

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11095
Non-Argument Calendar

D.C. Docket No. 0:17-cv-62447-FAM

EDDIE MONTERO,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

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

(February 20, 2020)

Before JORDAN, JILL PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

Eddie Montero, a Florida prisoner proceeding *pro se*, appeals the dismissal of

his habeas corpus petition as untimely. For the following reasons, we affirm.

On December 12, 2017, Mr. Montero filed his petition pursuant to 28 U.S.C. § 2254. Two weeks later, a magistrate judge entered a report recommending that the petition be dismissed *sua sponte*. The magistrate judge had reviewed Mr. Montero's state court docket and taken judicial notice of the records therein. Based on the procedural history established by those records, the magistrate judge concluded that Mr. Montero's petition was untimely. Mr. Montero filed objections to the report on February 5, 2018, arguing that the report had not used the dates of relevant events to calculate the timeliness of his petition. Without requiring a response from the state, the district court overruled Mr. Montero's objections, adopted the magistrate judge's report, and dismissed the petition on February 16, 2018. The district court also declined to issue a certificate of appealability.

Mr. Montero timely appealed, seeking a COA and *in forma pauperis* status.

We granted a COA as to the following procedural issue:

Whether the district court erred in *sua sponte* determining that [Mr.] Montero's 28 U.S.C. § 2254 petition was time-barred without reviewing the complete, official state court record?

In a recent decision, we addressed whether a district court could “on its own initiative and without hearing from the State, decide that the statute of limitations bars [a habeas] petition.” *Paez v. Sec’y, Fla. Dep’t of Corr.*, No. 16-15705, 2020 WL 63290, *1 (11th Cir. Jan. 7, 2020). We answered that question affirmatively.

First, we held that a district court may judicially notice the docket sheets of a state court as long as the parties have an opportunity to object and be heard. *See id.* at *3. Second, we held that a district court may dismiss a habeas petition as untimely on its own initiative if it gives the parties fair notice and an opportunity to present their positions. *See id.* at *4.

Under *Paez*, the district court did not abuse its discretion in dismissing Mr. Montero's petition as untimely. Mr. Montero had an opportunity to object to the magistrate judge's report and recommendation, which concluded that the habeas petition was untimely based on the state court docket sheets, and which recommended dismissal. Indeed, Mr. Montero filed objections to the report.*

AFFIRMED.

* In his brief, Mr. Montero argues that his habeas petition was timely because the state court's Rule 3.800(a) order constituted a new intervening judgment. We do not address this issue because it was not included in the COA we granted to Mr. Montero. *See generally Kueznal v. Allen*, 488 F.3d 1341, 1343 (11th Cir. 2007).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

4/9/20

No. 18-11095-EE

EDDIE MONTERO,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

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

BEFORE: JORDAN, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

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