No. 20- _____

IN THE

Supreme Court of the United States

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ROLANDO GUS PAEZ,
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

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APPENDIX

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APPENDIX A —

Judgment of the United States Court of Appeals

For the Eleventh Circuit dated January 7, 2020

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 16-15705

District Court Docket No.
2:16-cv-14259-RLR

ROLANDO GUS PAEZ,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: January 07, 2020
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

APPENDIX B —

Opinion of the United States Court of Appeals

For the Eleventh Circuit dated July 31, 2019

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15705

D.C. Docket No. 2:16-cv-14259-RLR

ROLANDO GUS PAEZ,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

(July 31, 2019)

Before TJOFLAT, MARTIN, and TRAXLER,* Circuit Judges.

MARTIN, Circuit Judge:

This case involves a state inmate who filed a petition under 28 U.S.C. § 2254 for a writ of habeas corpus that looks to be untimely. It thus presents the question of whether in this circumstance a district court may, on its own initiative and without hearing from the State, decide that the statute of limitations bars the petition. This District Court did just that, and dismissed the petition filed by Ronaldo Paez without ordering a response from the Secretary of the Florida Department of Corrections.

After oral argument and careful consideration, we conclude this was error. When a § 2254 petition states a legally sufficient claim for relief, a district court must order the State to respond, even if the petition appears untimely. This response need not be an answer on the merits. It may take whatever form the district court deems appropriate, including a motion to dismiss on timeliness grounds. But while district courts have discretion to direct various types of responses, they are without discretion to dispense with any response altogether.

Since this District Court ordered no State response to Mr. Paez's petition before dismissing it, we vacate that dismissal and remand for further proceedings

* Honorable William B. Traxler, Jr., United States Circuit Judge for the Fourth Circuit, sitting by designation.

consistent with this opinion. Our ruling does not prejudice the ability of the Secretary to question the timeliness of Mr. Paez's petition on remand.

I.

In 2004, Mr. Paez pled no contest to second degree murder and two cocaine charges in St. Lucie County (Florida) Circuit Court. The state court sentenced him to four years imprisonment followed by two years of "community control." In 2010, while still on community control, Mr. Paez was arrested for violating the terms of his supervised release. In response, the state court revoked his community control and sentenced him to 25 years on the murder charge and 15 years on the cocaine charges, all to run concurrently.

After years of state postconviction litigation over the sentences imposed for his violation of community control, in 2016 Mr. Paez filed a § 2254 petition asserting three claims. First, he said the state court lacked jurisdiction to sentence him for the violation of his community control. Second, he said his sentence for community control violation in turn violated his double jeopardy rights. And third, he argued he is actually innocent of the crimes charged. Mr. Paez's petition also set forth some of the relevant dates his state postconviction motions were filed and decided. No attorney appeared on behalf of the Secretary of the Florida Department of Corrections, who has custody of Mr. Paez. An email address belonging to the Florida Attorney General does appear on the docket, and some

filings are marked as having been sent to this address. However, the Florida Attorney General never filed anything in the case.

Mr. Paez's petition was assigned to a magistrate judge. Rule 4 of the Rules Governing Section 2254 Proceedings in the United States District Courts required the magistrate judge to do a preliminary assessment of Mr. Paez's petition and dismiss "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." After conducting this review, the magistrate judge took it upon himself to calculate the timeliness of Mr. Paez's petition.

A § 2254 petition must be filed within a year of, as relevant here, the date the challenged conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). The limitations period is tolled while properly filed state postconviction motions are pending. Id. § 2244(d)(2). The magistrate judge took judicial notice of the filing dates of Mr. Paez's postconviction motions and the dates of orders resolving those motions, as reflected in state court docket entries for Mr. Paez's criminal cases. These docket sheets were available online but never made a part of the record.

The dates Mr. Paez gave in his petition together with those reflected on the electronic dockets made it appear that his petition was untimely. Based on those dates, the magistrate judge recommended sua sponte dismissing Mr. Paez's petition under Rule 4 without ordering the Secretary to respond. The District Court adopted the Report and Recommendation over Mr. Paez's objections.

This appeal followed. Our Court granted Mr. Paez a certificate of appealability on the issue of whether the District Court erred in dismissing the petition as untimely. Because Mr. Paez was proceeding pro se, the Court appointed Joseph A. DiRuzzo, III, to represent him on appeal. We appreciate Mr. DiRuzzo's diligent representation of Mr. Paez and his service to the Court.

II.

This case presents two distinct issues. The first is whether the District Court could properly take judicial notice of the online state court dockets in Mr. Paez's criminal cases. The second is whether it was error to dismiss Mr. Paez's petition as untimely without ordering the Secretary to respond. We review a district court's decision to take judicial notice of a fact for abuse of discretion. Lodge v. Kondaur Capital Corp., 750 F.3d 1263, 1273 (11th Cir. 2014). We also review a district court's decision to sua sponte raise the statute of limitations for abuse of discretion. Day v. McDonough, 547 U.S. 198, 202, 126 S. Ct. 1675, 1679–80 (2006). Our review leads us to conclude the District Court was within its discretion to take notice of the state court dockets but went beyond its discretion when it sua sponte dismissed the petition without ordering a response from the Secretary.

A.

Federal Rule of Evidence 201 permits a court to "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily

determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). State court records of an inmate's postconviction proceedings generally satisfy this standard. See Cunningham v. Dist. Att'y's Office, 592 F.3d 1237, 1255 (11th Cir. 2010); Moore v. Estelle, 526 F.2d 690, 694 (5th Cir. 1976) ("[W]e take judicial notice of prior habeas proceedings brought by this appellant in connection with the same conviction. This includes state petitions, even when the prior case is not made part of the record on appeal . . . ." (citations omitted))[1]; see also Porter v. Ollison, 620 F.3d 952, 954–55 (9th Cir. 2010) (noticing "any state court dockets or pleadings that have been located (including on the Internet) and for which it is proper to take judicial notice").

The dates the District Court noticed from the online state court dockets constitute judicially noticeable facts under Rule 201. The dockets can be found on the website for the Clerk of the St. Lucie County Circuit Court, who is the public officer responsible for maintaining records of the St. Lucie County Circuit Court.[2] See Fla. Const. art. VIII, § 1(d). The dockets reflect the dates of proceedings in

[1] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

[2] The docket entries can be found at: https://courtcasesearch.stlucieclerk.com/BenchmarkWebExternal/Home.aspx/Search. Mr. Paez's case numbers are 56-2003-CF2667B and 56-2003-CF2934A. We were able to access the docket sheets using these case numbers with no trouble.

Mr. Paez's cases, from first appearance through to the Florida appellate courts' resolution of his postconviction motions. The docket entries also have links to electronic versions of many of Mr. Paez's filings, as well as to many state trial and appellate court orders on Mr. Paez's postconviction motions. We have no reason to think these docket entries do not accurately reflect the dates in Mr. Paez's cases. The District Court could properly notice the state court docket sheets in these circumstances.[3]

However, we caution that "the taking of judicial notice of facts is, as a matter of evidence law, a highly limited process. The reason for this caution is that the taking of judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court." Shahar v. Bowers, 120 F.3d 211, 214 (11th Cir. 1997) (per curiam) (en banc). "In order to fulfill these safeguards, a party is entitled to an opportunity to be heard as to the propriety of taking judicial notice." Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC, 369 F.3d 1197, 1205 (11th Cir. 2004) (quotation marks omitted and alteration adopted). Rule 201 does not require courts to warn parties before taking

[3] This ruling is consistent with non-binding opinions from prior panels of this Court. See Boyd v. Georgia, 512 F. App'x 915, 917 (11th Cir. 2013) (per curiam) (unpublished); United States v. Brown, 526 F.3d 691, 711–13 (11th Cir. 2008), vacated on other grounds, 556 U.S. 1150, 129 S. Ct. 1668 (2009); United States v. Ayuso, 272 F. App'x 833, 835–36 (11th Cir. 2008) (per curiam) (unpublished).

judicial notice of some fact, but, upon the party's request, it does require an opportunity to be heard after the court takes notice. Fed. R. Evid. 201(e).

These safeguards have particular importance in the context of determining the timeliness of § 2254 petitions. We know that online state court dockets may not always reflect the correct filing date for purposes of calculating the statute of limitations. For example, Florida and this Court both follow the "mailbox rule," which deems inmate papers filed the date of mailing or, absent an indication of the mailing date, the day the inmate signed them. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001) (per curiam); Haag v. State, 591 So. 2d 614, 617 (Fla. 1992); Waters v. Dep't of Corr., 144 So. 3d 613, 617 (Fla. 1st DCA 2014). And by its nature, the docket will show the date a pleading was docketed rather than the date it was mailed or signed. On top of that, inmates may not have ready access to their legal papers, leaving them unable to dispute the accuracy of any docket entry. Neither may they have access to an Internet connection. This would make disputing or even reviewing an online docket entry impossible where, as happened here, a district court fails to make the docket sheets part of the record. We think the best practice would be to include copies of any judicially noticed records as part of the Order that relies upon them, so as to ensure the inmate receives them. Cf. Rodriguez v. Fla. Dep't of Corr., 748 F.3d 1073, 1076–77 (11th

Cir. 2014) (holding the State must serve all documents referenced in an answer to a § 2254 petition on the petitioner).

While we urge caution, we conclude proper safeguards were followed in this case. Mr. Paez 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. Mr. Paez did not ask to be heard. See Fed. R. Evid. 201(e) (requiring a hearing where the party requests one). Neither did he dispute the accuracy of the docket entries the magistrate judge relied upon. Finally, Mr. Paez gave no indication he lacked the ability to dispute the docket sheets—because of, say, his lack of an Internet connection. The docket entries here were properly noticed, and the procedure followed gave Mr. Paez an opportunity to ask to be heard on the propriety of judicial notice. Thus, we see no abuse of discretion.

B.

Having concluded the docket entries relied upon by the District Court were properly noticed, we now turn to the second issue. That is, whether the District Court erred in dismissing sua sponte Mr. Paez's § 2254 petition without ordering the Secretary to respond. We hold the District Court abused its discretion when it dismissed Mr. Paez's petition in that way. Before dismissing Mr. Paez's petition on its own initiative, the District Court was required by Rule 4 of the Rules Governing Section 2254 Proceedings in the United States District Courts and by

the Supreme Court's holding in Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675 (2006), to order the Secretary to respond in some form to Mr. Paez's petition. This would allow the Secretary to either assert or waive the State's timeliness defense.

Rule 4 requires district courts to dismiss § 2254 petitions without ordering the State to respond "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." This preliminary review calls on the district court to perform a screening function, ordering summary dismissal where a petition makes no meritorious claim to relief. See Rules Governing § 2254 Cases, R. 4 advisory committee's note ("[I]t is the duty of the court to screen out frivolous applications."). The procedure serves to "eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Id.

To survive Rule 4 review, a § 2254 petition must set forth facts that, if true, would establish a constitutional violation entitling the petitioner to relief. See Borden v. Allen, 646 F.3d 785, 810 (11th Cir. 2011) (holding that a § 2254 petition must comply with the "fact pleading requirements of [Habeas] Rule 2(c) and (d)" to survive dismissal under Rule 4). If a petition does not set forth a sufficient factual basis for habeas relief, the petition is "legally insufficient on its face," and the district court must dismiss it. McFarland v. Scott, 512 U.S. 849, 856, 114 S. Ct. 2568, 2572 (1994). Dismissal under Rule 4 represents "a judgment that the

claims presented are nonmeritorious" based on the facts alleged. Borden, 646 F.3d at 812.

Rule 4 does not, however, permit district courts to sua sponte dismiss § 2254 petitions based on non-jurisdictional procedural bars to habeas relief at this stage of preliminary review. See Borden, 646 F.3d at 812; see also Granberry v. Greer, 481 U.S. 129, 135 n.7, 107 S. Ct. 1671, 1675 n.7 (1987) (noting that dismissal under Rule 4 "pretermits consideration of the issue of nonexhaustion," a non-jurisdictional procedural bar to habeas relief). Dismissal based on a procedural bar to relief does not represent a judgment that the asserted claims lack merit. Rather, it means the petitioner has run up against one of the hurdles found in the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-32, 110 Stat. 1214 (1996). These hurdles can include untimeliness or nonexhaustion. And these are not the proper subject of Rule 4 dismissal because they do not go to the merits of the petition.

What's more, we cannot imagine how it could "plainly appear from the petition that the petitioner is not entitled to relief" on non-jurisdictional procedural grounds, as required for Rule 4 dismissal. A State may waive these defenses. See In re Jackson, 826 F.3d 1343, 1348 (11th Cir. 2016) (per curiam) (noting that the government may waive the statute of limitations). And a district court cannot know from the face of the petition whether a State will choose to waive its

defenses. Thus, the District Court went beyond the Rule 4 preliminary assessment of the sufficiency of a § 2254 petition when it dismissed Mr. Paez's petition based on timeliness.

Beyond this, Rule 4 required the District Court to order a response to Mr. Paez's petition. The Rule's text could not be plainer: "If the petition is not dismissed" as nonmeritorious, Rule 4 says "the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." Rules Governing § 2254 Cases, Rule 4 (emphasis added). The Rule gives district courts "flexibility" to order something other than an answer, such as a motion to dismiss where the petition appears untimely or unexhausted on its face, where the case warrants it. Id. R. 4 comm. n. But Rule 4 does not leave district courts any room to dispense altogether with a response of some form once a petition is not dismissed as nonmeritorious.

The dissenting opinion disagrees with our reading, saying Rule 4's text does not limit summary dismissal to meritless petitions. Dissenting Op. at 2–3. But we do not read the dissenting opinion to engage with Borden or Granberry, both of which describe Rule 4 dismissal as a merits determination. Neither does the opinion explain how a deficiency like untimeliness could ever be apparent from the face of a petition when the State can waive it. In our view, the State's position on a petition's timeliness will never appear in the petition or any attached exhibits,

and these are the only materials the Rule contemplates district courts consulting as part of its preliminary review. See Rules Governing § 2254 Cases, R. 4.

The dissenting opinion also suggests we can infer the Secretary's desire to assert the statute of limitations from his silence in the face of Mr. Paez's petition. Dissenting Op. at 7. But the Secretary's silence does not come from the petition or any attached exhibits either, so considering it takes us beyond the review that Rule 4 sets out. If we go so as far as to attribute meaning to silence, then surely Rule 4's requirement that the district court order the respondent to take some action would kick in. In any event, this record contains no evidence about who monitors the email address listed on the docket or whether anyone from the Florida Attorney General's office reviewed Mr. Paez's petition. We have no confidence that this record supports an inference that the statute of limitations has been invoked in these circumstances.[4]

Our holding is consistent with the Supreme Court's recognition in Day "that district courts are permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner's habeas petition." 547 U.S. at 209, 126 S. Ct. at 1684; see also Jackson v. Sec'y, Dep't of Corr., 292 F.3d 1347, 1349 (11th Cir. 2002) (per

[4] Judge Traxler's point that "the State has never indicated a desire to waive the limitations bar" is well taken. Dissenting Op. at 7. But neither did the State indicate a desire to assert it in the District Court. This is why we made clear above and do so again here that the Secretary may assert the untimeliness of Mr. Paez's petition on remand.

curiam). In Day, a State incorrectly conceded a § 2254 petition's timeliness due to a miscalculation of the statute of limitations. 547 U.S. at 203, 126 S. Ct. at 1680. A magistrate judge noticed the error, raised it sua sponte, and recommended dismissing the petition as untimely, which the district court subsequently did. Id. at 204, 126 S. Ct. at 1680–81. The Supreme Court affirmed, considering it within the court's discretion to raise the time bar sua sponte when the State makes an "inadvertent error," for example, "a miscalculation [of the statute of limitations] that was plain under Circuit precedent." Id. at 211, 126 S. Ct. at 1685.

But at the same time it recognized a district court's discretion to raise timeliness sua sponte, the Day Court also recognized that this discretion has limits. Before a district court may "act[] on its own initiative," Day holds the district court "must accord the parties fair notice and an opportunity to present their positions." Id. at 210, 126 S. Ct. at 1684. The District Court failed to honor that limitation here.

This limitation tracks Rule 4's requirements. Day confirms that a court must seek the parties' position on timeliness before dismissing a § 2254 petition on that ground. Id. at 210. Day's ruling on this point is in keeping with the usual practice that litigants, not courts, advance claims and defenses. As the Supreme Court explained in a post-Day case, "a federal court does not have carte blanche to depart from the principle of party presentation basic to our adversary system." Wood v.

Milyard, 566 U.S. 463, 472, 132 S. Ct. 1826, 1833 (2012). Indeed, in Wood, the Supreme Court ruled the Tenth Circuit abused its discretion by dismissing a habeas petition on timeliness grounds that the State deliberately and intelligently waived. Id. at 466, 132 S. Ct. at 1830; see also Burgess v. United States, 874 F.3d 1292, 1298 (11th Cir. 2017) ("[A] court may not override a State's deliberate waiver" of timeliness. (quotation marks omitted)). Just as the District Court here would have abused its discretion if it overrode the Secretary's choice to waive timeliness, it abused its discretion by asserting the defense on the Secretary's behalf without knowing the Secretary's position. Both approaches depart equally from the principle of party representation.

The dissenting opinion says Day does not control. Dissenting Op. at 4. We certainly agree that Day does not answer the precise question before us. We simply observe that our opinion is consistent with the principles set forth in Day, so we believe we have the better reading of Rule 4.

In short, Rule 4 and Day make no allowance for a district court to dismiss a § 2254 petition on timeliness grounds without first ordering the State to respond in some way, though district courts have broad discretion to choose the form of the response. The District Court abused its discretion here when it dismissed the petition without ordering any response from the Secretary.

III.

The District Court went beyond what Rule 4 and Day allow—and thus abused its discretion—when it dismissed Mr. Paez's petition without ordering the Secretary to respond in some form. We therefore **VACATE** the dismissal of Mr. Paez's habeas petition and **REMAND** for further proceedings consistent with this opinion. On remand, the District Court must order the Secretary to respond to Mr. Paez's petition. We express no view on the form that response should take, nor about the timeliness of Mr. Paez's petition. And we reiterate that nothing precludes the Secretary from raising the statute of limitations as a defense to Mr. Paez's petition.

TRAXLER, Circuit Judge, concurring in part and dissenting in part:

I concur in Section II.A. of the majority's opinion. I agree that the district court properly took judicial notice of the online state court dockets to determine the timeliness of Mr. Paez's petition for habeas relief under 28 U.S.C. § 2254. I also agree that the best practice would be for the magistrate judge to attach copies of the records that were relied upon in making the report and recommendation. With respect, however, I dissent from the majority's holding that the district court abused its discretion in dismissing Mr. Paez's § 2254 petition as untimely without first determining whether the claims were meritorious and then requiring the State to affirmatively respond on the timeliness issue.

Through 28 U.S.C. § 2243 and Rule 4 of the Rules Governing § 2254 Proceedings, Congress made clear that § 2254 petitions should be expeditiously evaluated by district courts and summarily dismissed without requiring a response by the state when "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rules Governing § 2254 Cases, R. 4. If so, "the judge must dismiss the petition and direct the clerk to notify the petitioner" of the summary action. Id. If not, "the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." Id. Copies of the petition and any order are

served "on the respondent and on the attorney general or other appropriate officer of the state involved." Id.

Mr. Paez initiated his § 2254 petition by completing the standard form habeas petition (Form AO 251 (Rev. 01/15)). The Form instructs the petitioner that, "If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition." Doc. 1: 14. Mr. Paez answered simply, and without explanation, that "[t]he present petition is timely filed." Id. The Criminal Appeals Division of the Florida Attorney General was designated for notifications of action by electronic mail and, as is not uncommon, the petition was immediately assigned to a magistrate judge to conduct the preliminary review under Rule 4. The magistrate judge reviewed the § 2254 petition, took judicial notice of the state court docket, and determined that the petition was filed beyond the one-year limitations period established by Congress in 28 U.S.C. § 2244(d)(1)-(2). Accordingly, a report and recommendation was prepared for the district court, recommending summary dismissal after outlining the pertinent dates which demonstrated the untimeliness of the petition. Mr. Paez was provided with a copy of the report and recommendation. The magistrate judge's action was also docketed, and the docket entry likewise reflected the summary recommendation "that this petition for writ of habeas corpus be summarily dismissed with prejudice as time-barred pursuant to . . . § 2244(d)(1)-

(2)." DS: 4. Mr. Paez filed objections to the report and recommendation, but he did not contest the dates of his state court proceedings relied on by the magistrate judge to show untimeliness, nor did he indicate any inability to verify the information in the state docket sheets. The district court agreed with the magistrate judge's recommendation and dismissed the petition.

In my opinion, Mr. Paez was provided all the required notice and opportunity to be heard on the issue of timeliness, and neither Rule 4 nor the Supreme Court's decision in Day v. McDonough, 547 U.S. 198 (2006), required the district court to consider the merits of the claims first, or to obtain a response from the State before dismissing the petition as plainly insufficient.

First, Rule 4 does not textually restrict summary dismissals to merits-based deficiencies. As noted above, the district court must dismiss the petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rules Governing § 2254 Cases, R. 4; see also Kilgore v. Attorney Gen. of Colo., 519 F.3d 1084, 1089 (10th Cir. 2008) (A petition may be dismissed under Rule 4 for untimeliness if it is "clear from the face of the petition itself."). If such a deficiency is not apparent at the initial screening stage, the district court "must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." Rules Governing § 2254 Cases, R. 4. This latter directive "afford[s] the judge flexibility

in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by the respondent, which may show" a procedural deficiency and, thereby, "avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition." Rules Governing § 2254 Cases, R. 4 comm. n.; see also Day, 547 U.S. at 207 & n.6. In my view, this flexibility to order a limited response based upon additional information furnished by the respondent does not detract from the purpose of Rule 4. The district judge must still summarily dismiss the petition if it is apparent from the face of the petition, its exhibits, and any dates of which the court properly takes judicial notice, that the petition is untimely. So long as the petitioner has had notice and an opportunity to respond to the procedural deficiency, the judge must dismiss the petition and may do so without first examining the substantive merits of the claims.

Nor, in my view, does the Supreme Court's decision in Day require the judge to order the State to respond to the timeliness issue, and either affirmatively assert or waive the defense, before the court dismisses the action at the Rule 4 screening stage. The pertinent question in Day was "whether a federal court lacks authority, on its own initiative, to dismiss a habeas petition as untimely, [if] the State has answered the petition without contesting its timeliness," 547 U.S. at 202, or has

erroneously conceded the timeliness issue, see id. at 205. This quite different posture raised questions as to whether the State meant to waive its limitations defense, or merely overlooked it; whether the petitioner would be "significantly prejudiced by the delayed focus on the limitation issue"; and whether the "interests of justice would be better served by addressing the merits or by dismissing the petition as time barred." Id. at 210 (internal quotation marks omitted). As the Court explained, the threshold barriers to habeas relief (the limitations defense, exhaustion of state remedies, procedural default, and nonretroactivity) "implicate values beyond the concerns of the parties," such as "judicial efficiency and conservation of judicial resources, safeguard[ing] the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lend[ing] finality to state court judgments within a reasonable time." Id. at 205-06 (internal quotation marks and alteration omitted). Rather than adopt "an inflexible rule requiring dismissal whenever AEDPA's one-year clock has run, or, at the opposite extreme, a rule treating the State's failure initially to plead the one-year bar as an absolute waiver," the Court adopted an "intermediate approach" that allows, but does not require, the court to sua sponte raise the statute of limitations bar, id. at 208, provided the court also considers the additional concerns that are present when the state has forfeited the defense by failing to raise it in its answer. In sum, "Day create[d] an exception to the general rule of forfeiture, and thus allows a court to consider

untimeliness when the state has failed to plead this defense." Kilgore, 519 F.3d at 1089.

This case involves the quite different question of whether the district court may dismiss a habeas petition as plainly insufficient at the Rule 4 screening stage of the § 2254 proceedings, before the government had filed a response at all and after the petitioner was provided with notice of the statute of limitations and the recommendation that the petition should be dismissed on that basis. See Kilgore, 519 F.3d at 1089 (observing that "Day does not determine . . . whether a district court may, on its own initiative, dismiss an application as untimely before the state responds"). As noted above, I believe that it can, so long as (1) it is clear from the face of the petition, attached exhibits, and judicially noticeable facts, that the petition is untimely, and (2) the petitioner is given notice and an opportunity to dispute the untimeliness of the petition.[1]

Here, Mr. Paez was provided ample notice and opportunity to explain why his petition was timely in his Form petition and again when he was given the opportunity to respond to the magistrate judge's report and recommendation that the petition be

[1] Day appears to contemplate this interpretation of the Rule as well. Petitioner Day argued that the district court lost authority to sua sponte raise AEDPA's time bar once an answer has been ordered and filed by the State. "Were we to accept Day's position," the Court noted, "courts would never (or, at least, hardly ever) be positioned to raise AEDPA's time bar sua sponte," because "information essential to the time calculation is often absent . . . until the State has filed, along with its answer, copies of documents from the state-court proceedings." Day v. McDonough, 547 U.S. 198, 207 n.6 (2006). Here, that information was available at the initial screening stage, requiring no response from the State.

summarily dismissed as untimely. Moreover, the Attorney General was notified of the court's action, had an opportunity to respond (including an opportunity to inform the district court of any intention to waive the timeliness defense), and remained silent. And to this day, no one contests that the petition was untimely, and the State has never indicated a desire to waive the limitations bar.

For these reasons, I see no abuse of discretion by the district court under Rule 4 or the Supreme Court's decision in Day. Mr. Paez was given "due notice and a fair opportunity to show why the limitation period should not yield dismissal of the petition," and "nothing in the record suggests that the State 'strategically' withheld the defense or chose to relinquish it." Day, 547 U.S. at 210-11. In my view, all parties' rights were accommodated under 28 U.S.C. § 2243, Rule 4, and Day, and the system worked just as Congress intended.

APPENDIX C —

Opinion of the United States Court of Appeals

For the Eleventh Circuit dated December 23, 2019

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15705

D.C. Docket No. 2:16-cv-14259-RLR

ROLANDO GUS PAEZ,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

Before MARTIN, TJOFLAT, and TRAXLER,* Circuit Judges.

The Opinion issued in this matter on July 31, 2019 is VACATED. A replacement opinion will be forthcoming.

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*The Honorable William B. Traxler, Jr., United States Circuit Judge for the Fourth Circuit, sitting by designation.

APPENDIX D —

Opinion of the United States Court of Appeals

For the Eleventh Circuit dated January 7, 2020

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15705

D.C. Docket No. 2:16-cv-14259-RLR

ROLANDO GUS PAEZ,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

(January 7, 2020)

Before MARTIN, TJOFLAT, and TRAXLER,[*] Circuit Judges.

PER CURIAM:

[*] Honorable William B. Traxler, Jr., United States Circuit Judge for the Fourth Circuit, sitting by designation.

We publish this opinion in place of our July 31, 2019 opinion, which was vacated by order of the Court on December 23, 2019.

Rolando Gus Paez is a state inmate who filed a petition under 28 U.S.C. § 2254 for a writ of habeas corpus that looks to be untimely. His case presents the question of whether in this circumstance a district court may, on its own initiative and without hearing from the State, decide that the statute of limitations bars the petition. This District Court did just that, and dismissed the petition filed by Mr. Paez without ordering a response from the Secretary of the Florida Department of Corrections.

After oral argument and careful consideration, we affirm the District Court.

I.

In 2004, Mr. Paez pled no contest to second degree murder and two cocaine charges in St. Lucie County (Florida) Circuit Court. The state court sentenced him to four years imprisonment followed by two years of "community control." In 2010, while still on community control, Mr. Paez was arrested for violating the terms of his supervised release. In response, the state court revoked his community control and sentenced him to 25 years on the murder charge and 15 years on the cocaine charges, all to run concurrently.

After years of state postconviction litigation over the sentences imposed for his violation of community control, in 2016 Mr. Paez filed a § 2254 petition

asserting three claims. First, he said the state court lacked jurisdiction to sentence him for the violation of his community control. Second, he said his sentence for community control violation in turn violated his double jeopardy rights. And third, he argued he is actually innocent of the crimes charged. Mr. Paez's petition also set forth some of the relevant dates his state postconviction motions were filed and decided. No attorney appeared on behalf of the Secretary of the Florida Department of Corrections, who has custody of Mr. Paez. An email address belonging to the Florida Attorney General does appear on the docket, and some filings are marked as having been sent to this address. However, the Florida Attorney General never filed anything in the case.

Mr. Paez's petition was assigned to a magistrate judge. Rule 4 of the Rules Governing Section 2254 Proceedings in the United States District Courts required the magistrate judge to do a preliminary assessment of Mr. Paez's petition and dismiss "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." After conducting this review, the magistrate judge took it upon himself to calculate the timeliness of Mr. Paez's petition.

A § 2254 petition must be filed within a year of, as relevant here, the date the challenged conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). The limitations period is tolled while properly filed state postconviction motions are pending. Id. § 2244(d)(2). The magistrate judge took judicial notice of the filing

dates of Mr. Paez's postconviction motions and the dates of orders resolving those motions, as reflected in state court docket entries for Mr. Paez's criminal cases. These docket sheets were available online but never made a part of the record.

The dates Mr. Paez gave in his petition together with those reflected on the electronic dockets made it appear that his petition was untimely. Based on those dates, the magistrate judge recommended sua sponte dismissing Mr. Paez's petition under Rule 4 without ordering the Secretary to respond. The District Court adopted the Report and Recommendation over Mr. Paez's objections.

This appeal followed. Our Court granted Mr. Paez a certificate of appealability on the issue of whether the District Court erred in dismissing the petition as untimely. Because Mr. Paez was proceeding pro se, the Court appointed Joseph A. DiRuzzo, III, to represent him on appeal. We appreciate Mr. DiRuzzo's diligent representation of Mr. Paez and his service to the Court.

II.

This case presents two distinct issues. The first is whether the District Court could properly take judicial notice of the online state court dockets in Mr. Paez's criminal cases. The second is whether it was error to dismiss Mr. Paez's petition as untimely without ordering the Secretary to respond. We review a district court's decision to take judicial notice of a fact for abuse of discretion. Lodge v. Kondaur Capital Corp., 750 F.3d 1263, 1273 (11th Cir. 2014). We also review a district

court's decision to sua sponte raise the statute of limitations for abuse of discretion. Day v. McDonough, 547 U.S. 198, 202, 126 S. Ct. 1675, 1679–80 (2006). Our review leads us to conclude the District Court acted properly when it took notice of the state court dockets as well as when it sua sponte dismissed the petition without ordering a response from the Secretary.

A.

Federal Rule of Evidence 201 permits a court to "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). State court records of an inmate's postconviction proceedings generally satisfy this standard. See Cunningham v. Dist. Att'y's Office, 592 F.3d 1237, 1255 (11th Cir. 2010); Moore v. Estelle, 526 F.2d 690, 694 (5th Cir. 1976) ("[W]e take judicial notice of prior habeas proceedings brought by this appellant in connection with the same conviction. This includes state petitions, even when the prior case is not made part of the record on appeal . . . ." (citations omitted))[1]; see also Porter v. Ollison, 620 F.3d 952, 954–55 (9th Cir. 2010) (noticing "any state

[1] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

court dockets or pleadings that have been located (including on the Internet) and for which it is proper to take judicial notice").

The dates the District Court noticed from the online state court dockets constitute judicially noticeable facts under Rule 201. The dockets can be found on the website for the Clerk of the St. Lucie County Circuit Court, who is the public officer responsible for maintaining records of the St. Lucie County Circuit Court.[2] See Fla. Const. art. VIII, § 1(d). The dockets reflect the dates of proceedings in Mr. Paez's cases, from first appearance through to the Florida appellate courts' resolution of his postconviction motions. The docket entries also have links to electronic versions of many of Mr. Paez's filings, as well as to many state trial and appellate court orders on Mr. Paez's postconviction motions. We have no reason to think these docket entries do not accurately reflect the dates in Mr. Paez's cases. The District Court could properly notice the state court docket sheets in these circumstances.[3]

[2] The docket entries can be found at: https://courtcasesearch.stlucieclerk.com/. Mr. Paez's case numbers are 56-2003-CF2667B and 56-2003-CF2934A. We were able to access the docket sheets using these case numbers with no trouble.

[3] This ruling is consistent with non-binding opinions from prior panels of this Court. See Boyd v. Georgia, 512 F. App'x 915, 917 (11th Cir. 2013) (per curiam) (unpublished); United States v. Brown, 526 F.3d 691, 711–13 (11th Cir. 2008), vacated on other grounds, 556 U.S. 1150, 129 S. Ct. 1668 (2009); United States v. Ayuso, 272 F. App'x 833, 835–36 (11th Cir. 2008) (per curiam) (unpublished).

However, we caution that "the taking of judicial notice of facts is, as a matter of evidence law, a highly limited process. The reason for this caution is that the taking of judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court." Shahar v. Bowers, 120 F.3d 211, 214 (11th Cir. 1997) (per curiam) (en banc). "In order to fulfill these safeguards, a party is entitled to an opportunity to be heard as to the propriety of taking judicial notice." Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC, 369 F.3d 1197, 1205 (11th Cir. 2004) (quotation marks omitted and alteration adopted). Rule 201 does not require courts to warn parties before taking judicial notice of some fact, but, upon the party's request, it does require an opportunity to be heard after the court takes notice. Fed. R. Evid. 201(e).

These safeguards have particular importance in the context of determining the timeliness of § 2254 petitions. We know that online state court dockets may not always reflect the correct filing date for purposes of calculating the statute of limitations. For example, Florida and this Court both follow the "mailbox rule," which deems inmate papers filed the date of mailing or, absent an indication of the mailing date, the day the inmate signed them. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001) (per curiam); Haag v. State, 591 So. 2d 614, 617 (Fla. 1992); Waters v. Dep't of Corr., 144 So. 3d 613, 617 (Fla. 1st DCA 2014). And by its nature, the docket will show the date a pleading was docketed

rather than the date it was mailed or signed. On top of that, inmates may not have ready access to their legal papers, leaving them unable to dispute the accuracy of any docket entry. Neither may they have access to an Internet connection. This would make disputing or even reviewing an online docket entry impossible where, as happened here, a district court fails to make the docket sheets part of the record. We think the best practice would be to include copies of any judicially noticed records as part of the Order that relies upon them, so as to ensure the inmate receives them. Cf. Rodriguez v. Fla. Dep't of Corr., 748 F.3d 1073, 1076–77 (11th Cir. 2014) (holding the State must serve all documents referenced in an answer to a § 2254 petition on the petitioner).

While we urge caution, we conclude proper safeguards were followed in this case. Mr. Paez 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. Mr. Paez did not ask to be heard. See Fed. R. Evid. 201(e) (requiring a hearing where the party requests one). Neither did he dispute the accuracy of the docket entries the magistrate judge relied upon. Finally, Mr. Paez gave no indication he lacked the ability to dispute the docket sheets—because of, say, his lack of an Internet connection. The docket entries here were properly noticed, and the procedure followed here gave Mr. Paez an opportunity to ask to be heard on the propriety of judicial notice. Thus, we see no abuse of discretion.

B.

Having concluded the docket entries relied upon by the District Court were properly noticed, we now turn to the second issue. That is, whether the District Court erred in sua sponte dismissing Mr. Paez's § 2254 petition without ordering the Secretary to respond.

Rule 4 requires district courts to dismiss § 2254 petitions without ordering the State to respond "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." This preliminary review calls on a district court to perform a screening function, ordering summary dismissal where a petition makes no meritorious claim to relief. See Rules Governing § 2254 Cases, R. 4 advisory committee notes ("[I]t is the duty of the court to screen out frivolous applications."). The procedure serves to "eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Id.

To survive Rule 4 review, a § 2254 petition must set forth facts that, if true, would establish a constitutional violation entitling the petitioner to relief. See Borden v. Allen, 646 F.3d 785, 810 (11th Cir. 2011) (holding that a § 2254 petition must comply with the "fact pleading requirements of [Habeas] Rule 2(c) and (d)" to survive dismissal under Rule 4). If a petition does not set forth a sufficient factual basis for habeas relief, the petition is "legally insufficient on its face," and the district court must dismiss it. McFarland v. Scott, 512 U.S. 849, 856, 114 S.

Ct. 2568, 2572 (1994). Dismissal under Rule 4 represents "a judgment that the claims presented are nonmeritorious" based on the facts alleged. Borden, 646 F.3d at 812.

We hold that the District Court did not err by sua sponte dismissing Mr. Paez's § 2254 petition after giving him notice of its decision and an opportunity to be heard in opposition. Our conclusion is supported by the text of Rule 4, the Advisory Committee Notes to Rule 4, and Supreme Court precedent.

First, the text of Rule 4 does not restrict summary dismissals to merits-based deficiencies. As we've already noted, the district court must dismiss a § 2254 petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." Rules Governing § 2254 Cases, R. 4. Both a procedural bar and a merits-based deficiency could lead a district court to conclude that the petitioner is "not entitled to relief." See id.

Our reading of the rule is supported by the Advisory Committee Notes. In 1976, when the rule was adopted, the Advisory Committee recognized the suggestion "that an answer should be required in every habeas proceeding." Rules Governing § 2254 Cases, R. 4 advisory committee notes. The Advisory Committee rejected this idea, saying that district courts have a "duty . . . to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Id. In support of this broad

interpretation of Rule 4, the Advisory Committee cited Allen v. Perini, 424 F.2d 134 (6th Cir. 1970). In Allen, the Sixth Circuit held that a district court has the authority to dismiss a "petition sua sponte for failure to exhaust State remedies," even if the State has not responded to the petition and raised that procedural bar to relief. Id. at 138–39. As the Sixth Circuit put it, "[if] at any time during the course of a habeas corpus proceeding the District Court finds that the prisoner has not exhausted the remedies available to him in the courts of the State, the petition should be dismissed." Id. The Allen court went on to explain that a response from the State is not needed "when the petition is frivolous, or obviously lacking in merit, or where . . . the necessary facts can be determined from the petition itself." Id. at 141. This description clearly encompasses the case we consider here, where the petition was dismissed for lack of timeliness.

Finally, our interpretation of Rule 4 is aligned with Supreme Court precedent. In Day, the Supreme Court confronted the question of "whether a federal court lacks authority, on its own initiative, to dismiss a habeas petition as untimely, [if] the State has answered the petition without contesting its timeliness," 547 U.S. at 202, 126 S. Ct. at 1679, or has erroneously conceded the timeliness issue, see id. at 205, 126 S. Ct. at 1681. The Supreme Court ruled that a district court may act on its own initiative to dismiss a petition in such a circumstance, provided the court "accord[s] the parties fair notice and an opportunity to present

their positions." Id. at 210, 126 S. Ct. at 1684. The Supreme Court rejected the petitioner's countervailing interpretation of Rule 4, in part because it would make it nearly impossible for courts "to raise AEDPA's time bar sua sponte." Id. at 207 n.6, 126 S. Ct. at 1682 n.6. This reasoning applies with even greater force at the Rule 4 stage, where district courts "must" dismiss petitions that plainly present no entitlement to review.

Other Circuits agree that a district court may sua sponte dismiss a § 2254 petition if the petition's untimeliness is "clear from the face of the petition itself." Kilgore v. Att'y Gen. of Colo., 519 F.3d 1084, 1089 (10th Cir. 2008); see Valdez v. Montgomery, 918 F.3d 687, 693 (9th Cir. 2019) (holding that the district court did not err by sua sponte dismissing plainly untimely § 2254 petition where the court provided the petitioner with "adequate notice and an opportunity to respond" (quotation marks omitted)); cf. Shelton v. United States, 800 F.3d 292, 295 (6th Cir. 2015) (holding that the district court erred by sua sponte dismissing habeas petition on timeliness grounds because the petitioner did not have an "opportunity to challenge the arguments that the district court invoked in finding the motion untimely"). And our pre-Day precedent does not suggest otherwise. See Jackson v. Sec'y for Dep't of Corr., 292 F.3d 1347, 1349 (11th Cir. 2002) (per curiam) (holding that, "even though the statute of limitations is an affirmative defense, the district court may review sua sponte the timeliness of the section 2254 petition.").

Here, Mr. Paez was provided ample notice and opportunity to explain why his petition was timely in his form petition and again when he was given the opportunity to respond to the magistrate judge's Report and Recommendation that his petition be summarily dismissed as untimely. See Magourik v. Phillips, 144 F.3d 348, 359 (5th Cir. 1998) (holding that plaintiff "was afforded both notice and a reasonable opportunity to oppose" procedural default when he was given an opportunity to object to magistrate judge's Report and Recommendation that "placed [him] on notice that procedural default was a potentially dispositive issue"). Beyond that, the Secretary was notified of the court's action and had an opportunity to respond, including an opportunity to inform the District Court if it intended to waive the timeliness defense. The Secretary remained silent. To this day, no one contests that the petition was untimely, and the State has never indicated a desire to waive the limitations bar. The District Court thus complied with Day and Rule 4 and its dismissal was not an abuse of discretion.

III.

For these reasons, the District Court did not abuse its discretion when it dismissed Mr. Paez's § 2254 petition without ordering the Secretary to respond in some form. We therefore **AFFIRM** the dismissal of his petition.

APPENDIX E —

United States Court of Appeals for the Eleventh Circuit

Denial of Petitioner's Petition for Rehearing *En Banc*

dated April 9, 2020

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15705-AA

ROLANDO GUS PAEZ,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, TJOFLAT and TRAXLER*, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

*Honorable William B. Traxler, Jr., United States Circuit Judge for the Fourth Circuit, sitting by designation.

ORD-42

APPENDIX F —

Report and recommendation of

the United States District Court for the Southern District of Florida,

dated July 7, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-Civ-14259-ROSENBERG
MAGISTRATE JUDGE P.A. WHITE

ROLANDO GUZ PAEZ, :

Petitioner, :

v. : REPORT OF MAGISTRATE JUDGE

JULIE JONES, :

Respondent. :

I. Introduction

Rolando Gus Paez, who is presently confined at Hamilton Correctional Institution in Jasper, Florida, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his convictions and sentences for violations of probation in case numbers 56-2003-CF2667B and 56-2003-CF2934A, entered in the Nineteen Judicial Circuit Court of Saint Lucie County.

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

Upon review of the petition for writ of habeas corpus filed by a person in state custody and pursuant to 28 U.S.C. §2243 and Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, it appears that petitioner is not entitled to relief in this habeas corpus proceeding.[1] From the face of the

[1]Section 2243, governing applications for writ of habeas corpus, provides:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, *unless it appears from the application that the applicant or person is not entitled thereto.*

28 U.S.C. §2243 (emphasis added). Rule 4 of the Rules Governing Section 2254

petition and state court records which this Court can take judicial notice, it is apparent that Petitioner has filed his petition beyond the applicable limitations period as set forth in 28 U.S.C. §2244(b). Courts may *sua sponte* consider the issue of the timeliness of a habeas petition. Day v. McDonough, 547 U.S. 198, 199 (2006)(holding that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition, even after the pre-answer, initial screening stage of the habeas proceeding). See also Jackson v. Secretary for Dept. of Corrections, 292 F.3d 1347, 1349 (11th Cir. 2002)(holding that the district court possessed the discretion to raise sua sponte the timeliness issue). Since summary dismissal is warranted, the respondent has not been ordered to file a response to the habeas corpus petition, addressing the claims raised.

II. Claims

Ground One:	The trial court lacked jurisdiction to deviate from the negotiated plea for a technical violation of community control.
Ground Two:	Petitioner's present sentence was imposed in violation of double jeopardy.
Ground Three:	Petitioner is actually and factually innocent.

Cases provides in pertinent part:

> The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. *If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.*

RULES GOVERNING SECTION 2254 CASES, RULE 4 (emphasis added). A district court has the power under Rule 4 of the Rules Governing Section 2254 Cases "to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state." Kiser v. Johnson, 163 F.3d 326, 328 (5th Cir. 1999). See also Bundy v. Wainwright, 808 F.2d 1410, 1414-15 (11th Cir. 1987)(stating that court entertaining application for writ of habeas corpus may either grant the writ, or issue order directing respondent to show cause why it should not be granted, or it may summarily dismiss petition for facial insufficiency).

III. Procedural History

Petitioner entered a consolidated plea to one count of second degree murder in case number 56-2003-CF2667B, and one count of delivery of cocaine and one count of possession of cocaine in case number 56-2003-CF2934A. See Petition at ¶¶1-6 (DE# 1); State v. Paez, Case Nos. 56-2003-CF2667B and 56-2003-CF2934A (Fla. 19th Jud. Cir. Ct.); www.courtcasesearch.stlucieclerk.com. He appeared for sentencing on December 22, 2004, and was sentenced to a total term of imprisonment of four years on each count followed by two years of community control, all to run concurrent. Id. Petitioner did not pursue a direct appeal from his original convictions and sentences.

On October 27, 2008, violations of probation were filed in both of Petitioner's criminal cases. See State v. Paez, Case Nos. 56-2003-CF2667B and 56-2003-CF2934A, DE##129-130 & 106-07, respectively.[2] On February 27, 2009, the trial court revoked Petitioner's probation and sentenced him to six months' in county jail, to be followed by ten and eight years' community control in his two cases, respectively. Id. at DE##154 & 132. Petitioner again did not appeal.

On August 25, 2010, Petitioner was arrested for yet another probation violation. See Id. at DE##170-173 & 147-150. On December 15, 2010, his probation was again revoked, and this time Petitioner was sentenced to 25 years' in prison on the murder charge, and 15 years on the drug charges, all to run concurrent. Id. at DE##193, 220, 222 & 168, 189, 190). The judgments and sentences were filed on December 23, 2010. Id. at DE##227 & 196.

[2]Unless otherwise noted, the docket entry numbers corresponding to Case No. 2667B will be listed first.

Sometime in mid-December of 2010, Petitioner filed motions to modify or reduce his sentences pursuant to Fla.R.Crim.P. 3.800(c).[3] Those motions were denied on January 24, 2011. Id. at DE##233 & 200.

On May 20, 2011, Florida's Fourth District Court of Appeal received a petition for belated appeal in Petitioner's two criminal cases. http://www.4dca.org/, Case No. 4D11-1832.[4] That petition was referred to the circuit court for a report and recommendation, and was ultimately denied. Id.; see also DE#1, ¶11(a).

Thereafter, on December 15, 2011, Petitioner filed a state motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. DE#1, ¶11(b)(3).[5] Petitioner then amended that motion. See Case

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[3]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. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); see also Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)(setting forth the "prison mailbox rule"). Here, it appears that Petitioner's 3.800(c) motion was initially docketed in case number 2934A, and that a supplement Petitioner later filed was docketed in case number 2667B. See Case No. 2934A, DE#194; Case No. 2667B, DE#232. Moreover, the Court cannot determine the precise date of filing pursuant to the mailbox rule, because the Court does not have copies of the pleadings themselves. However, neither of these issues have any bearing on the outcome of this case since, as will be explained below, Petitioner's Rule 3.800(c) motion did not toll the limitations period.

[4]Again, the Court cannot determine the precise date of filing pursuant to the prison mailbox rule, because the Court does not have a copy of the petition itself. But this again does not have any bearing on the outcome of this case since, as will be explained below, Petitioner's petition for belated appeal similarly did not toll the limitations period because it was denied.

[5]The motion was not received and docketed by the trial court until December 19, 2011. See Case No. 2667B, DE#272. Again, the Court does not have a copy of Petitioner's 3.850 motion in order to independently determine the precise filing date pursuant to the prison mailbox rule. However, since the motion was received and docketed only four days after Petitioner alleges it was filed (presumably pursuant to the mailbox rule), and because this seems like a plausible mailing time, the Court gives Petitioner the benefit of the doubt and accepts his representation which is, after all, made under penalty of perjury.

No. 2667B, DE##290, 291, 299, 300.[6] On May 3, 2013, the state trial court dismissed the motion. Case No. 2667B, DE#301; Case No. 2934A, DE#299.

Petitioner did not appeal the trial court's May 3, 2013 order dismissing his first Rule 3.850 motion. Rather, sometime in early June of 2013, Petitioner filed a second 3.850 motion. See Id. at DE##302 (in both cases).[7] That motion was denied by the trial court on March 3, 2014. Id. at DE##309 (in both cases).

On January 8, 2015, Florida's Fourth District Court of Appeal received a petition for belated appeal of the state trial court's order denying Petitioner's second 3.850 motion. http://www.4dca.org/, Case No. 4D15-51. On February 5, 2015, Florida's Fourth District granted the petition, and Petitioner's appeal thereafter proceeded under case number 4D15-815. On September 3, 2015, the Court of Appeal affirmed the state trial court's order denying Petitioner's second 3.850 motion. Id., Case No. 4D15-815. Petitioner's motion for re-hearing was denied on October 16, 2015, and the mandate issued on November 6, 2015. Id.

While Petitioner's appeal of the denial of his second 3.850 motion was pending, Petitioner filed a motion to correct illegal sentence in the trial court, pursuant to Fla.R.Crim.P. 3.800(a).

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[6]It appears that Petitioner's motion was initially only docketed in case number 2667B. However, the Court again gives Petitioner the benefit of the doubt that Petitioner filed his motion in both cases, since the matters were consolidated and the order resolving this motion was docketed in both matters. See Case No. 2667B, DE#3001; Case No. 2934A, DE#299.

[7]Again, because the Court does not have copies of the pleadings themselves, the Court cannot determine the precise date that Petitioner's second 3.850 motion was filed pursuant to the prison mailbox rule. However, this again does not change the outcome of this case since, as set forth *infra*, the Court is giving Petitioner the benefit of the doubt and presuming that Petitioner's 3.850 proceedings were pending from the date of the filing of his first 3.850 motion, through the conclusion of those proceedings with the issuance of the mandate affirming the trial court's denial of his second 3.850 motion.

See Case No. 2667B, DE#326, 329, 331; Case No. 2934A, DE#326.[8] On February 5, 2016, after the Fourth District's mandate affirming the state trial court's denial of Petitioner's 3.850 motion, the state trial court denied Petitioner's then-pending 3.800(a) motion. Case No. 2667B, DE#343. Petitioner did not file an appeal of that order. Rather, on June 21, 2016, Petitioner filed the instant federal petition for writ of habeas corpus.

IV. Discussion

Because Petitioner filed his federal habeas petition after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") governs this proceeding. See Wilcox v. Fla.Dep't of Corr., 158 F.3d 1209, 1210 (11th Cir. 1998)(per curiam). The AEDPA imposed for the first time a one-year statute of limitations on petitions for writ of habeas corpus filed by state prisoners.[9]

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[8]It appears that, although Petitioner's Petitioner's initial 3.800(a) motion was docketed in both of his criminal cases, all subsequent proceedings relating to this motion were docketed in Case No. 2667B only.

[9]The statute provides that the limitations period shall run from the latest of —

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

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 ...."). Once the limitations period is triggered, the AEDPA clock begins to run.

A properly filed application for state post-conviction relief stops the AEDPA clock, and tolls the limitations period. See 28 U.S.C. §2244(d)(2)(tolling the limitation period for "[t]he 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").[10] The AEDPA clock and limitations period then resumes running when the state's highest court issues its mandate disposing of the motion for post-conviction relief.[11] Lawrence v. Florida, 549 U.S. 327, 331-32, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007). In order to toll the limitations period, however, the state motion for post-conviction relief must be filed before the limitations period expires. See Tinker v. Moore, 255 F.3d 1331, 1332 (11th Cir. 2001)(holding that a state petition filed after expiration of the federal limitations period cannot toll the period, because there is no period remaining to be tolled); Webster v. Moore, 199 F.3d 1256, 1258-60 (11th Cir. 2000)(holding that even

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28 U.S.C. §2244(d)(1).

[10]A properly-filed application is defined as one whose "delivery and acceptance are in compliance with the applicable laws and rules governing filings," which generally govern such matters as the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. Artuz v. Bennett, 531 U.S. 4 (2000)(overruling Weekley v. Moore, 204 F.3d 1083 (11th Cir. 2000)).

[11]In cases where the defendant does not file a notice of appeal, the AEDPA's limitations period resumes again when the time to seek appellate review of the order denying post-conviction relief expires. See Cramer v. Sec'y, Dep't of Corr., 461 F.3d 1380, 1383 (11th Cir. 2006). In cases where the defendant moves to voluntarily dismiss the application for state post-conviction relief, the limitations period resumes again on the date that the trial court grants the voluntary dismissal. See Stafford v. Thompson, 328 F.3d 1302, 1303 (11th Cir. 2003).

properly filed state court petitions must be pending in order to toll the limitations period), cert. denied, 531 U.S. 991 (2000).[12]

In this case, the limitations period began to run from the date when Petitioner's judgment of conviction became final. In such cases, the AEDPA "marks finality as of 'the conclusion of direct review of the expiration of the time for seeking such review[.]'" Gonzalez v. Thaler, ___ U.S. _____, 132 S.Ct. 641, 653 (2012); see also 28 U.S.C. §2244(d)(1)(A); Jimenez v. Quarterman, 555 U.S. 113, 118-21, 129 S.Ct. 681, 685-86, 172 L.Ed.2d 475 (2009). In cases where a criminal defendant pursues direct review to the United States Supreme Court, judgment becomes final when the Supreme Court affirms the conviction on the merits or denies the petition for certiorari. Gonzalez, 132 S.Ct. at 653. In all other cases, the judgment becomes final when the time for pursuing direct review in the Supreme Court, or in state court, expires. Id.

Here, Petitioner did not timely appeal his judgment of conviction for the violations of probation. His convictions and sentences thus became final when the thirty-day period for seeking an appeal under the Florida Rules of Appellate Procedure expired. See Demps v. State, 696 So. 2d 1296, 1297, n.1 (Fla. 3d DCA 1997); Ramos v. State, 658 So.2d 169 (Fla. 3d DCA 1995); Caracciolo v. State, 564 So.2d 1163 (Fla. 4th DCA 1990); Gust v. State, 535 So. 2d 642 (Fla. 1st DCA 1988); Fla. R. App. P. 9.110(b) (a notice of appeal must be filed within thirty days of rendition of the order

[12]The one-year limitations period is also subject to equitable tolling in rare and exceptional cases. See Holland v. Florida, 560 U.S. 631, 130 S.Ct. 2549 (2010). In order for a habeas petitioner to establish that he is entitled to equitable tolling, he must show that: (1) he acted with reasonable diligence; and (2) "some extraordinary circumstance stood in his way and prevented timely filing." Holland, 130 S.Ct. at 2562 (internal quotation marks omitted); see also Helton v. Secretary for Dept. of Corrections, 259 F.3d 1310, 1312 (11th Cir. 2001)(stating that "[e]quitable tolling can be applied to prevent the application of the AEDPA's statutory deadline when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition."), cert. denied, 535 U.S. 1080 (2002).

to be reviewed); Fla. R. App. P. 9.020(h) ("Rendition" means the filing, not the service, of a signed written order with the clerk of the lower tribunal); see also Gonzalez, 132 S.Ct. at 653; 28 U.S.C. § 2244(d)(1)(A) (one-year period is measured from the date on which the judgment became final by the conclusion of direct review). That date was **January 22, 2011**, which is thirty days after the judgments for Petitioner's violations of probation were entered on December 23, 2010.[13] The limitations period then ran unchecked for **327 days**, until Petitioner filed his first Rule 3.850 motion for state post-conviction relief on December 15, 2011.[14] The limitations period then remained tolled until **March 7, 2016**, which is when the 30-day period for Petitioner to have sought review of the trial court's February 5, 2016 order denying his motion to correct illegal sentence pursuant to Fla.R.Crim.P. 3.800(a) expired.[15] The limitations period then ran unchecked for an

[13]Petitioner's petition for belated appeal from his judgments did not toll the limitations period, because that petition was denied. See Espinosa v. Sec'y, Dep't of Corr., 804 F.3d 1137, 1140 (11th Cir. 2015).

[14]Petitioner's January 2011 motion to modify or reduce his sentence did not toll the limitations period because it was pursuant to Fla.R.Crim.P. 3.800(a) governing discretionary sentence reductions. See Alexander v. Sec'y, Dep't of Corr., 523 F.3d 1291, 1297 (11th Cir. 2008), *abrogated on other grounds by* Wall v. Kholi, 131 S.Ct. 1278, 1283, 562 U.S. 545, 179 L.Ed.2d 252 (2011); Baker v. McNeil, 439 Fed.Appx. 786, 789 (11th Cir. 2011). But even assuming that this had been or could be construed as a tolling motion to correct illegal sentence pursuant to Fla.R.Crim.P. 3.800(a), the motion was only pending for approximately **41 days** and, as such, would make no difference in the outcome of this case. Specifically, as will be set forth below, the limitations period in this case ran unchecked for a total of **433 days** before Petitioner filed his federal petition for writ of habeas corpus. So even if Petitioner's January 2011 3.800 motion tolled the limitations period, the instant petition would still be untimely, with a total of **392 days** of untolled time having expired prior to its filing (433 - 41 = 392).

[15]The limitations remained tolled until the 30-day period for seeking review of the denial of Petitioner's 3.800(a) expired because that motion was filed while the appeal of the denial of Petitioner's Rule 3.850 motion was pending, and because the order denying it was entered after the mandate was issued affirming the denial of the 3.850 motion.

additional **106 days** before Petitioner filed the instant federal petition for writ of habeas corpus on June 21, 2016, bringing the **total to 433 days of untolled time.** As such, the instant petition is untimely.

Petitioner appears to believe that the AEDPA's one-year limitations period does not bar his petition, stating in conclusory fashion that it is timely filed. DE#1, ¶18. However, Petitioner cannot rely on his status as an unskilled layperson to excuse the delay. See Johnson v. United States, 544 U.S. 295, 311, 125 S.Ct. 1571, 1582 (2005)(stating that "the Court has never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness."). See also Rivers v. United States, 416 F.3d at 1323 (holding that while movant's lack of education may have delayed his efforts to vacate his state conviction, his procedural ignorance is not an excuse for prolonged inattention when promptness is required); Carrasco v. United States, 2011 WL 1743318, *2-3 (W.D.Tex. 2011)(finding that movant's claim that he just learned of *Padilla* decision did not warrant equitable tolling, although movant was incarcerated and was proceeding without counsel, because ignorance of the law does not excuse failure to timely file §2255 motion).

Petitioner also alleges in Ground Three that he is actually and factually innocent. In support of this claim, Petitioner alleges that all parties understood when he entered his plea that it was his father that committed the charged murder and that Petitioner had no knowledge of what his father was about to do, and that the prosecutor presented double hearsay testimony at the VOP hearing which gave the appearance that it was Petitioner who had committed this crime. Although alleged as a free-standing claim of actual innocence, construed liberally this could also be read as a claim that Petitioner is entitled to equitable tolling of the

limitations period on the basis that he is actually innocent of the crime for which he was convicted.[16]

Actual innocence may serve to overcome the procedural bar caused by an untimely filing. As the United States Supreme Court has held, actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), and House v. Bell, 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006), or expiration of the AEDPA statute of limitations. McQuiggin v. Perkins, ___ U.S. ___, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013).[17]

"[T]he *Schlup* standard is demanding and permits review only in the "'extraordinary' case." House v. Bell, 547 U.S. at 538. "In the usual case the presumed guilt of a prisoner convicted in state [or federal] court counsels against federal review of [untimely] claims." Id. at 537. *Schlup* observes that "a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare.... To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." Schlup, 513 U.S. at 324.

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[16]"It is well established that the submissions of a pro se litigant must be construed liberally and interpreted 'to raise the strongest arguments that they suggest.'" Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006)(citations omitted).

[17]The Eleventh Circuit had before the Supreme Court decision already recognized an equitable exception to AEDPA's statute of limitations based on a credible showing of actual innocence. See San Martin v. McNeil, 633 F.3d 1257, 1267-68 (11th Cir.), *cert. denied sub nom.*, San Martin v. Tucker, ___ U.S. ___, 132 S.Ct. 158, 181 L.Ed.2d 73 (2011).

To succeed on a claim of actual innocence, the petitioner "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.'" House, 547 U.S. at 536-37(quoting Schlup, 513 U.S. at 327, 115 S.Ct. 851). "Actual innocence" requires the petitioner to show "factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). Thus, "[a] court also may consider an untimely petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a 'fundamental miscarriage of justice' because it would require that an individual who is actually innocent remain imprisoned." San Martin v. McNeil, 633 F.3d 1257, 1267-68 (11th Cir. 2011)(*citing* Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001)).

Here, Petitioner is essentially alleging that the prosecutor misled the court, at Petitioner's VOP hearing, into believing that Petitioner was the one who had committed the actual murder in Case No. 2667B. See DE# 1, Ground Three. However, Petitioner presents no new evidence whatever, let alone any "new reliable evidence, to support his claim of actual innocence of the underlying crime, nor has he suggested that this requisite evidence exists so as to meet the stringent standard. See House v. Bell, 547 U.S. 518. Rather, Petitioner presents *only* his self-serving, conclusory assertion that he is actually innocent of the charge for which he stands convicted.[18] The record, however, belies any assertion of factual innocence. See Case No. 2667B, DE#112 (Petitioner appeared in open court and entered plea of *nolo contendre*, factual basis found and

[18]Absent supporting evidence in the record, a court cannot consider a habeas petitioner's mere assertions on a critical issue in his pro se petition to be of probative value. See Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991) (recognizing that a petitioner is not entitled to habeas relief "when his claims are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible'" (citation omitted)). See also Ross v. Estelle, 694 F.2d 1008, 1011-12 (5th Cir. 1983).

plea accepted). Therefore, Petitioner fails to demonstrate actual innocence, and his claims remain procedurally barred by AEDPA's one-year filing limitation.

V. Evidentiary Hearing

The Petitioner has requested an evidentiary hearing. Based upon the foregoing, Petitioner's request for an evidentiary hearing on the limitations issue and/or the merits of his claims should be denied since the habeas petition can be resolved by reference to the petition and state court record which the undersigned has taken judicial notice. 28 U.S.C. §2254(e)(2); Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007)(holding that if record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). See also Atwater v. Crosby, 451 F.3d 799, 812 (11th Cir. 2006)(addressing the petitioner's claim that his requests for an evidentiary hearing on the issue of trial counsel's effectiveness during the penalty phase of his trial in both the state and federal courts were improperly denied, the court held that an evidentiary hearing should be denied "if such a hearing would not assist in the resolution of his claim."). Petitioner has failed to satisfy the statutory requirements in that he has not demonstrated the existence of any factual disputes that warrant a federal evidentiary hearing.

VI. Recommendations

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be summarily dismissed with prejudice as time-barred pursuant to 28 U.S.C. §2244(d)(1)-(2). It is further

recommended that no certificate of appealability issue,[19] and the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 6TH day of July, 2016.

UNITED STATES MAGISTRATE JUDGE

cc: Rolando Gus Paez
K65500
Hamilton Correctional Institution
Inmate Mail/Parcels
10650 SW 46th Street
Jasper, FL 32052
Pro Se

[19]A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a habeas petitioner's constitutional claims have been adjudicated and denied on the merits by the district court, the petitioner must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a petitioner's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the petitioner can demonstrate both "(1) 'that jurists of reason would find it debatable whether the petition [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85. Here, Petitioner cannot satisfy the second component of the Slack test: to wit, that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. As such, Petitioner is not entitled to a certificate of appealability. See Rose, 252 F.3d at 684.

APPENDIX G —

Order (adopting Magistrate's report and recommendation) of the United States District Court for the Southern District of Florida, dated July 27, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 2:16-CV-14259-ROSENBERG/WHITE

ROLANDO GUS PAEZ,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS MATTER is before the Court upon *pro se* Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [DE 1], which was previously referred to the Honorable Patrick A. White for a Report and Recommendation on any dispositive matters. *See* DE 3. On July 7, 2016, Magistrate Judge White issued a Report and Recommendation [DE 8] recommending that the Petition be dismissed with prejudice as time-barred. The Court has conducted a *de novo* review of Magistrate Judge White's Report and Recommendation, has reviewed Petitioner's Objections thereto [DE 9], has reviewed the entire record, and is otherwise fully advised in the premises.

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

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

1. Magistrate Judge White's Report and Recommendation [DE 8] is **ADOPTED**.

2. Petitioner's Petition [DE 1] is **DISMISSED WITH PREJUDICE**.

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

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

DONE AND ORDERED in Chambers, Fort Pierce, Florida, this 26th day of July, 2016.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Rolando Gus Paez