APPENDIX

APPENDIX

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15753
Non-Argument Calendar

D.C. Docket No. 9:17-cv-81108-WPD

TELLY KAVANTZAS,

Petitioner-Appellant,

versus

STATE OF FLORIDA,

Respondent-Appellee.

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

(February 14, 2020)

Before GRANT, TJOFLAT and MARCUS, Circuit Judges.

PER CURIAM:

Telly Kavantzas, a Florida prisoner, appeals the district court's sua sponte dismissal of his 28 U.S.C. § 2254 petition. He argues that: (1) the district court erred in dismissing his petition as untimely by taking judicial notice of his state court

criminal proceedings and post-conviction filings and by not first requiring a response from the state; and (2) the district court erred in its alternative sua sponte denial of his petition, which determined that Grounds One and Two of his petition were unexhausted and Grounds Three and Four failed on the merits, without requiring the state to respond. After careful review, we affirm.

We review for abuse of discretion a district court's decision to take judicial notice of a fact and its decision to sua sponte raise the statute of limitations. Paez v. Sec'y, Fla. Dep't of Corr., 2020 WL 63290 at *2, __ F.3d __ (11th Cir. Jan. 7, 2020). Federal Rule of Evidence 201 permits a court to "judicially notice a fact that is not subject to reasonable dispute." Fed. R. Evid. 201(b). "State court records of an inmate's postconviction proceedings generally satisfy this standard." Paez, 2020 WL 63290 at *2. Taking judicial notice of facts is, however, a "highly limited process" that must be done with caution because it bypasses safeguards provided by presenting facts through evidence. Id. at *3. In the context of determining the timeliness of § 2254 petitions, we've recommended that the district court include copies of any judicially noticed records as part of the order relying on them. Id.

Habeas Rule 4 provides that, "[i]f 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." Rules Governing § 2254 Cases, Rule 4. In these

instances, the petition is legally insufficient on its face, the district court must dismiss it, and can do so without ordering the state to respond. Id.

In our now-vacated decision in Paez v. Sec'y, Fla. Dep't of Corr., 931 F.3d 1304, opinion vacated by 944 F.3d 1327 (11th Cir. 2019), we determined that dates from online state court dockets were judicially noticeable facts under Rule 201 and that proper safeguards had been followed because the petitioner had an opportunity to be heard after the court took judicial notice. Id. at 1307. We held, therefore, that the district court had not abused its discretion by taking judicial notice of the docket entries. Id. We further held, however, that the district court had abused its discretion when it dismissed the petition as untimely without ordering any response from the state. Id. at 1311. But after vacating that opinion, we replaced it with a new one. In the new opinion, we affirmed the district court decision in its entirety, holding that the district court could both (1) take judicial notice of the state court docket, and (2) sua sponte dismiss the petition as untimely without ordering the state to respond. Paez, 2020 WL 63290 at *2-*5.

In this case, as in Paez, the district court did not abuse its discretion by taking judicial notice of Kavantzas' electronic state court dockets. Although courts should use caution in this respect, the district court here followed the proper procedural safeguards -- the magistrate judge made the electronic dockets on which he relied part of the record, and Kavantzas never alleged that he did not receive those dockets.

See id. at *3. Moreover, before the present appeal, Kavantzas did not object, dispute the accuracy of the dockets or the dates the magistrate judge used, or otherwise ask to be heard on the issue of judicial notice. Accordingly, the district court did not abuse its discretion in taking judicial notice of the electronic state court dockets. See id.

Nor did the district court abuse its discretion by sua sponte dismissing Kavantzas' § 2254 petition as untimely without requiring a response from the state. Under Rule 4, the district court could sua sponte dismiss Kavantzas's petition for a procedural bar, like untimeliness, because he would not be entitled to relief if his petition was untimely. See id. at *4. Kavantzas was provided notice and an opportunity to argue the timeliness of his petition in his form petition and after the magistrate judge's Report and Recommendation was issued. See id. at *5. Similarly, the state was notified of both the Report and Recommendation and the district court's adoption of it, which meant that the state could have indicated its intent to assert or waive its timeliness defense. See id. Accordingly, we affirm the district court's dismissal of the petition for untimeliness, and need not address the district court's dismissal in the alternative.[1]

AFFIRMED.

[1] In addition, we DENY the parties' joint motion to stay further proceedings pending the issuance of the mandate in Paez.

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

TELLY KAVANTZAS,

Petitioner,

vs.

JULIE JONES,

Respondent.
_____/

CASE NO. 17-81108-CIV-DIMITROULEAS

FINAL JUDGMENT ADOPTING REPORT AND ORDER DISMISSING HABEAS PETITION

THIS CAUSE is before the Court on Petitioner Kavantzas' September 28, 2017 Petition for Writ of Habeas Corpus [DE-1] and Magistrate Judge Patrick A. White's October 4, 2017 Report and Recommendation [DE-3] and the time has passed for Kavantzas to have filed any Objections. The Court has conducted a *de novo* review of the Report and Recommendation and the record, and finds as follows:

1. On January 26, 2010, Kavantzas was charged by Information with Burglary of a Dwelling, Resisting an Officer Without Violence and Criminal Mischief (less than $200). [DE-4-13, pp. 8-9]. The crimes occurred on January 2, 2010.

2. On August 18, 2010, Kavantzas was found guilty on all three (3) charges. [DE-4-13, pp. 16-17].

3. On October 12, 2010, the State recommended a sentence of thirty (30) years in prison. [DE-4-13, pp. 21-28, 56]. Kavantzas wrote a letter to the Judge indicating that he was just looking for a place to sleep. [DE-4-13, p. 58, 66].

4. On October 27, 2010, Kavantzas was sentenced to twenty-five (25) years in prison. [DE-4-13, pp. 30-32].

5. On July 18, 2012, the Fourth District Court of Appeals affirmed in a written opinion. [DE-4-13, pp. 78-79; DE-4-2]. *Kavantzas v. State*, 93 So. 3d 447 (Fla. 4th DCA 2012). The appellate court found no abuse of discretion in the trial court's denying an objection to the admissibility of Kavantzas' statements, rather than affording him an evidentiary hearing. Additionally, it was held that the lower court did not abuse its discretion in excluding evidence of the foreclosure status of the burgled home. Mandate issued on August 17, 2012. [DE-4-13, p. 81]. No review was sought in the Florida Supreme Court.

6. On September 3, 2012, Kavantzas filed a Motion to Mitigate. [DE-4-13, pp. 83-86]. It was denied on September 13, 2012. [DE-4-13, p. 87].

7. On October 7, 2013, Kavantzas filed a Motion to Correct Illegal Sentence. [DE-4-18, pp. 21-26]. An Amended Motion was filed on November 21, 2013. [DE-4-18, pp. 28-33]. It was denied on June 18, 2014. The Fourth District Court of Appeal affirmed on September 4, 2014. [DE-4-4]. *Kavantzas v. State*, 149 So. 3d 25 (Fla. 4th DCA 2014).

8. On August 11, 2014, Kavantzas filed a Motion for Post Conviction Relief. [DE-4-14]. It was denied on June 19, 2015. [DE-4-15]. On March 16, 2016, Kavantzas sought a belated appeal. [DE-4-5]. It was granted on August 16, 2016. On December 8, 2016, the Fourth District Court of Appeals affirmed. [DE-4-6]. *Kavantzas v. State*, 221 So. 3d 627 (Fla. 4th DCA 2016). Mandate issued on January 6, 2017. [DE-4-7].

9. On December 2, 2016, Kavantzas filed a Second Motion for Post Conviction Relief. [DE-4-18, pp. 1-14]. It was denied on February 10, 2017. [DE-4-18, pp. 15-19]. Rehearing was denied on March 10, 2017. The Fourth District Court of Appeal affirmed on June 22, 2017 [DE-4-8]. *Kavantzas v. State*, 2017 WL 2703 923 (Fla. 4th DCA 2017). Rehearing was denied on August 30, 2017. Mandate issued on September 22, 2017. [DE-4-8, p. 2].

10. In this untimely habeas petition, Kavantzas contends that he should have been afforded an evidentiary hearing on his Motion in Limine/Suppress statements. Second, he complains that it was

error to sustain an objection to the house being in foreclosure. Third, Kavantzas contends he received ineffective assistance of counsel in not investigating the ownership of the house. Finally, he contends that he received ineffectiveness assistance of counsel in refusing a plea offer of eighteen (18) years in prison.

11. This petition is time-barred. Kavantzas' conviction became final on August 17, 2012 when he did not seek discretionary review with the Florida Supreme Court. *See Gonzalez v. Thaler*, 565 U.S. 134, 149 (2012). Seventeen (17) days of un-lapsed time ran until Kavantzas filed his Motion to Mitigate on September 3, 2012. It was denied on September 13, 2012. The AEDPA one year statute of limitations began to run again on October 13, 2012 when Kavantzas failed to file an appeal. Three Hundred Fifty-Nine (359) days of untolled time ran until October 7, 2013 when Kavantzas filed his first motion to correct sentence. It was denied and affirmed on appeal on September 4, 2014. Meanwhile, Kavantzas had filed a Motion for Post Conviction Relief. It was denied on June 19, 2015. Kavantzas was granted a belated appeal, which was denied on December 8, 2016. Meanwhile, Kavantzas had filed a Second Motion for Post Conviction Relief on December 2, 2016. It was denied and the appeal was denied on June 22, 2017. Rehearing was denied on August 30, 2017. Another twenty-nine (29) days of untolled time elapsed until Kavantzas filed this federal petition on September 28, 2017. A total of four hundred five (405) days of untolled time elapsed prior to Kavantzas' filing this federal petition. It is time-barred. No basis for equitable tolling has been shown.

12. Even if timely filed, this petition would not be granted.

13. First and Second, there is generally a federal constitutional right to a pre-trial evidentiary hearing on a motion to suppress. *Jackson v. Denno*, 378 U.S. 368 (1964). Nevertheless, the state court trial judge did not abuse his discretion in denying an evidentiary hearing on the late-filed motion. *Clark v. State,* 985 So. 2d 637, 639 (Fla. 4th DCA 2008); *Smith v. State,* 695 So. 2d 864, 865-866 (Fla. 4th DCA 1997). Here, the state trial court denied suppression during the trial; Rule 3.190(h)(3), Fla. R. Crim. Proc.

gives the trial court judge the discretion to entertain an objection at trial. No constitutional error has been shown. No harmful error was shown. *U.S. v. Davidson,* 768 F. 2d 1266 (11th Cir. 1985). Additionally, evidentiary rulings are rarely the basis for federal habeas relief. Moreover, those issues were raised in direct appeal to the Fourth District Court of Appeal. The failure to pursue those issues in a discretionary review with the Florida Supreme Court prohibits this federal review, as being unexhausted. *O'Sullivan v. Boerckel,* 526 U.S. 838 (1999).

14. Third, as Kavantzas has conceded in his fourth complaint [DE-1, p. 18], there was nothing to be found if counsel had investigated the ownership interest of Ms. Philips. Ownership for the purpose of charging Burglary in Florida is not the same as ownership in property. Ownership means any possession which is rightful against the burglar. *D.S.S. v. State*, 806 So. 2d 554 (Fla. 2d DCA 2002). No prejudice has been shown.

15. Finally, Kavantzas' self-serving assertion, after losing at trial, on appeal and on collateral attack, that he would have pled guilty if properly advised and that he would have accepted an eighteen (18) year sentence, is highly suspect and insufficient upon which to base any relief. *Diaz v. U.S.*, 930 F. 2d 832 (11th Cir. 1991). Kavantzas has not shown that he would have accepted the offer, if given. Indeed, just prior to and at sentencing, he was still contending that he was just looking for a place to sleep . [DE-4-13, pp. 58,66]. He has not shown that the trial court would have accepted the offer. *Missouri v. Frye*, 566 U.S. 134 (2012). Indeed, as a Prisoner Releasee Reoffender, the Court had to impose at least a fifteen (15) year mandatory minimum. [DE-4-13, p. 42]. No prejudice has been shown.

The Report and Recommendation [DE-4] is Adopted.

Wherefore, Kavantzas habeas petition [DE-1] is Dismissed, as time-barred. Alternatively it is denied on the merits.

The Clerk shall close this case and deny any pending motions as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 2nd day of November, 2017.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

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Miami, FL 33194

Honorable Patrick A. White, US Magistrate Judge

Don Rogers, AAG

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 17-81108-Civ-DIMITROULEAS
MAGISTRATE JUDGE P.A. WHITE

TELLY KAVANTZAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The *pro se* petitioner, **Telly Kavantzas**, a convicted state felon, has filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, challenging the constitutionality of his convictions for burglary of a dwelling, resisting an officer without violence, and criminal mischief entered following a jury verdict in Palm Beach County Circuit Court, **case no. 2010-CF-000071-AMB.**

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and the Rules 8(b) and 10 Governing Section 2254 Cases in the United States District Courts. No order to show cause has been issued because, on the face of the petition, it is evident the petitioner is entitled to no relief. See Rule 4,[1] Rules Governing Section 2254 Proceedings.

[1]Rule 4 of the Rules Governing Section 2255 Petitions, provides, in pertinent part, that "[I]f 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...."

For its consideration of this petition,[2] the Court has reviewed the petitioner's on-line criminal trial and appellate court dockets and relevant pleadings, copies of which are being filed by separate order and made part of the court's record.

II. Claims

Because the petitioner is *pro se*, he has been afforded liberal construction under Haines v. Kerner, 404 U.S. 419 (1972). In this federal habeas petition, the petitioner raises a total of four grounds for relief, two of which involve claims of trial court error and the remaining two challenges the effectiveness of counsel. (DE#1).

III. Procedural History

The petitioner was charged with and found guilty of burglary of a dwelling (Count 1), resisting an officer without violence (Count 2), and criminal mischief causing less than $200 in damages (Count 3), following a jury verdict. (See Trial Court Docket; see also 8/11/14 Rule 3.850 Motion:pg.2; DE#1:1). He was adjudicated guilty and sentenced as a Prison Releasee Reoffender to a term of 25 years imprisonment, with a 15-year minimum mandatory as to Count

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[2]The court may take judicial notice of its own records in habeas proceedings, McBride v. Sharpe, 25 F.3d 962, 969 (11th Cir. 1994), Allen v. Newsome, 7985 F.2d 934, 938 (11th Cir. 1986), together with the state records, which can be found on-line. See Fed.R.Evid. 201; see also, United States v. Glover, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999)(finding the district court may take judicial notice of the records of inferior courts).

In that regard, copies of the state trial court on-line criminal dockets, together with appellate court on-line dockets, and other relevant copies of state court filings are being filed and made part of the record in this case by separate order.

1, and time-served as to Counts 2 and 3. (DE#1:1).

Petitioner prosecuted a direct appeal, raising two claims of trial court error. See Kavantzas v. State, 93 So.3d 447 (Fla. 4 DCA 2012). On **July 18, 2012**, the Florida Fourth District Court of Appeal affirmed the convictions and sentences in a written, published opinion, finding as follows:

> Here, the defendant filed a motion in limine to suppress his statement just prior to trial. The trial court denied the motion, and declined to hear the matter in a separate evidentiary hearing during the trial. Instead, the trial court alternatively ruled on a defense objection when the State attempted to introduce the statement. We find no abuse of discretion in the trial court's handling of the issue. *See Smith v. State*, 695 So.2d 864, 865-66 (Fla. 4 DCA 1997)(finding no abuse of discretion in the trial court entertaining an objection at trial on the voluntariness of a statement)....
>
> We also find no abuse of discretion in the trial court's exclusion of evidence concerning the foreclosure status of the home. The victim had a possessory interest in the home as a tenant that was not affected by a foreclosure having been filed against the home's owner. The trial court properly found the evidence irrelevant....

See Kavantzas v. State, 93 So.3d at 449-450. Petitioner did not seek a rehearing, and the direct appeal concluded with the issuance of the mandate on **August 17, 2012**. (See 4DCA Docket, Case No. 4D10-4644). Petitioner also did not seek discretionary review with the Florida Supreme Court.[3] The time for doing so expired thirty days after the appellate court issued its order affirming the

[3]The court also takes judicial notice of the Florida Supreme Court's on-line website, located at http://www.floridasupremecourt.org/, which reveals that petitioner did not seek certiorari review of the appellate court's order affirming his convictions and sentences. See Fed.R.Evid. 201.

convictions and sentences on direct appeal, or no later than **Friday, August 17, 2012.**[4]

Because the petitioner did not seek discretionary review to the Florida Supreme Court, he is not entitled to an additional ninety days to file a petition for a writ of certiorari in the United States Supreme Court. Gonzalez v. Thaler, ___ U.S. ___, 132 S.Ct. 641, 646 (2012). In that regard, the Supreme Court explained in Gonzalez that:

> The text of §2244(d)(1)(A), which marks finality as of 'the conclusion of direct review or the expiration of the time for seeking such review,' consists of two prongs. Each prong--the 'conclusion of direct review' and the 'expiration of the time for seeking such review'--relates to a distinct category of petitioners. For petitioners who pursue direct review all the way to this Court [U.S. Supreme Court], the judgment becomes final at the 'conclusion of direct review'--when this Court affirms a conviction on the merits or denies a petition for certiorari. **For all other petitioners, the judgment becomes final at the 'expiration of the time for seeking such review'--when the time for pursuing direct review in this Court, or in state court, expires. We thus agree with the Court of Appeals that because Gonzalez did not appeal to the State's highest court, his judgment became final when his time for seeking review with the State's highest court expired**....

Gonzalez v. Thaler, 565 U.S. 134, 146-47, 132 S.Ct. 641, 653-54, 181 L.Ed.2d 619 (2012) (emphasis added). Thus, where a state

[4]Pursuant to Fla.R.App.P. 9.120(b), a motion to invoke discretionary review must be filed within 30 days of rendition of the order to be reviewed.

prisoner does not seek review in a State's highest court, the judgment becomes "final" under §2244(d)(1)(A), when time for seeking such review expires. Gonzalez v. Thaler, 565 U.S. at 154, 132 S.Ct. at 661.

As applied here, the petitioner is not entitled to the 90-day period for seeking certiorari review with the United States Supreme Court, because after his judgment was affirmed on direct appeal in a written, published opinion, petitioner did not attempt to obtain discretionary review by Florida's state court of last resort-the Florida Supreme Court, nor did he seek rehearing with the appellate court. See Gonzalez v. Thaler, ___ U.S. ___, 132 S.Ct. 641, 653-54, 181 L.Ed.2d 619 (2012)(holding that conviction becomes final upon expiration of time for seeking direct review); Jimenez v. Quarterman, 555 U.S. 113, 118-21, 129 S.Ct. 681, 685-86, 172 L.Ed.2d 475 (2009)(explaining the rules for calculating the one-year period under §2244(d)(1)(A)). See also Clay v. United States, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003)(holding that "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."); Chavers v. Secretary, Florida Dept. of Corrections, 468 F.3d 1273 (11th Cir. 2006)(holding that one-year statute of limitations established by AEDPA began to run 90 days after Florida appellate court affirmed habeas petitioners' conviction, not 90 days after the mandate was issued by that court).

In other words, the Florida Supreme Court has made clear that it lacks discretionary review jurisdiction over the following four types of cases: (1) a *per curiam* affirmance rendered without

written opinion[5]; (2) a *per curiam* affirmance with a citation to (i) a case not pending review or a case that has not been quashed or reversed by this Court, (ii) a rule of procedure, or (iii) a statute;[6] (3) a *per curiam* or other unelaborated denial of relief rendered without written opinion;[7] and, (4) a *per curiam* or other unelaborated denial of relief with a citation to (i) a case not pending review or a case that has not been quashed or reversed by this Court, (ii) a rule of procedure, or (iii) a statute.[8] See Wells V. State, 132 So.3d 1110, 1113 (Fla. 2014).

As applied here, where a Florida state prisoner, who pursues a direct appeal, but does not pursue discretionary review to the Florida Supreme Court after the intermediate appellate court affirms the conviction in a written, published opinion, that conviction becomes final, for purposes of federal habeas corpus review, when time for seeking such discretionary review expires in the state's highest court and not upon expiration of the 90-day period for seeking certiorari review with the United States Supreme Court. See Gonzalez V. Thaler, 565 U.S. at 149, 132 S.Ct. at 656. Petitioners' judgment of conviction was affirmed by the state appellate court in a written, published opinion. Petitioners did not seek discretionary review with the Florida Supreme Court, nor did he seek discretionary review with the U.S. Supreme Court. As noted previously in this Report, the appellate court's decision affirming the petitioner's conviction on appeal was not without a written opinion or otherwise not elaborated. To the contrary, it

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[5]See Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980).

[6]See Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369, 1369 (Fla. 1980) and Jollie v. State, 405 So.2d 418, 42 (Fla. 1981).

[7]See Stallworth v. Moore, 827 So.2d 974, 978 (Fla. 2002).

[8]See Gandy v. State, 846 So.2d 1141, 1144 (Fla. 2003).

was an extensive written opinion. See Gandy V. State, 846 So.2d 1141 (Fla. 2003).

As such, the petitioner could have sought discretionary review with the Florida Supreme Court to consider whether the appellate court's decision "expressly and directly conflict[ed] with a decision of another court of appeal or of the supreme court on the same question of law, thus invoking the supreme court's discretionary jurisdiction. Jenkins V. State, 385 so.2d 1356 (Fla. 1980). Petitioner did not do so here. Consequently, his conviction became final on **Friday, August 17, 2012**, when the 30-day period for seeking discretionary review with the Florida Supreme Court expired. See 28 U.S.C. §1257(a) (Supreme Court may review final judgments or decrees rendered by "the highest court of a State in which a decision could be had"); Sup.Ct.R. 13.1 (petition for writ of certiorari is timely if filed within 90 days of entry of a judgment of a "state court of last resort," or of an order denying discretionary review of a lower state court judgment that is subject to further review). See also, Robinson v. Jones, 2016 WL 3014611, at *1 (S.D. of Fla. Mar. 23, 2016) *report and recommendation adopted by* 2016 WL 2988997 (S.D. Fla. May 24, 2016)(J.Gayles); Moore v. Fla. Dep't of Corr's, 2014 WL 758008 (M.D. Fla. Feb. 26, 2014)(same). Thus, since the petitioner here did not seek discretionary review to the Florida Supreme Court or the U.S. Supreme Court, he is not entitled to the additional 90-day period for doing so. Under these circumstances, petitioners' judgment of conviction became final on **August 17, 2012.**

The federal limitations period ran unchecked for **18 days**, from the time the petitioner's conviction became final on **August 17, 2012** until **September 4, 2012**, when he returned to the trial court

filing a Rule 3.800 motion to a correct illegal sentence. (See Trial Docket; see also 9/4/12 Rule 3.800 Motion). The motion was denied by trial court order entered on **September 13, 2012.** (See Trial Court Docket; see also 9/13/12 Order). No direct appeal was prosecuted. Thus, the proceeding concluded on **October 13, 2012,** when the 30-day appeal period expired.[9]

From the conclusion of the Rule 3.800 motion above on **October 13, 2012, over one year** elapsed thereafter until the petitioner next filed another Rule 3.800 motion on **October 17, 2013.** (See Trial Docket; see also 10/17/13 Rule 3.800 Motion). He filed an amended, operative Rule 3.800 motion on **November 21, 2013.** (See Trial Docket; see also 11/21/13 Rule 3.800 Motion). Following the state's response thereto, by Order entered on **June 19, 2014,** the motion was denied. (See Trial Docket; see also 6/19/14 Order). The denial was subsequently affirmed on direct appeal, Kavantzas v. State, 149 So.3d 25 (Fla. 4 DCA 2014), and concluded with the issuance of the mandate on **October 3, 2014.** (See 4DCA Docket, Case No. 4D14-2353).

At this juncture, it must be noted that the foregoing post-conviction proceedings did not serve to toll the limitations period because it was instituted after the one-year federal limitation period had already expired. See Hutchinson v. Florida, 677 F.3d 1097, 1098 (11th Cir. 2012)("In order for...§2244(d)(2) statutory tolling to apply, the petitioner must file his state collateral

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[9]The Eleventh Circuit has held that the time during which a habeas petitioner could have sought appeal of the denial of a postconviction motion tolls AEDPA's one-year limitations period even though the petitioner did not seek appellate review of the denial order. Cramer v. Secretary, Dep't of Corrections, 461 F.3d 1380, 1384 (11 Cir. 2006). If the 30th day falls on a Saturday, Sunday, or legal holiday, the petitioner has until the next business day to timely file his notice of appeal. Fed.R.Civ.P. 6(a)(1).

petition before the one-year period for filing his federal habeas petition has run."); Tinker v. Moore, 255 F.3d 1331 (11 cir. 2001)(quoting Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)); Delquidice v. Fla. Dep't of Corr's, 351 Fed.Appx. 425, 428 (11 Cir. 2009)(unpublished)(finding petitioner's amended motion correcting deficiencies of previously filed motion, submitted within 2-year limitations period under Florida law, did not expand the AEDPA's one-year limitations period; and, as such, did not resurrect the expired federal limitations period).

Procedurally, however, before the Rule 3.800 proceeding above concluded, petitioner returned to the trial court, filing a Rule 3.850 motion for post-conviction relief. (See Trial Docket; see also Rule 3.850 motion). Following the state's response thereto, the motion was denied by written order entered on June 22, 2015. (See Trial Docket; see also 6/22/15 Order). It appears that the petitioner filed a notice of appeal on July 16, 2015, and the state received it on July 20, 2015. (See 7/29/16 Order Recommending Granting Belated Appeal). Thereafter, the appellate court, in case no. 4D16-2961, granted petitioner a belated appeal of the trial court's denial of his Rule 3.850 motion, noting that it would proceed under a new case number. Thereafter, the denial of the Rule 3.850 motion was *per curiam* affirmed on appeal in a decision without written opinion, Kavantzas v. State, 221 So.3d 627 (Fla. 4 DCA 2016), and the appeal concluded with the issuance of the mandate on **January 6, 2017**. (See 4DCA Docket, Case No. 4D16-2961).

Before the foregoing proceeding concluded, petitioner filed a second, successive Rule 3.850 motion for post-conviction relief. (See Trial Docket; see also 12/2/16 Rule 3.850 Motion). The trial court dismissed the motion was untimely and successive, and denied rehearing thereon on **March 10, 2017**. (See Trial Docket; see also

2/14/17 Order). The dismissal of the second Rule 3.850 motion was subsequently *per curiam* affirmed on direct appeal, Kavantzas v. State, 221 So.3d 627 (Fla. 4DCA 2016)(table), and concluded with the issuance of the mandate on **September 22, 2017.** (See 4DCA Docket, Case No. 4D17-1095).

It is well settled that, pursuant to 28 U.S.C. §2244(d)(2), the limitations period is tolled during the time that "a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." As applied, the foregoing **September 22, 2017,** second Rule 3.850 motion was not properly filed and did not toll the one-year federal statute of limitations, because the state court explicitly found that the motion was untimely filed and successive, and thus not in accordance with the state procedural rules regarding such filings.[10] The Eleventh Circuit has held that, where a state court finds that a state postconviction motion is untimely, it does not toll the one-year federal limitation period under the AEDPA, even if the state court denied the motion on alternative grounds. See Sweet v. Sec'y Dept. of Corr., 467 F.3d 1311, 1318 (11th Cir. 2006); see also, Ousley v. Sec'y Dept. of Corr., 269 Fed.Appx. 884, 887 (11th Cir. 2008)(affirming holding in Sweet); Artuz v. Bennett, 531 U.S. 4 (2000); Pace v. DiGuglielmo, 544 U.S. 408 (2005)(finding that state postconviction motion rejected as untimely under state law is not properly filed within the meaning of the AEDPA's §2244(d)(2)).

Since the foregoing post-conviction proceeding was not properly filed, pursuant to Florida rules governing such filings,

[10]Pursuant to Fla.R.Cr.P. 3.850, a motion for postconviction relief must be filed within two years from the date the mandate issued on direct appeal. Further Fla.R.Cr.P. 3.800(c) requires that the motion be filed within 60 days of issuance of the mandate following direct appeal. See Barcelona v. State, 974 So.2d 1133 (Fla. 3 DCA 2008), relying on Fla.R.Cr.P. 3.800(c).

the limitations period once again unchecked for **over 8 months**, from the conclusion of the belated appeal on **January 6, 2017** until the petitioner then came to this court on **September 28, 2017**, filing this federal habeas petition after he signed and handed the petition to prison authorities for mailing in accordance with the mailbox rule.[11] (DE#1:26). Given the detailed procedural history narrated above, there was well in excess of **one year** untolled during which no post-conviction proceedings were pending so as to stop the federal limitations period from expiring.

IV. Discussion-Timeliness

Since 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. 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...."). Specifically, the AEDPA provides that the limitations period shall run from the latest of –

(A) the date on which the judgment became final by

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[11]"Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

> the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such action;
>
> © 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 presented could have been discovered through the exercise of due diligence.

See 28 U.S.C. §2244(d)(1).

The limitations period is tolled, however, 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). Consequently, this petition is time-barred, pursuant to 28 U.S.C. §2244(d)(1)(A), unless the appropriate limitations period was extended by properly filed applications for state post-conviction or other collateral review proceedings. See 28 U.S.C. §2244(d)(2); see also, Rich v. Sec'y for Dep't of Corr's, 512 Fed.Appx. 981, 982-83 (11th Cir. 2013); Nesbitt v. Danforth, 2014 WL 61236 at *1 (S.D. Ga. Jan. 7, 2014).

An application is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, 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, 8, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000)(footnote omitted); see also, Rich, 512 Fed.Appx. At 983; Everett v. Barrow, 861 F.Supp.2d 1373, 1375 (S.D. Ga. 2012). Consequently, if the petitioner sat on any claim or created any time gaps in the review process, the one-year clock would continue to tick. Kearse v. Sec'y, Fla. Dep't of Corr's, 736 F.3d 1359, 1362 (11th Cir. 2013); Nesbitt v. Danforth, 2014 WL 61236 at *1.

Further, "[a]n application that is untimely under state law is not 'properly filed' for purposes of tolling AEDPAs limitations period." Gorby v. McNeil, 530 F.3d 1363, 1366 (11th Cir. 2008)(citation omitted), cert. den'd, ___ U.S. ___, 129 S.Ct. 1592, 173 L.Ed.2d 684 (2009). A motion filed past the deadline for filing a federal habeas petition cannot toll the limitations period. See Hutchinson v. Florida, 677 F.3d 1097, 1098 (11th Cir. 2012)("In order for...§2244(d)(2) statutory tolling to apply, the petitioner must file his state collateral petition before the one-year period for filing his federal habeas petition has run."); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000); Nesbitt, 2014 WL 61236 at *1.

A. Statutory Tolling Under §2244(d)(1)(A)

As noted previously in this Report, over **one year** of untolled time elapsed from the time petitioner's convictions became final until he filed this federal petition. As will be recalled, his convictions became final on **August 17, 2012**. The limitations ran unchecked for over **one year**, from **October 13, 2012** when his first Rule 3.800 proceeding concluded until he filed his **October 17, 2013** Rule 3.800 motion. Moreover, as will be recalled, the limitations period was also not tolled for over **9 months**, from the **January 6,**

2017 conclusion of his Rule 3.850 proceeding until he filed his federal habeas petition here on **September 28, 2017**. The intervening second or successive petition filed in December 2016 did not serve to toll the limitations period. Even if it had, there was still in excess of one year during which no state post-conviction proceedings were pending which would serve to statutorily toll the limitations period. Therefore, no statutory tolling is warranted and this federal petition remains time-barred.

B. Equitable Tolling

That, however, does not end the inquiry. Given the detailed procedural history narrated above, this federal habeas proceeding is due to be dismissed unless the petitioner can establish that equitable tolling of the statute of limitations is warranted.

The one-year limitations period set forth in §2244(d) "is subject to equitable tolling in appropriate cases." Holland v. Florida, 560 U.S. 631, 645, 130 S.Ct. 2549, 2560, 177 L.Ed.2d 130 (2010). In that regard, the Supreme Court has established a two-part test for equitable tolling, stating that a petitioner "must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevent timely filing." Lawrence v. Florida, 549 U.S. 327, 336, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007); Holland v. Florida, 560 U.S. at 649 (quoting Pace v. DiGuglielmo, 544 U.S. 408 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)); see also, Brown v. Barrow, 512 F.3d 1304, 1307 (11th Cir. 2008)(noting that the Eleventh Circuit "has held that an inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances that are both beyond his control and unavoidable with diligence, and this high hurdle will not be easily surmounted. Howell v. Crosby, 415 F.3d

1250 (11th Cir. 2005); Wade v. Battle, 379 F.3d 1254, 1265 (11th Cir. 2004)(citations omitted).

Equitable tolling "is an extraordinary remedy 'limited to rare and exceptional circumstances and typically applied sparingly.'" Cadet v. Fla. Dep't of Corr's, 742 F.3d 473, 477 (11th Cir. 2014)(quoting Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th Cir. 2009)). The petitioner bears the burden of establishing the applicability of equitable tolling by making specific allegations. See Cole v. Warden, Ga. State Prison, 768 F.3d 1150, 1158 (11th Cir. 2014)(citing Hutchinson v. Fla., 677 F.3d 1097, 1099 (11th Cir. 2012)).

"The diligence required for equitable tolling purposes is reasonable diligent, not maximum feasible diligence." Holland, 560 U.S. at 653 (citation and quotation marks omitted). Determining whether a circumstance is extraordinary "depends not on 'how unusual the circumstance alleged to warrant tolling is among the universe of prisoners, but rather how severe an obstacle it is for the prisoner endeavoring to comply with AEDPA's limitations period.'" Cole, 768 F.3d at 1158 (quoting Diaz v. Kelly, 515 F.3d 149, 154 (2d Cir. 2008)). Further, a petitioner must show a causal connection between the alleged extraordinary circumstances and the late filing of the petition." San Martin v. McNeil, 633 F.3d 1257, 1267 (11th Cir. 2011)(citing Lawrence v. Fla., 421 F.3d 1221, 1226-27 (11th Cir. 2005)); Drew v. Dep't of Corr's, 297 F.3d 1278, 1286 (11th Cir. 2002).

In his initial habeas petition (DE#1:14:¶18), in response to the timeliness issue, petitioner suggests that this proceeding was timely instituted following completion of all state post-conviction collateral attacks. As narrated above, however, the petitioner is

mistaken. There were no properly filed, post-conviction proceedings that were timely instituted before expiration of the one year limitations that would have served to stop the federal, one-year limitations period from expiring.[12]

Nevertheless, both the United States Supreme Court and Eleventh Circuit Court of Appeals have held that equitable 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. Holland v. Florida, 560 U.S. 631, 648, 130 S.Ct. 2549, 2562 (2010) ("We have previously made clear that a 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing.") (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)); San Martin v. McNeil,[13] 633 F.3d 1257, 1267 (11 Cir. 2011); Chavez v. Secretary, Dept. of Corrections, 2011 WL 2990060, at *7 (11th 2011).

"The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" Holland

[12]The petitioner is cautioned that any attempt to provide due diligence in objections to this Report may not be considered in the first instance by the district court. See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). This is so because "[P]arties must take before the magistrate, 'not only their best shot but all of the shots.'" Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987) (quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

[13]In San Martin, petitioner failed to explain how a two-week delay in receiving notice of the Supreme Court's denial of his certiorari petition ultimately caused the late filing of his federal petition, or why he did not have ample time, even after the two-week delay, to have presented a timely federal habeas petition. See San Martin v. McNeil, 633 F.3d 1257, 1261-63 (11th Cir. 2011).

v. Florida, 560 U.S. at 652, 130 S.Ct. at 2565 (quoting Lonchar v. Thomas, 517 U.S. 314, 326 (1996)). "As for the 'extraordinary circumstances' prong...a defendant [must] show a causal connection between the alleged extraordinary circumstances and the late filing of the petition." San Martin v. McNeil, 633 F.3d at 1267. In Holland, the Supreme Court reiterated that it had previously found that "'a garden variety claim of excusable neglect,' such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline, does not warrant equitable tolling." Holland, 560 U.S. at 651, 130 S.Ct. at 2564 (citations omitted) (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)). The Holland Court noted that when facts of the case warrant it, equitable tolling can be applied in the "absence of an allegation and proof of bad faith, dishonesty, divided loyalty, [or] mental impairment." Holland, 560 U.S. at 642-43, 130 S.Ct. at 2559-60. The court further explained that "professional conduct that fails to [rise to that level] could nonetheless amount to egregious behavior that warrants equitable tolling." Holland, 560 U.S. at 650-51, 130 S.Ct. at 2563-64.

In setting aside a court's finding that no diligence had been demonstrated, the Supreme Court found that Holland's counsel had not only failed to file Holland's federal petition on time, but also failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case. Holland, 560 U.S. at 651, 130 S.Ct. at 2564. The Supreme Court further found that counsel failed to communicate with his client over a period of years, despite Holland's numerous letters to counsel that repeatedly emphasizing the importance of filing the federal petition on time, identifying the applicable legal rules, pleading for information about the Florida Supreme Court's decision, and

pleading with counsel to respond to the letters. Holland,[14] 560 U.S. at 651, 130 S.Ct. at 2564.

Something more than attorney negligence may justify equitable tolling in appropriate cases. For example, in Downs v. McNeil, 520 F.3d 1311 (11th Cir. 2009), the Eleventh Circuit drew the distinction between "mere negligence" on the one hand, and "egregious misconduct" on the other. "Egregious misconduct" is conduct in which an attorney makes misrepresentations, gives false assurances, or outright lies about the status of a case to his client. See Downs v. McNeil, 520 F.3d at 1321-22,1323 (giving an example of egregious misconduct as one of "outright willful deceit"); see also, Roper v. Dep't of Corr's, 434 Fed.Appx. 786, 2011 WL 2693183 (11th Cir. 2011)(holding that "affirmative misrepresentation by counsel" about the status of a motion may constitute "extraordinary circumstances" justifying equitable tolling of the habeas filing deadline).

Further, counsel's mistake "in miscalculating the limitations period does not provide a basis for equitable tolling because such an argument would essentially equitably toll limitations period for every person whose attorney missed a deadline. Attorney

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[14]In Holland, however, the Supreme Court determined that the facts did not involve a garden variety claim of attorney negligence, but instead far more serious instances of attorney misconduct. Holland, 560 U.S. at 651, 130 S.Ct. at 2564. In Holland, the Supreme Court stressed that:

> Holland not only wrote his attorney numerous letters seeking crucial information and providing direction; he also repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have Collins [Holland's attorney]--the central impediment to the pursuit of his legal remedy--removed from his case. And, the *very day* that Holland discovered that his AEDPA clock had expired due to Collins' failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court.

Holland, 560 U.S. at 652, 130 S.Ct. at 2565.

miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." Lawrence v. Florida, 549 U.S. 327, 336-37 (2007). Likewise, the filing of motions for extensions of time by counsel to file a motion for post conviction relief in state court also does not serve to toll the AEDPA statute of limitations. Chavez v. Fla. Dep't of Corr's, 647 F.3d 1057 (11th Cir. 2011).

The Eleventh Circuit has also cautioned that a petitioner's efforts to learn the disposition of pre-federal habeas steps are crucial to determining whether equitable tolling is appropriate. See Knight v. Schofield, 292 F.3d 709 (11th Cir. 2002)(*per curiam*); Drew v. Dep't of Corr's, 297 F.3d 1278, 1288 (11th Cir. 2002)("A lengthy delay between the issuance of a necessary order and an inmate's receipt of it might provide a basis for equitable tolling *if the petitioner has diligently attempted to ascertain the status of that order and if the delay prevented the inmate from filing a timely federal habeas corpus petition.*" (emphasis supplied)). Where a petitioner alleges to have contacted the court by mail, but provides no copies of the letters and does not make any attempt to otherwise contact the court, such as by calling or seeking help from a person who could go to the court personally, no equitable tolling is warranted. Drew, 297 F.3d at 1289). Petitioner has not demonstrated here that he took any steps to ascertain the filing of his post-conviction proceedings on a timely basis.

Also, any suggestion in objections or otherwise that he is entitled to equitable tolling on the basis that he is ignorant of the law has been repeatedly rejected by the Eleventh Circuit and other courts to have considered the issue. The Eleventh Circuit has held that a lack of a legal education and related confusion or

ignorance about the law as excuses for a failure to file in a timely fashion does not warrant equitable tolling of the limitations period. See Perez v. Florida, 519 Fed.Appx. 995, 997 (11th Cir. 2013)(quoting, Rivers v. United States, 416 F.3d 1319, 1323 (11th Cir. 2005)(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)); Felder v. Johnson, 204 F.3d 168, 172-73 & n. 10 (5 Cir. 2000)(citing cases), cert. den'd, 531 U.S. 1035 (2000)(holding that ignorance of law and pro se status are insufficient to toll statute of limitations).

As with any litigant, *pro se* litigants "are deemed to know of the one-year statute of limitations." Outler v. United States, 485 F.3d 1273, 1282 n.4 (11th Cir. 2007); see also Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006)(holding that "a *pro se* petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling"); Shannon v. Newland, 410 F.3d 1083, 1090 (9th Cir. 2005)(observing that, in each of the cases in which equitable tolling has been applied, the requisite "extraordinary circumstances" has been based on "wrongful conduct" that "actually prevented the prisoner from preparing or filing the habeas petition"); United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004)(*pro se* status and ignorance of the law does not justify equitable tolling); Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000)(holding that *pro se* status and lack of access to an attorney do not warrant equitable tolling); Felder v. Johnson, 204 F.3d 168, 171 (5th Cir. 2000)("proceeding *pro se* is not a 'rare and exceptional' circumstance because it is typical of those bringing a §2254 claim"); United States v. Flores, 981 F .2d 231, 236 (5th Cir. 1993)(*pro se* status, illiteracy, deafness, and lack of legal training are not external factors sufficient to excuse or

extend limitations period); Henderson v. Johnson, 1 F.Supp.2d 650, 656 (N.D.Tex. 1998)(claim by prisoner that he was entitled to equitable tolling, because he " 'did not know what to do,' " is "archetypal" for *pro se* prisoners seeking federal habeas relief and "far from the extraordinary circumstances required to toll the statute").

In fact, in Dodd v. United States, 365 F.3d 1273, 1282-83 (11th Cir. 2004), the movant argued for equitable tolling because he was transferred to a different facility and detained there for over ten months without access to his legal papers. The Eleventh Circuit denied equitable tolling, stating that "lockdowns and periods in which a prisoner is separated from his legal papers are not 'extraordinary circumstances' in which equitable tolling is appropriate. Id. at 1283. In Paulcin v. McDonough, 259 Fed.Appx. 211, 213 (11th Cir. 2007), the Eleventh Circuit also determined that the transfer to county jail and denial of access to his legal papers and the law library did not constitute extraordinary circumstances. There, the petitioner Paulcin "failed to allege specifically or present evidence that his detention in county jail, due to pending criminal charges, was extraordinary or anything other than routine. Additionally, in the district court, Paulcin asserted only the conclusory allegation that he was denied access to the library and his records, but failed to allege how his inability to obtain legal materials thwarted his efforts to file a timely federal proceeding."

Given the foregoing, petitioner has not established any fact to support a finding that he is "entitled to the rare and extraordinary remedy of equitable tolling." See Drew v. Dep't of Corr's, 297 F.3d 1278, 1289 (11th Cir. 2002). This court is not unmindful that petitioner pursued collateral relief in the state

forum as to one of the offenses challenged herein. However, it is evident that there was well over one year of untolled time during which no properly filed postconviction proceedings were pending which would act to toll the federal limitations period. As a result of petitioner's failure to properly and diligently pursue his rights, he has failed to demonstrate that he qualifies for equitable tolling of the limitations period. See Webster v. Moore, 199 F.3d 1256, 1258-60 (11 Cir.)(holding that even properly filed state court petitions must be pending in order to toll the limitations period), cert. den'd, 531 U.S. 991 (2000).

The time-bar is ultimately the result of the petitioner's failure to timely and properly pursue state post-conviction proceedings and then this federal habeas corpus proceeding. Since this habeas corpus proceeding, instituted on **September 28, 2017**, is untimely, the petitioner's claim challenging the lawfulness of his judgment is now time-barred pursuant to 28 U.S.C. §2244(d)(1)-(2) and should not be considered on the merits.

Finally, to the extent petitioner means to argue that he is entitled to equitable tolling of the limitations period, in that the failure to review his challenges on the merits will result in a fundamental miscarriage of justice, that claim also warrants no relief. The law is clear that a petitioner may obtain federal habeas review of a procedurally defaulted claim, without a showing of cause or prejudice, if such review is necessary to correct a fundamental miscarriage of justice. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Henderson v. Campbell, 353 F.3d 880, 892 (11th Cir. 2003). This exception is only available "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent." Henderson, 353 F.2d at 892.

As a threshold matter, the Eleventh Circuit has never held that Section 2244(d)'s limitations period carries an exception for actual innocence, and it has declined to reach the issue whether the absence of such an exception would violate the Constitution. See Taylor v. Sec'y, Dep't of Corr's, 230 Fed. Appx. 944, 945 (11th Cir. 2007)("[W]e have never held that there is an 'actual innocence' exception to the AEDPA's one-year statute of limitations, and we decline to do so in the instant case because [the petitioner] has failed to make a substantial showing of actual innocence."); Wyzykowski v. Dep't of Corr's, 226 F.3d 1213, 1218-19 (11th Cir. 2000)(leaving open the question whether the §2244 limitation period to the filing of a first federal habeas petition constituted an unconstitutional suspension of the writ). But cf. United States v. Montano, 398 F.3d 1276, 1284 (11th Cir. 2000)("Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by appellant's failure to timely file his §2255 motion."). However, several other circuits have recognized such an exception. See, e.g., Souter v. Jones, 395 F.3d 577 (6th Cir. 2005); Flanders v. Graves, 299 F .3d 974 (8th Cir. 2002). Assuming, without deciding, that a petitioner's actual innocence might support equitable tolling of the limitation period, notwithstanding, the petitioner has failed to make a substantial showing of actual innocence.

Even if there were an "actual innocence" exception to the application of the one-year limitations provisions of §2244, the Court would still be precluded from reviewing the claims presented in the instant petition on the merits. "To establish actual innocence, [a habeas petitioner] must demonstrate that ... 'it is more likely than not that no reasonable [trier of fact] would have convicted him.' Schlup v. Delo, 513 U.S. 298, 327-328, 115 S.Ct. 851, 867-868, 130 L.Ed.2d 808 (1995)." Bousley v. United States,

523 U.S. 614, 623 (1998). "[T]he Schlup standard is demanding and permits review only in the "'extraordinary' case." House v. Bell, 547 U.S. 518, 538 (2006).

Courts have emphasized that actual innocence means factual innocence, not mere legal insufficiency. Id.; see also High v. Head, 209 F.3d 1257 (11 Cir. 2000); Lee v. Kemna, 213 F.3d 1037, 1039(8 Cir.2000); Lucidore v. New York State Div. of Parole, 209 F.3d 107 (2 Cir. 2000)(citing Schlup v. Delo, 513 U.S. 298, 299, (1995); Jones v. United States, 153 F.3d 1305 (11 Cir. 1998)(holding that appellant must establish that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him). See also Bousley, 523 U.S. at 623-624; Doe v. Menefee, 391 F.3d 147, 162 (2 Cir. 2004)("As Schlup makes clear, the issue before [a federal district] court is not legal innocence but factual innocence.").

To be credible, a claim of actual innocence requires the 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." Schlup v. Delo, 513 U.S. at 324. All things considered, the evidence must undermine the Court's confidence in the outcome of the trial. Id. at 316. No such showing has been made here. Even if such an exception exists, the petitioner has failed to make the requisite showing of actual innocence that would support consideration of his untimely §2254 petition on the merits.

On the record before this court, no fundamental miscarriage of justice will result by time-barring the claims raised in this habeas proceeding. In other words, petitioner has not presented

sufficient evidence to undermine the court's confidence in the outcome of his criminal proceedings sufficient to show that a fundamental miscarriage of justice will result if the claim(s) are not addressed on the merits. See Milton v. Sec'y, Dep't of Corr's, 347 Fed.Appx. 528, 531-532 (11th Cir. 2009) (holding that affidavits proffered by *pro se* habeas petitioner were insufficient to establish actual innocence of murder, as would allegedly have created an exception to one-year limitations period, because affidavits were presented more than ten years after murder and eight years after petitioner's trial, the affiants were in most cases aware of the alleged facts to which they attested before petitioner's trial, the affidavits were either not new evidence or were of questionable reliability, and none of the evidence negated petitioner's confession or his taped conversation with the victim's mother wherein he implicated another individual in the murder) (unpublished). Consequently, under the totality of the circumstances present here, this federal petition is not timely.

IV. Evidentiary Hearing

To the extent petitioner requests an evidentiary hearing on this matter, the request must be denied. To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, show both extraordinary circumstances and reasonable diligence entitling a petitioner to enough equitable tolling to prevent his motion to vacate or habeas petition from being time-barred. See generally Chavez v. Sec'y Fla. Dep't of Corr's, 647 F.3d 1057, 1060-61 (11th Cir. 2011) (holding that an evidentiary hearing on the issue of equitable tolling of the limitations period was not warranted in a §2254 proceeding and further finding that none of the allegations in the habeas petition about what postconviction counsel did and failed to do came close

to the serious attorney misconduct that was present in Holland, instead, were at most allegations of garden variety negligence or neglect). If so, he gets an evidentiary hearing and the chance to prove that those factual allegations are true. Id. As noted by the Eleventh Circuit, "[t]he allegations must be factual and specific, not conclusory. Conclusory allegations are simply not enough to warrant a hearing." Id. at 1061. Based upon the reasons stated above, this is not one of those cases where an evidentiary hearing is warranted on the limitations issue or otherwise.

V. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA"). See 28 U.S.C. §2253(c)(1); Harbison v. Bell, 556 U.S. 180, 129 S.Ct. 1481 (2009). This Court should issue a Certificate of Appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding, if petitioner does not agree, he may bring this argument to the

attention of the district judge in objections.

VI. Conclusion

Based upon the foregoing, it is recommended that: (1) this petition for writ of habeas corpus be dismissed as time-barred; (2) a final judgment be entered; (3) a Certificate of Appealability be denied; and, (4) the case 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 4th day of October, 2017.

UNITED STATES MAGISTRATE JUDGE

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A-4

93 So.3d 447
District Court of Appeal of Florida,
Fourth District.

Telly KAVANTZAS, Appellant,
v.
STATE of Florida, Appellee.

No. 4D10–4644.
|
July 18, 2012.

Synopsis

Background: Defendant was convicted in the Fifteenth Judicial Circuit Court, Palm Beach County, John Kastrenakes, J., of burglary of a dwelling, resisting an officer without violence, and criminal mischief causing less than $200 in damages. Defendant appealed.

Holdings: The District Court of Appeal, May, C.J., held that:

[1] trial court acted within its discretion in deferring ruling on defendant's motion in limine to suppress, and instead ruling on defense objection when State attempted to introduce the statement at trial, and

[2] defense evidence regarding foreclosure status of home in which defendant was found hiding was irrelevant.

Affirmed.

West Headnotes (4)

[1] **Criminal Law** ⇐ Reception of evidence
Criminal Law ⇐ Competency of evidence
A trial judge's ruling on a motion to suppress is clothed with a presumption of correctness, and the ruling should not be disturbed on appeal absent an abuse of discretion.

[2] **Criminal Law** ⇐ Time for filing; waiver for failing to file or to timely file
Criminal Law ⇐ Time for hearing; continuance
In exercising the discretionary authority to entertain a motion to suppress during trial, the judge must balance the rights of defendant to due process and effective assistance of counsel with the rights of the state to appeal an adverse ruling on a motion to suppress. U.S.C.A. Const.Amends. 6, 14.

[3] **Criminal Law** ⇐ Motions in limine
Trial court acted within its discretion in deferring ruling on defendant's motion in limine to suppress inculpatory statement, and instead ruling on defense objection when State attempted to introduce the statement at trial, where there was no need for additional testimony to rule on the objection. West's F.S.A. RCrP Rule 3.190(h).

[4] **Burglary** ⇐ Description, occupancy, and ownership or possession of building
Defense evidence regarding foreclosure status of home in which defendant was found hiding was irrelevant in prosecution for burglary of a dwelling; victim had a possessory interest in the home as a tenant that was not affected by a foreclosure having been filed against the home's owner.

Attorneys and Law Firms

*448 Carey Haughwout, Public Defender, and Tom Wm. Odom, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.

Opinion

MAY, C.J.

The defendant appeals his conviction and sentence for burglary of a dwelling, resisting an officer without violence,

and criminal mischief causing less than $200 in damages. He argues the trial court erred in: (1) refusing to conduct an evidentiary hearing on his motion in limine to suppress his statement and (2) sustaining the State's objection to testimony concerning the foreclosure status of the burglarized home. We find no error and affirm.

Law enforcement caught the defendant in the attic of the victim's home when they responded to the victim's 911 call. When an officer asked the defendant what he was doing in the house, the defendant responded, "I'm just trying to make a living, come on, guys."

Just prior to trial, the defendant filed a motion in limine to suppress the statement he made in the victim's attic. Defense counsel indicated that the statement had just been discovered during a recent deposition. Defense counsel had not received *449 the transcript before he announced ready for trial. The trial court deferred ruling on the motion in limine because defense counsel failed to file a motion to suppress before trial. The court indicated it would address the issue later.

When the issue came up at trial, the court ruled on the merits of the motion. It found the defendant was not under arrest at the time the statement was made, and that the statement was voluntary. In short, the statement was not the product of a custodial interrogation.

[1] "A trial judge's ruling on a motion to suppress is clothed with a presumption of correctness, and the ruling should not be disturbed on appeal absent an abuse of discretion." *Lock v. State*, 799 So.2d 384, 385 (Fla. 4th DCA 2001) (citation omitted).

Florida Rule of Criminal Procedure 3.190(h) governs the procedure for filing a motion to suppress and provides, in relevant part:

> **(h) Motion to Suppress a Confession or Admission Illegally Obtained.**
>
> ....
>
> (3) *Time for Filing.* The motion to suppress shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion **or** an appropriate objection at the trial.
>
> (4) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided to rule on the motion.

Fla. R.Crim. P. 3.190(h)(3)-(4) (emphasis added).

[2] "In exercising the discretionary authority to entertain a motion to suppress during trial, 'the judge must balance the rights of the defendant to due process and effective assistance of counsel with the rights of the state to ... appeal an adverse ruling on a motion to suppress.' " *State v. Gaines*, 770 So.2d 1221, 1227 (Fla.2000) (quoting *Savoie v. State*, 422 So.2d 308, 312 (Fla.1982)). Our supreme court has explained:

> [T]he general requirement that a motion to suppress be made before trial is "designed to promote the orderly process of trial by avoiding the problems and delay caused when the trial judge must interrupt trial, remove the jury from the courtroom, and hear argument on a motion to suppress that could have been disposed of before trial." Further, when the ruling is issued before trial, the State is given the opportunity to appeal the ruling of a trial judge in the event the evidence is suppressed.

Id. (quoting *Savoie*, 422 So.2d at 311).

[3] Here, the defendant filed a motion in limine to suppress his statement just prior to trial. The trial court denied the motion, and declined to hear the matter in a separate evidentiary hearing during the trial. Instead, the trial court alternatively ruled on a defense objection when the State attempted to introduce the statement. We find no abuse of discretion in the trial court's handling of the issue. *See Smith v. State*, 695 So.2d 864, 865–66 (Fla. 4th DCA 1997) (finding no abuse of discretion in the trial court entertaining an objection at trial on the voluntariness of a statement).

In this case, there was no need for additional testimony to rule on the objection. The trial court found the defendant was not in custody, and the statement was not made during an interrogation. Instead, the remark was a spontaneous statement made by the defendant as law enforcement discovered him hiding in the victim's attic. Rule 3.190(h) specifically provides the trial court with the option of ruling on an objection when no motion to suppress is filed prior to trial.

*450 [4] We also find no abuse of discretion in the trial court's exclusion of evidence concerning the foreclosure status of the home. The victim had a possessory interest in the

home as a tenant that was not affected by a foreclosure having been filed against the home's owner. The trial court properly found the evidence irrelevant.

Affirmed.

TAYLOR and CIKLIN, JJ., concur.

All Citations

93 So.3d 447, 37 Fla. L. Weekly D1717

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A-5

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	Southern District of Florida
Name (under which you were convicted): TELLY KAVANTZAS	Docket or Case No.:
Place of Confinement: Everglades Correctional Institution 1599 S.W. 187th Avenue Miami, Florida 33194	Prisoner No.: L20464
Petitioner (include the name under which you were convicted) TELLY KAVANTZAS	Respondent (Authorized person Having custody of petitioner) v. STATE OF FLORIDA
The Attorney General of the State of: Pamela Jo Bondi	

PETITION

1. (a) Name and location of the court that entered the judgment you are challenging: Fifteenth Judicial Circuit IN and For Palm Beach County, Florida.

   (b) Criminal docket of case number (if you know): 2010-CF-000071-AXX

2. (a) Date of the judgment of conviction (if you know): August 10, 2010

   (b) Date of sentencing: October 27, 2010

3. Length of sentence: Ct. 1- 25 years/ 15 years mandatory Prison Releasee Reoffender; Ct. 2.& 3- sentence to time served.

4. In this case, were you convicted of more than one count or of more than one crime? ☒ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case: Burglary of a Dwelling; Resisting An Officer Without Violence; Criminal Mischief

6. (a) What was your plea? (Check one)

   ☒ (1) Not guilty
   ☐ (2) Guilty
   ☐ (3) Nolo contendere (no contest)
   ☐ (4) Insanity plea

(b) If you entered a plea of guilty to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? Proceeded to trial on all counts.

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post trial hearing?

☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: Fourth District Court of Appeal

(b) Docket or case number (if you know): 4D10-4644

(c) Result: Affirmed with opinion

(d) Date of result (if you know): July 18, 2012. Mandate issued August 17, 2014.

(e) Citation to the case (if you know): 93 So. 3d 447 (Fla. 4th DCA 2012)

(f) Grounds raised: TRIAL COURT REVERSIBLY ERRED BY FAILING TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT; THE TRIAL COURT REVERSIBLY ERRED BY SUSTAINING THE STATE'S OBJECTION PRECLUDING TESTIMONY ABOUT PHILLIPS' KNOWLEDGE THAT THE HOUSE WAS IN FORECLOSURE.

(g) Did you seek further review by a higher state court? ☐ Yes ☒ No

If yes, answer the following:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Result:

(4) Date of result (if you know):

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

_____

_____

_____

_____

(h) Did you file a petition for certiorari in the Unites States Supreme Court? ☐ Yes ☒ No

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any petitions, applications, or motions concerning this judgment of conviction in any state court? Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida

(2) Docket or case number (if you know): 2010-CF-000071-AXXX

(3) Date of filing (if you know): August 8, 2014

(4) Nature of the proceeding: Motion for Post Conviction Relief

(5) Grounds raised: Ineffective Assistance of Counsel For Not Investigating And Presenting Evidence To Establish That, As A Squatter In The House, Veronica Phillip Lacked A Rightful Possessory Interest In The House And That, Therefore, Mr. Kavantzas Cannot Be Guilty Of Burglary.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result: Denied, summary

(8)Date of result (if you know): June 19, 2015.

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida

(2) Docket or case number (if you know): 2010-CF-000071-AXXX

(3) Date of filing (if you know): August 8, 2014

(4) Nature of the proceeding: Motion for Post Conviction Relief

(5) Grounds raised: Trial Counsel Failed To Conduct An Adequate Pretrial Investigation, In Violation Of The Defendant's Sixth And Fourteenth Amendment Rights To The United States Constitution

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result: Summarily Denied

(8)Date of result (if you know): February 15, 2017.

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result: _____

(8)Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition	☒ Yes	☐ No
(2) Second petition	☒ Yes	☐ No
(3) Third petition	☐ Yes	☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: _____

12. For this petition, state every ground on which you claim you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: TRIAL COURT REVERSIBLY ERRED BY FAILING TO HOLD EVIDENTIARY HEARING ON PETITIONER'S MOTION TO SUPPRESS HIS STATEMENT- 5TH, 6TH, & 14TH AMEND. U.S. CONST.

(a) Supporting facts (Do not argue or cite case law. Just state the specific facts that support your claim.): _____

Trial Counsel sought to suppress the Petitioner's statement prior to trial. Defense counsel stated that he did not raise the motion to suppress before trial because the information came out during depositions, and he did not have the transcripts. A discussion ensued where defense counsel explained that petitioner made a statement after falling through the ceiling, un-Mirandized, in response to Officer Vanyi's questions: "what's you problem, man, why are you breaking into our house." However, Officer Paone perceived this statement as being spontaneous

Continued on page 6(a))

(b) If you did not exhaust your state remedies on Ground One, explain why: Ground One is properly exhausted.

Ground One Continued:

The trial court denied the motion because it was not filed before trial. Furthermore, the trial court stated that it would not hear an evidentiary motion during the course of the trial, but it would decide the admissibility of the statement prior to allowing the statement at trial. The trial court erred by not hearing the motion to suppress.

Petitioner alleges that the motion to suppress a confession or admission by a defendant should be raised before trial. However, when the opportunity did not exist, or the defendant was not aware of the grounds, the motion may be brought at any time during trial. Furthermore, the trial court has discretion to entertain the motion during trial. When exercising this discretion the trial court must balance the rights of the defendant against the state to have the opportunity to appeal an adverse ruling. Petitioner cited case law indicating that discretionary authority is necessary in order to avoid the sixth amendment ramifications that might result from the application of an absolute waiver rule against a defendant whose counsel failed to comply with the requirements of court rules.

Petitioner also cited authorities that when a legally sufficient motion is presented and can be heard without unreasonable delay a trial court commits reversible error by failing to reach the merits of the asserted claim. Petitioner's witnesses were available and testified during trial. The motion to suppress could have been heard and dealt with quickly before trial while the court discussed the issue or during trial. Defense counsel would have needed only to ask each officer a few questions; it would not have unreasonably caused a delay in the proceedings. In fact, since the evidence in this motion was so short, it would have caused a more unreasonable delay if it had to be heard on a separate day. It would have taken more time to bring the officers to court twice.

Despite refusing to hear the motion before trial, the court entertained the motion during the testimony of witness Paone. Thus, timeliness was no longer a proper ground for denying the motion. However, at the time the court entertained the motion, one of the pertinent officers, Vanyi, had been dismissed. The court stated, though, that it would rule based on the evidence before it. The court therefore, erroneously ruled without hearing all the facts, contrary to the rules of court indicting that the court shall receive evidence on any issue of fact necessary to be decided to rule on the motion.

It cannot be said that this error was harmless beyond a reasonable doubt. The jury heard that petitioner stated, "I'm just trying to make a living, come on, guys." This statement was the State's strongest evidence against petitioner's lack of intent.

This court should find that the Petitioner is entitled to relief.

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2)If you did not raise this issue in your direct appeal, explain why: _____

_____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes'" state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result: (attach a copy of the court's opinion or order, if available): _____

_____

_____

_____

(3)Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4)Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result: (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or (d)(5) is "No," explain why you did not raise this issue: _____

Trail Court error is not cognizable on Post conviction relief.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: No other remedies exist.

GROUND TWO: COURT REVERSIBLY ERRED BY SUSTAINING STATE'S OBJECTION TO PHILLIPS' TESTIMONY OF KNOWLEDGE THAT HOUSE WAS BEING FORECLOSED- 14TH AMEND. U.S. CONST.

(a) Supporting facts (Do not argue or cite case law. Just state the specific facts that support your claim.): _____

During cross-examination of Phillips, defense counsel tried to elicit that she saw a letter to the homeowner that the house was in foreclosure and that the owner defaulted the mortgage. First, according to defense counsel, this was not hearsay because it is not offered for the truth of the matter asserted. Instead, Phillips knowledge of the contents of the letter put her on notice that she did not have a rightful possessory interest in the property. Second, this was relevant because it goes to the elements of burglary. The trial court sustained the objection. This was error as the testimony was not hearsay and was relevant to petitioner's Continued on page 8(a)

(b) If you did not exhaust your state remedies on Ground Two, explain why: Ground two has been exhausted.

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2)If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes"" state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Ground Two Continued:

theory of defense.

Petitioner submits that rulings regarding the admissibility of evidence are reviewed under an abuse of discretion standard. The law is clear that where evidence tends to in any way to establish, even indirectly, a reasonable doubt of defendant's guilt, it is error to deny its admission. Therefore, as a general proposition, any evidence that tends to support the defendant's theory of defense is admissible.

Part of Petitioner's theory was that Phillips did not have a rightful possessory interest in the home and therefore could not be a victim of burglary. This was because at the time of trial, the petitioner, as well as counsel, (due to an insufficient pretrial investigation) believed Phillips was a squatter in the home. Petitioner believed that Phillips was not rightfully in the residence and therefore could not assert a possessory interest in the residence.

The foreclosure letter was not offered to prove the truth of the matter asserted, but rather that Phillips' knew her possessory interest was not rightful. Therefore, it was not hearsay.

This evidence, along with the fact that she did not pay rent or utilities for months, goes to prove that Phillips did not have a rightful possessory interest. It was relevant to support petitioner's theory of defense.

It cannot be said that this error was harmless beyond a reasonable doubt because defense counsel was excluded from making the argument to the jury.

Docket or case number (if you know): _____

Date of the court's decision: _____

Result: (attach a copy of the court's opinion or order, if available): _____

(3)Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4)Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result: (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or (d)(5) is "No," explain why you did not raise this issue: _____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: Petitioner has exhausted all available remedies.

GROUND THREE: INEFFECTIVE ASSISTANCE OF COUNSEL- FAILURE TO INVESTIGATE AND PRESENTING EVIDENCE – IN VIOLATION OF 6TH 14TH AMEND. U.S. CONST.

(a) Supporting facts (Do not argue or cite case law. Just state the specific facts that support your claim.): _____

Count 1 of the amended information alleges that the Petitioner entered a dwelling, "the property of Veronica Phillips," with an intent to commit an offense in the dwelling. Police Reports reveal that the dwelling was a house located at 4854 Luqui Court, West Palm Beach, Florida. Counsel learned through discovery that the house was in foreclosure and the Ms. Phillips had been occupying the residence as a squatter. Counsel deposed Ms. Phillips on July 14, 2010 and that she rented a room in the house from Michael Houghtaling. (Continued on page 9(a))

Ground Three Continued:

She paid rent to Houghtaling for the months of September through November 2008. In December 2008 Houghtaling abandoned the property and vacated the premises. He told Ms. Phillips she could have the place. Sometime in 2009 Ms. Phillips discovered a document in the house that indicated that the house was in the process of foreclosure for failure to pay the mortgage payments. Houghtaling returned in August 2009 to collect his property. Ms. Phillips stated she was disappointed that he had not told her the house was in foreclosure. Ms. Phillips stated in her deposition that she continued to live in the residence until March 2010.

Petitioner told counsel that he had entered the residence the night of January 2, 2010 to find a place to sleep. He explained that the residence appeared abandoned and did not know that anyone was inside.

Counsel knew, or should have known that if he could establish that Ms. Phillips lacked a possessory interest in the house that was rightful and superior to that of the petitioner, then the Petitioner could not be convicted of burglary.

Counsel did not investigate Ms. Phillips' possessory interest in the house. Counsel did not interview or depose Mr. Houghtaling. Counsel did not investigate the history of the residence to identify the mortgagee of the property.

Had counsel untaken a proper investigation, counsel would have discovered the following: Michael Houghtaling owned the house. He had defaulted his mortgage. The mortgagee instituted foreclosure proceedings against Houghtaling in 2008. In later 2008, early 2009, the mortgagee took possession of the residence. Houghtaling vacated the house in December 2008. The mortgagee did not authorize any persons to occupy the residence and was unaware that Ms.

Phillips was residing in the residence. The mortgagee did not give, and would not have given Ms. Phillips consent to occupy the residence.

Because of counsel's failure to investigate, counsel was unable to present any of the above information to the jury to prove that Ms. Phillips lacked a possessory interest in the house.

Notably, at trial, counsel attempted to introduce through cross-examination of Ms. Phillips the content of the letter foreclosure letter that she discovered in the house in 2009. Counsel proffered that Ms. Phillips would testify that the letter stated that Houghtaling had defaulted on his mortgage and that the residence was in foreclosure. Counsel explained that he was offering this testimony to show that the bank had foreclosed on the residence and was the rightful owner of the property. Such testimony, counsel argued, was relevant to the issue of whether Ms. Phillips had a possessory interest in the house that was rightful and superior to that of the Petitioner. The trial court ruled that the testimony was inadmissible based on the prosecution's hearsay objection.

Had counsel conducted a proper pretrial investigation he would have been able to present competent substantial evidence to prove that Ms. Phillips lacked any possessory interest in the residence.

Petitioner alleges that the mortgagee or a representative thereof would have testified that it held the mortgage on the house at 4854 Luqui Court. The mortgagor, Michael Houghtaling had defaulted on the mortgage. The mortgagee would have testified that it foreclosed on the house in 2008. The mortgagee did not authorize any person to occupy the residence.

The Mortgagee would have testified that it was unaware that Ms. Phillips had been occupying the residence as a squatter. The mortgagee did not consent or in any way authorize Houghtaling or any other person to occupy the house. Had the mortgagee known that Ms.

Phillips was occupying the residence it would have contacted law enforcement and submitted a criminal complaint that Ms. Phillips was illegally occupying the residence.

The State would not have been able to dispute the evidence that Ms. Phillips was illegally occupying the residence at the time petitioner entered the residence. Accordingly, the State would not have been able to prove, as an essential element of burglary, that Ms. Phillips had a possessory interest in the house that was both rightful and superior to that of the petitioner.

Because petitioner cannot be found guilty of burglary with Ms. Phillips as the victim, he would have been entitled to dismissal of the burglary count in a pretrial motion to dismiss or by motion for judgment of acquittal during trial proceedings. Alternatively, the jury would have found petitioner not guilty of burglary based in the State's failure to prove that Ms. Phillips had a rightful and superior interest in the residence.

But for counsel's failure to investigate and present evidence that Ms. Phillips was an illegal squatter in the house, petitioner would not have been found guilty of burglary.

(b) If you did not exhaust your state remedies on Ground Three, explain why: Ground Three is exhausted.

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No

(2)If you did not raise this issue in your direct appeal, explain why: Ineffective Assistance of Counsel is not cognizable on direct appeal.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes'" state:

Type of motion or petition: Motion for post Conviction Relief.

Name and location of the court where the motion or petition was filed: Fifteenth Judicial Circuit In And For Palm Beach County, Florida

Docket or case number (if you know): 2010-CF-000071-AXX

Date of the court's decision: June 19, 2015

Result: (attach a copy of the court's opinion or order, if available): Denied

(3)Did you receive a hearing on your motion or petition? ☐ Yes ☒ No

(4)Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Fourth District Court of Appeal.

Docket or case number (if you know): 4d16-0983 and 4D16-2961

Date of the court's decision: December 8, 2016

Result: (attach a copy of the court's opinion or order, if available): Per Curiam Affirmed

(7) If your answer to Question (d)(4) or (d)(5) is "No," explain why you did not raise this issue: _____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: No other remedies are available.

GROUND FOUR: COUNSEL FAILED TO CONDUCT ADEQUATE PRETRIAL INVESTIGATION, IN VIOLATION OF 6TH & 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

(a) Supporting facts (Do not argue or cite case law. Just state the specific facts that support your claim.):

Petitioner asserts that trial counsel was ineffective for failing to adequately investigate the charges against him. As a result, trial counsel placed an invalid theory of defense before the court. Had the petitioner known that the defense was invalid he would not have asserted his right to trial but would have entered a plea to the State's plea offer of 18 years imprisonment. Had petitioner entered the plea the total sentence would have been less severe than the sentence imposed, and would not have been withdrawn by the State--- Continued on page 11(a)).

(b) If you did not exhaust your state remedies on Ground Four, explain why: Ground Four has been exhausted.

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2)If you did not raise this issue in your direct appeal, explain why: Ineffective Assistance of counsel is not cognizable on direct appeal.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes'" state:

Type of motion or petition: Motion for Post Conviction Relief

Name and location of the court where the motion or petition was filed: Fifteenth Judicial Circuit Court, Palm County, Florida.

Docket or case number (if you know): 2010-CF-000071-AXX

Date of the court's decision: February 15, 2017

Result: (attach a copy of the court's opinion or order, if available): Denied

Ground Four Continued:

and the trial court would have accepted the offered plea. But for counsel's error and omission, the petitioner would not have received the more severe sentence that was imposed in this case.

Petitioner understood that the defense theory during trial (squatter/ foreclosure issue) was a secondary issue. However, to the defendant's understanding it was the deciding factor that convinced him not to accept the 18 year plea offer from the State Attorney and to go to trial. The petitioner asserts that his state of mind was, "Why should I go to prison for 18 years, being a squatter myself, when this illegal squatter – who the State claims is the victim – is innocent of any crime?"

The petitioner's state of mind was that he was being victimized by the alleged victim's actions and circumstances. In the petitioner's mind the ultimate question and deciding factor for him going to trial was how could the victim be declared a squatter, and not be accused of the same burglary as the petitioner. Stated another way, the petitioner asserted his right to trial based upon counsel's advise that the alleged victim was a squatter, and because she was a squatter and the petitioner was asserting to be a squatter himself, then both, or neither, had to be guilty if burglary. However, the advice was incorrect. The victim was not a squatter according to Florida law. Counsel was attempting to assert that the victim was a squatter based upon an anonymous tip – which counsel failed to validate – thus denying the defendant information that was needed in order to make a decision based on the actual facts (not a squatter) rather than hearsay (that she was a squatter). Petitioner asserts that his state of mind is relevant according to Florida Rules of Court. Petitioner asserts that he decided to go to trial only after counsel informed him that he had obtained information that the alleged victim was a squatter on foreclosed property. That alone – and not any foreclosure status – is what persuaded the petitioner's decision to reject the

State's offered 18 years plea offer. Petitioner alleges that counsel influenced his state of mind given the above advice. Had the petitioner known that the alleged victim was rightfully residing (until actual foreclosure) in the residence he would not have felt victimized by her seeming deception, and would have accepted responsibility by accepting the State's plea offer.

After the trial proceedings in this case, the petitioner was able to obtain records showing that trial counsel failed to conduct an adequate pretrial investigation and that had he done so he would have discovered that the planned defense was an invalid defense negated by Florida law. In short, trial counsel would have discovered that the victim was not a squatter and was lawfully residing in the residence.

Petitioner asserts that after trial proceedings were concluded in this case he received information from the Clerk of Court that indicated that trial counsel misadvised and failed to investigate the allegations against the petitioner and as a result the petitioner failed to accept the State's proffered plea of 18 years, as well as asserting an incorrect defense during the trial.

The Clerk of Court has provided the petitioner with a warranty deed that illustrates the dates of ownership of the residence. The document indicates that the actual owner that the victim had been renting from was in actual lawful possession of the burglarized residence beginning January 24, 2002. It was not until February 11, 2010 that foreclosure proceedings were competed. Thus, the dates of ownership are clear. The owner, Michael Houghtaling, had lawful possession of the residence and property from January 2002 until February 2010 and the alleged victim, Ms. Phillips, was the legal renter. The next document (Quit Claim Deed) establishes that Michael Houghtaling was the lawful possessor of the property effectively ended on or about September 30, 2010. This is the date that the Mortgagee (Countrywide Home Loans, Inc.) quitclaimed the property to Federal National Mortgage Association. This would indicate

the actual date that the alleged victim would have became a squatter in the residence and therefore residing illegally.

The petitioner is alleged to have committed the instant burglary on January 2, 2010. Foreclosure proceedings were not concluded until February 11, 2010. This effectively negated any squatter defense that trial counsel could have reasonably asserted. The defense was not a valid defense.

Petitioner alleges that trial counsel failed to conduct an adequate pretrial investigation. Had counsel done so a likely probability exists that a different outcome would have occurred in this case. Specifically, the petitioner would have accepted the State's proffered plea of 18 years imprisonment instead of proceeding to trial on an invalid defense and being found guilty and receiving a much more severe sentence of 25 years, for going to trial. Petitioner asserts that the plea would not have been withdrawn and that the trial court would have accepted the proffered plea, but for counsel's ineffective assistance and misadvice.

Petitioner learned that there was a potential problem when he was called before the circuit court in response to the petitioner's filing of a petition seeking a belated appeal from the summary denial of his initial rule 3.850 motion for post conviction relief that was denied June 19, 2015. The belated appeal proceedings resulted in the Circuit Court having to conduct an evidentiary hearing on the matter of whether or not the petitioner filed a timely notice of appeal. The appeal was found to be timely filed and the belated appeal was granted.

While in the county jail, awaiting transport back to the Florida Department of Corrections, defense counsel spoke with the defendant and stated that he had failed to investigate the facts and that as a result of counsel's failure to investigate the facts of the case the defendant failed to enter

a plea that would have resulted in a sentence less severe than the sentence rendered, and that would not have been withdrawn by the State and accepted by the Trial Court.

Trial counsel's performance in this case prejudiced the defendant in that counsel asserted an erroneous defense to the alleged charges because he failed to conduct a proper pretrial investigation. Had counsel done so, defendant would have discovered the non-existent defense being employed. Had counsel properly investigated a likely probability exists that (1) trial counsel would have properly advised the defendant that he was in fact guilty of the charged offense, and (2) the defendant would have accepted culpability for his actions and entered a plea to the state's proffered plea of 18 years imprisonment; A sentence that is 7 years less severe than the 25 years received for going to trial. Counsel's performance denied the defendant his rights to effective assistance of counsel and due process of the law by failing to adequately, and accurately advise him of his defenses. Counsel's performance violated the rights established under the Sixth and Fourteenth Amendment to the United States Constitution.

(3)Did you receive a hearing on your motion or petition? ☐ Yes ☒ No

(4)Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Fourth District Court of Appeal.

Docket or case number (if you know): 4D17-1095

Date of the court's decision: June 22, 2017 Rhrng Denied August 30, 2017

Result: (attach a copy of the court's opinion or order, if available): Per Curiam Affirmed

(7) If your answer to Question (d)(4) or (d)(5) is "No," explain why you did not raise this issue: _____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: No other remedies are available.

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☒ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: _____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, state why the ground or grounds have not been presented, and state your reasons for not presenting them: _____

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☒
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, with state or federal, for the judgment you are challenging? Yes ☐ No ☒
If "Yes," state the name and location of the court, the docket number, they type of proceeding, and the issues raised. _____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you re challenging:
(a) At preliminary hearing: Public Defender
(b) At arraignment and plea: Same as (a)
(c) At trial: Same as (a)
(d) At sentencing: Same as (a)
(e) On Appeal: Same as (a)
(f) In any post conviction proceeding: All post conviction proceeding have been conducted pro se fashion
(g) On appeal from any ruling against you in a post conviction proceeding: Conducted pro se

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☐

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentences were imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. §2244(d) does not bar your petition.*

Petitioner asserts that the instant petition for writ of habeas corpus is timely filed.

[1]The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. §2254(d) provides in pertinent part that:

(1) A one-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. The limitation 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 was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, of the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief:

or any other relief to which the petitioner may be entitled.

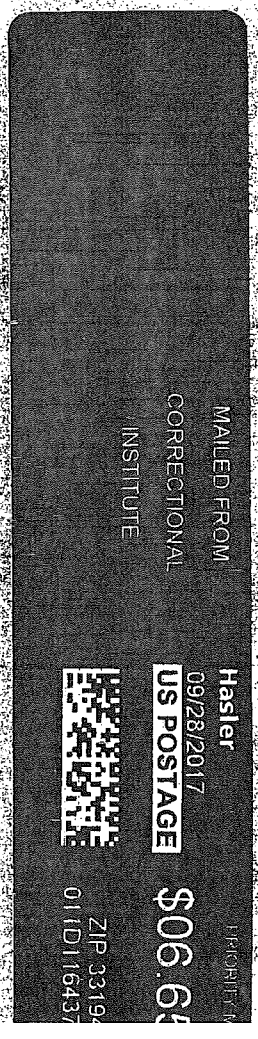
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 9-28-17 (month, date, year).

Executed and signed on this 28th day of September, 2017.

Signature of Petitioner

If the person signing is not the petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.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