCaseView/search.aspx. Unlike some electronic dockets systems, Palm Beach's system resembles the federal PACER system in that each docket entry corresponding to the filing of a pleading or order is accompanied by a link to a PDF copy of that document. A user of the docket therefore need not rely blindly on the face of the docket when determining whether the date listed for each docket entry is correct; because each document is available for review, the user can simply view the document and confirm for herself, based on its certificate of service and electronic date stamp, that the date listed properly reflects the date of filing. While some state-court electronic docket systems may present reliability concerns, this is not one of them.

Thus, whatever this Court's ultimate view of the merits of the judicial notice question, Petitioner is unlikely to obtain meaningful relief.

C. Petitioner has waived any argument that the Sixth Amendment guaranteed him the right to postconviction appellate counsel.

Petitioner also asserts that this Court should grant certiorari to consider whether the Eleventh Circuit's "denial of counsel was violative of [his] 6th Amendment right to counsel." Pet. i. Like his judicial-notice challenge, however, Petitioner waived that claim in the court of appeals.

In his motion for appointment of counsel, Petitioner cited 18 U.S.C. § 3006A(a) and argued that appointment of counsel was appropriate because he "lack[ed] the proper adequate resources to fully, fairly, and thoroughly address the complex issues related to this case." Mot. for Appointment of Counsel, *Toth v. Jones*, No. 18-11087, at *1–2 (11th Cir. July 16, 2018). Petitioner did not cite the Sixth Amendment—or any constitutional provision—and did not seek to preserve for further review the claim that this Court should recede from its cases holding that the Constitution guarantees no right to counsel in postconviction and postconviction appeal proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 755–57 (1991); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Any such claim is therefore not properly before this Court. Petitioner preserved, at most, a statutory claim that he was entitled to counsel under 18 U.S.C. § 3006A(a). But he does not advance that statutory argument here.

Moreover, before the court of appeals could rule on his motion for appointment of counsel, Petitioner filed his initial brief *pro se*, mooting his request for counsel. Petitioner has offered no satisfactory explanation why, if he believed the issues presented were "complex" enough to warrant the assistance of counsel, he could not

have waited until the court of appeals ruled upon his request before proceeding to litigate the merits of his case *pro se*. *See* Pet. 19 (citing only his "unfamiliarity with Federal Appellate Court Rules").

D. The merits of Petitioner's underlying constitutional claims are not properly before the Court.

Finally, Petitioner urges the Court to consider whether his Fourth, Sixth, and Fourteenth Amendments rights were violated in state court. *See* Pet. i. For two reasons, those questions are not fairly presented here.

First, "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *NCAA v. Smith*, 525 U.S. 459, 469–70 (1999) (refusing to decide in the first instance issues that were not decided by the court of appeals). The Eleventh Circuit did not address the underlying merits of the habeas petition because it found Petitioner had waived any argument as to the threshold issue of timeliness. At most, then, this case presents only the issue the court of appeals actually addressed: whether Petitioner waived his arguments as to the issues identified in the COA.

Second, Petitioner's claims arise under Section 2254, and are therefore subject to AEDPA's deferential standard of review, requiring Petitioner to show the state court's judgment was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" decisions from this Court, or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)-(2). Yet Petitioner has never identified a decision of this Court establishing that the state courts reached conclusions contrary to clear federal law. *Id.* Because federal habeas

review is "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal," *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam) (internal quotation marks omitted), and because Petitioner has failed to make even a preliminary showing of such an extreme malfunction, this case does not present a vehicle for resolving any significant or novel constitutional questions.

II. Petitioner Identifies No Split of Authority That Might Warrant This Court's Review.

The foregoing aside, Petitioner has identified no split of authority that might justify a writ of certiorari. To date, the only courts of appeals to consider the question for which the Eleventh Circuit granted Petitioner a COA have held that it is appropriate for a federal court to rely on state-court electronic dockets and publicly-available records when determining whether a § 2254 petition was timely. *See Paez v. Sec'y, Fla. Dep't of Corrections*, 947 F.3d 649, 651–53 (11th Cir. 2020); *Porter v. Ollison*, 620 F.3d 952, 954–55 & n.1 (9th Cir. 2010) (citing *Smith v. Duncan*, 297 F.3d 809 (9th Cir. 2002)).[3] Given that so few circuits have weighed in on this precise issue—and that they are in agreement—further percolation of the issue is warranted. *See California v. Carney*, 471 U.S. 386, 400 n.11 (1985) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts

[3] At least one court of appeals has issued an unpublished opinion holding that a § 2254 court may take judicial notice of state-court electronic dockets. *See Mitchell v. Dowling*, 672 F. App'x 792, 793 n.2 (10th Cir. 2016). Others have authorized juridical notice of state-court dockets in related contexts. *See Mangiafico v. Blumenthal*, 471 F.3d 391 (2d Cir. 2006) (dismissal of § 1983 complaint).

before the Supreme Court ends the process with a nationally binding rule."); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari) (explaining that percolation "allow[s] . . . the issue [to] receive[] further study" in the lower courts "before it is addressed by this Court").

Likewise, circuit courts nationwide faithfully apply this Court's consistent holdings that an inmate has no constitutional right to counsel in a postconviction proceeding. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 755–57 (1991); *McCleskey v. Zant*, 499 U.S. 467, 495 (1991); *Murray v. Giarratano*, 492 U.S. 1, 7–8 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

III. The District Court Properly Took Judicial Notice of Certain State-Court Dockets and Records.

Finally, review is not warranted because, even assuming Petitioner could overcome the hurdles described above, the district court properly took judicial notice of certain state-court electronic dockets and records (whose reliability is not disputed by Petitioner) when it concluded both that his § 2254 petition was time-barred and that it failed on the merits. Because his federal habeas petition fell outside AEDPA's 1-year limitations period, it failed at the threshold.

Although no circuit precedent resolving the judicial notice question existed at the time the Eleventh Circuit affirmed Petitioner's appeal, a subsequent published opinion is now controlling within the circuit. *See Paez v. Sec'y, Fla. Dep't of Corrections*, 947 F.3d 649 (11th Cir. 2020). Petitioner has offered no reason to believe that case was wrongly decided.

Judicial notice is governed by Rule 201. That rule authorizes a court to "judicially notice a fact that is not subject to reasonable dispute because it" either "is generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)-(2). In *Paez*, assessing the same question at issue in this case, the Eleventh Circuit held that "[t]he dates the District Court noticed from the online state court dockets constitute judicially noticeable facts under Rule 201." 947 F.3d at 652. The court of appeals noted that the dockets were located on the state courts' website; that those dockets reflected the dates of various filings and events; and that the dockets contained links to electronic versions of the inmate's state-court pleadings and corresponding rulings. *Id.* Because the court found "no reason to think these docket entries do not accurately reflect the dates," it held that the district court properly took judicial notice of them. *Id.*

Adding that judicial notice is "a highly limited process" without the full plethora of fact-finding safeguards, the court of appeals observed that Rule 201 protects the due process rights of a litigant by "requir[ing] an opportunity to be heard after the court takes notice." *Id.* That protection was present in *Paez* because, as the Eleventh Circuit pointed out, the inmate "had an opportunity to object to the Report and Recommendation after the magistrate judge took judicial notice of the dates from his state court dockets" yet "did not ask to be heard." *Id.* at 653. "Neither did he dispute the accuracy of the docket entries the magistrate judge relied upon." *Id.* Accordingly, there was no abuse of discretion. *Id.*

Petitioner enjoyed the same safeguards here. The magistrate's report and recommendation meticulously listed each of the dates relevant to its timeliness findings. Pet. App. 34–38. In doing so, the magistrate was careful to give Petitioner the benefit of the mail-box rule, *id.* at 36 n.9 ("Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed."), and listed, when appropriate, the date Petitioner had delivered his state-court pleadings to prison officials for mailing. *See, e.g.*, *id.* at 36 (citing December 28, 2015 as the date of filing for Petitioner's motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, rather than later date listed in electronic docket). The magistrate was also transparent about the source for each of those dates, first advising that its findings were predicated on a review of "the online state court criminal docket . . . and certain documents located therein." Pet. App. 30–31, and then citing specific docket entries pertinent to each such finding. *See, e.g.*, *id.* at 36.

Petitioner was aware of the contents of the report and recommendation. Indeed, he filed objections to it. Yet he did not take issue with any aspect of the magistrate's findings as to dates and, as to the magistrate's ultimate recommendation as to untimeliness, offered only the conclusory, single-sentence that "Equitable Tolling and 28 U.S.C. 2244(d)(1)(D) supports the Petitioner's Application for Writ of Habeas Corpus." DE6:2. Not only did he never dispute the dates relied upon by the magistrate or the district court, his subsequent pleadings confirm the critical date when he filed his state postconviction motion challenging the judgment and sentence:

"December 28. 2015." Appellant's Initial Br., *Toth v. Jones*, No. 18-11087, at *4 (11th Cir. Aug. 10, 2018).

As in *Paez*, the electronic docket system relied upon by the district court is a model for courts everywhere to follow. Namely:

- "The dockets can be found on the website for the Clerk of the [Palm Beach] County Circuit Court, who is the public officer responsible for maintaining records of the [Palm Beach] County Circuit Court," *Paez*, 947 F.3d at 652;
- "The dockets reflect the dates of proceedings in [Petitioner's] cases, from first appearance through to the Florida appellate courts' resolution of his postconviction motions," *id.*; and
- "The docket entries also have links to electronic versions of many of [Petitioner's] filings, as well as to many state trial and appellate court orders on [Petitioner's] postconviction motions." *Id.*

Consequently, there is "no reason to think these docket entries do not accurately reflect the dates" of Petitioner's state-court filings. *Id.*

As to the question whether the district court erred by failing to obtain a complete, official copy of the state-court record, Petitioner has never suggested that any document missing from the district court's review of the timeliness question suggested a different result. He has not alleged, for instance, that he filed some *other* state postconviction claim within the 1-year statute of limitations, such that the time for filing his federal habeas petition was tolled. Were that the case, it might be an abuse of discretion for the district court to fail to obtain and review a copy of that pleading. But none of that happened here.

In short, the district court properly found that Petitioner's § 2254 petition failed at the threshold because he did not file it within one year of his state conviction

and sentence becoming final and because Petitioner has not demonstrated any claim to tolling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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