[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12981
Non-Argument Calendar

D.C. Docket No. 6:18-cv-00759-RBD-GJK

ASHLEY L. DUNN,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

(April 1, 2020)

Before MARTIN, ROSENBAUM and MARCUS, Circuit Judges.

PER CURIAM:

Ashley Dunn, a Florida prisoner proceeding pro se, appeals from the district court's dismissal of her 28 U.S.C § 2254 petition as untimely. A certificate of appealability was granted on the issue of whether the district court erred in

concluding that Dunn's § 2254 petition was not entitled to equitable tolling when she claimed reliance on the state order holding her Fla. R. Crim. P. 3.850 motion in abeyance. On appeal, she argues that her petition is entitled to tolling because she reasonably relied on the state court's holding of her Rule 3.850 motion in abeyance as assurance that her federal time was being tolled. After careful review, we affirm.

We review a district court's dismissal of a § 2254 petition as untimely de novo. Pugh v. Smith, 465 F.3d 1295, 1298 (11th Cir. 2006). We also review de novo a district court's legal decision on the application of equitable tolling. San Martin v. McNeil, 633 F.3d 1257, 1265 (11th Cir. 2011). However, we review for clear error a district court's determination of the relevant facts, including those related to a petitioner's diligence and whether extraordinary circumstances stood in her way. Id. at 1265, 1269. Thus, "we must affirm a district court's findings of fact unless the record lacks substantial evidence to support them." Id. at 1265 (quotations omitted). "The burden of proving circumstances that justify the application of the equitable tolling doctrine rests squarely on the petitioner." Id. at 1268.

The relevant facts are these. In August 2013, Dunn was sentenced to life without the possibility of parole for first-degree murder with a firearm (Count 1), in violation of Fla. Stat. §§ 775.087 and 782.04(1), and thirty years' imprisonment for arson of a dwelling (Count 2), in violation of Fla. Stat. § 806.01(1)(a). The Florida

Fifth District Court of Appeal ("Fifth DCA") affirmed her sentences and convictions on August 19, 2014, and issued its mandate on September 12, 2014.

On September 10, 2015, Dunn filed a pro se Fla. R. Crim. P. 3.850 motion, titled "Motion for Post-Conviction Relief with Special Request to Temporarily Hold Proceedings in Abeyance," in which she asserted, without any argument, that her convictions were obtained in violation of the Sixth and Fourteenth Amendments. She added that the incongruity between Florida's two-year deadline for filing for postconviction relief and the federal one-year deadline was illogical and prejudiced her because she was entitled to an extra full year of investigation and preparation under Florida law. She asked the state court to hold her motion in abeyance until she filed an amended Rule 3.850 motion. The state court found that Dunn's motion did not present any claims for relief and did not toll Rule 3.850's two-year statute of limitations, but granted her request for an abeyance, noting that it would not rule on the sufficiency of her postconviction motion "at this time" and that she must "file a facially sufficient" motion by September 12, 2016 "to avoid a procedural bar."

On September 7, 2016, Dunn filed an amended Rule 3.850 motion, which was subsequently amended for a second time. The state court ultimately denied the motion on the merits on June 23, 2017. The Fifth DCA affirmed and issued its mandate on April 30, 2018.

On May 11, 2018, Dunn filed the instant pro se § 2254 petition, raising the same 13 claims of ineffective assistance of counsel that she brought in her amended Rule 3.850 motion. The state responded that Dunn's § 2254 petition was untimely because the one-year limitation period had expired on November 16, 2015, and her September 2015 motion had not tolled her time. The district court denied Dunn's petition as untimely, agreeing with the state. This timely appeal followed.

Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a § 2254 petition is governed by a one-year statute of limitations that begins to run on the latest of four triggering events:

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

28 U.S.C. § 2244(d)(1)(A)-(D). For purposes of § 2244(d)(1)(A), a state prisoner's conviction becomes final when the U.S. Supreme Court denies certiorari or issues a

decision on the merits, or when the 90-day period in which to file a certiorari petition expires. Bond v. Moore, 309 F.3d 770, 773-74 (11th Cir. 2002).

The one-year limitation period for filing a § 2254 petition is statutorily tolled during the time in "which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). To qualify as an "application for State post-conviction or other collateral review," a pleading actually must seek "review" by making a good faith request for legal relief from the court. Sibley v. Culliver, 377 F.3d 1196, 1200 (11th Cir. 2004). Therefore, a state habeas petition must: (1) set forth the grounds upon which it is based; (2) state the relief desired; (3) attack the relevant conviction or sentence; and (4) "contain something vaguely approaching legitimate, relevant, coherent legal analysis," whether grounded in state or federal law. Id. An application is pending, for purposes of § 2244(d)(2), between when it is properly filed and when it has received a final resolution under the state court's postconviction procedures. Cramer v. Sec'y, Dep't. of Corr., 461 F.3d 1380, 1383 (11th Cir. 2006). Thus, time remains tolled until the state appellate court has issued its mandate or the state supreme court denies review. Lawrence v. Florida, 549 U.S. 327, 332 (2007).

If a prisoner files an untimely § 2254 petition, the district court may still review it if the petitioner demonstrates that she is entitled to equitable tolling by showing that: (1) she has pursued her rights diligently, and (2) an extraordinary

circumstance prevented her from filing a timely petition. Damren v. Florida, 776 F.3d 816, 821 (11th Cir. 2015). We've characterized the equitable-tolling standard as a two-part test, stating that "equitable tolling is available only if a petitioner establishes both extraordinary circumstances and due diligence." Diaz v. Sec'y for Dep't of Corr., 362 F.3d 698, 702 (11th Cir. 2004) (emphasis omitted). Thus, courts need not consider whether extraordinary circumstances exist if a petitioner's delay in filing the federal habeas petition exhibits a lack of due diligence. Id. at 702 & n.7.

"[E]quitable tolling is an extraordinary remedy [that] is limited to rare and exceptional circumstances and typically applied sparingly." Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th Cir. 2009) (quotations omitted). "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" San Martin, 633 F.3d at 1267. As to the "extraordinary circumstances" requirement, the petitioner must show a causal connection between the alleged extraordinary circumstances and the late filing of the petition. Id.

Our "precedent provides that federal habeas petitioners who rely upon the timeliness of state post-conviction proceedings to satisfy the requirement of AEDPA do so at their peril." Johnson v. Fla. Dep't of Corr., 513 F.3d 1328, 1333 (11th Cir. 2008); see also Howell v. Crosby, 415 F.3d 1250, 1251-52 (11th Cir. 2005) (holding that a federal habeas petitioner is not entitled to equitable tolling merely because the state court granted an extension of time to file his state postconviction petitions). In

Tinker v. Moore, we rejected a petitioner's argument that § 2244(d) forced him to make an "impermissible choice" between seeking Florida or federal habeas relief. 255 F.3d 1331, 1334-35 (11th Cir. 2001). We reasoned that he did not have to forego his state remedy in order to avail himself of the federal remedy, but was only required to "exercise [his state remedy] within one year of the date his judgment became final and do so in a manner that leaves him sufficient time to timely file his federal petition." Id.

In Akins v. United States, a movant argued for equitable tolling of his 28 U.S.C. § 2255 motion because (1) he was subjected to lockdowns in jail for several months, during which he could not access the law library, and (2) prison officials misplaced his legal papers for a period of time. 204 F.3d 1086, 1089-90 (11th Cir. 2000). After noting that the movant had ample time (including four years before Congress adopted the AEDPA one-year period of limitation) to file his motion when these impediments did not exist, we declined to apply equitable tolling, determining that he had "failed to demonstrate that the untimely filing of his motion was due to extraordinary circumstances that were both beyond his control and unavoidable even with diligence." Id. at 1090.

Similarly, in Dodd v. United States, a movant argued that he was entitled to equitable tolling of his § 2255 motion because he was transferred to a different facility and detained there for over ten months without access to his legal papers.

365 F.3d 1273, 1282-83 (11th Cir. 2004). We declined to apply equitable tolling, determining that such circumstances were not extraordinary and the movant did not establish due diligence because he had nearly five months with no impediments to prepare his motion and presented no evidence that "he made any request to have his papers delivered to him, attempted to contact counsel to assist him with timely filing his motion, or otherwise undertook any action that would suggest reasonable diligence under the circumstances." Id. at 1283 (footnoted omitted).

On the other hand, we've recognized that equitable tolling may be warranted when a government official has misled a petitioner. Spottsville v. Terry, 476 F.3d 1241, 1245 (11th Cir. 2007). In Spottsville, for example, the petitioner had followed the incorrect filing instructions issued to him in a Georgia superior court order and improperly filed the necessary documents to appeal the denial of his state habeas petition in the superior court, rather than the Georgia Supreme Court. Id. at 1243. The petitioner then filed a § 2254 petition, which the district court dismissed as untimely because it found no statutory tolling on the ground that the appeal documents were not "properly filed." Id. We held that the petitioner was entitled to equitable tolling for the time when his appeal documents were in the wrong court, noting that (1) the petitioner had followed the state court order's instructions "to the letter" by filing his papers in the superior court; (2) "it [was] unreasonable to expect

a pro se litigant to second-guess or disregard an instruction in a written order of a court"; and (3) the petitioner had diligently filed his § 2254 petition. Id. at 1245-46.

Similarly, in Knight v. Schofield, a clerk of the Georgia Supreme Court had assured a petitioner that he would be notified when the court ruled on his state habeas petition. 292 F.3d 709, 710 (11th Cir. 2002). When the court ruled, it sent the notice to the wrong person and failed to notify Knight, and the AEDPA's one-year limitation period lapsed while he was waiting. Id. We held that the petitioner was entitled to equitable tolling until the date he actually received notice of the final disposition of his state application because the clerk had assured him he would receive notice of its decision and, when the court failed to provide notice, he exercised diligence in inquiring about the status of his case. Id. at 711. We added that, while equitable tolling applied in this case, each case turns on its own facts. Id.

Addressing the preliminary issue of statutory tolling first, we conclude that the district court did not err in finding that Dunn's § 2254 petition was not subject to statutory tolling from September 2015. As the record reveals, regardless of whether Dunn's September 2015 motion was "properly filed," the court did not err in finding that it was not an "application" for state postconviction relief. Dunn's September 2015 motion merely asserted that her convictions were obtained in violation of her Sixth and Fourth Amendment rights without containing any argument, caselaw, or legal analysis to that point. Thus, rather than being a properly

filed application for postconviction relief that needed to be amended, the motion was insufficient to qualify as an "application" for state postconviction relief at all. See Sibley, 377 F.3d at 1200. Accordingly, the district court properly found that Dunn's September 2015 motion did not statutorily toll the one-year limitation period under § 2244(d)(2). See 28 U.S.C. § 2244(d)(2).

Nor did the district court err in finding that Dunn was not entitled to equitable tolling since she had failed to demonstrate extraordinary circumstances or due diligence. As the record reflects, Dunn intentionally tried to toll her federal one-year limitation period by filing a placeholder motion in order to take advantage of Florida's two-year limitation period, which is directly contrary to this Court's holding in Tinker, 255 F.3d at 1334-35. Thus, even if she was misled by the state court's order holding her motion in abeyance, her reliance on the timeliness of her state postconviction proceedings to satisfy the AEDPA's requirements was at her own peril and, consequently, did not constitute an extraordinary circumstance beyond her control that warrants equitable tolling. See Johnson, 513 F.3d at 1333; Howell, 415 F.3d at 1251 52.

Moreover, the district court did not clearly err in finding that Dunn was not diligent. Diaz, 362 F.3d at 702 & n.7. As in Dodd, Dunn has presented no evidence that, before she asked the state court to hold her motion in abeyance, she attempted to contact counsel to assist her with timely filing a Rule 3.850 motion or otherwise

undertook any action to timely file the motion that would suggest reasonable diligence. Dodd, 365 F.3d at 1283. While she later asserted in her federal proceedings that there were not enough law clerks to assist her and that she had limited access to the law library, we've previously found that even a complete lack of access to a law library for several months was not enough to excuse a lack of diligence. Akins, 204 F.3d at 1089-90. Therefore, Dunn has not met her burden of showing that it was unavoidable even with due diligence. See San Martin, 633 F.3d at 1268. Accordingly, her petition was not subject to tolling, and we affirm.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 01, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-12981-AA
Case Style: Ashley Dunn v. Secretary, Department of Corr., et al
District Court Docket No: 6:18-cv-00759-RBD-GJK

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ASHLEY L. DUNN,

Petitioner,

v. Case No: 6:18-cv-759-Orl-37GJK

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

Respondents.

_____/

ORDER

THIS CAUSE is before the Court on Ashley L. Dunn's Petition for Writ of Habeas Corpus ("Petition," Doc. 1), filed pursuant to 28 U.S.C. § 2254. Respondents filed a Response (Doc. 6), and Petitioner filed a Reply. (Doc. 8.)

Petitioner asserts thirteen (13) claims for relief in the Petition. For the reasons set forth below, the Petition will be denied as untimely.

I. PROCEDURAL HISTORY

Petitioner was charged with first degree murder with a firearm and arson of a dwelling. (Doc. 7-2 at 105–06.) Following a jury trial, she was convicted as charged and sentenced to life imprisonment without parole for first degree murder and to thirty years for arson of a dwelling. (Doc. 7-3 at 264, 266–68, 335–38.) Petitioner appealed, and

Florida's Fifth District Court of Appeal ("Fifth DCA") affirmed the convictions and sentences, *per curiam*. (Doc. 7-4 at 720); *Dunn v. State*, 146 So. 3d 1199 (Fla. 5th DCA 2014).

Petitioner then filed, on September 10, 2015, a motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure, titled "Motion for Post Conviction Relief with Special Request to Temporarily Hold Proceedings in Abeyance." (Doc. 7-4 at 724–28.) Noting that Petitioner had set forth no claims for relief, the state court granted the motion, stating that "the Court will not issue a ruling on the sufficiency of the Motion for Postconviction Relief at this time." (Doc. 7-5 at 3.) The Court ordered Petitioner to "file a facially sufficient Motion for Postconviction Relief on or before September 12, 2016, to avoid a procedural bar." (*Id.*) The Court further instructed that the two-year time period for moving for post-conviction relief pursuant to Rule 3.850 was not tolled. (*Id.*)

On September 7, 2016, almost a year later, Petitioner filed an amended motion pursuant to Rule 3.850, Fla. R. Crim. P. (Doc. 7-5 at 5–47.) The post-conviction court struck one ground with leave to amend, and Petitioner subsequently amended the stricken ground. (Doc. 7-5 at 52–53, 55–63.) The post-conviction court then denied Petitioner's Rule 3.850 motion, and the Fifth DCA affirmed the denial, *per curiam*. (Doc. 7-5 at 96–107, 187.)

On May 11, 2018, Petitioner filed the instant Petition for federal habeas relief, pursuant to 28 U.S.C. § 2254. (Doc. 1 at 27.) As the Court can resolve the entire petition on the basis of the record, an evidentiary hearing is not warranted. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

II. ANALYSIS

Pursuant to 28 U.S.C. § 2244:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. 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, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C § 2254(d)(1)-(2).

In the present case, the Fifth DCA affirmed Petitioner's conviction on August 19, 2014. Petitioner then had ninety days, or through November 17, 2014, to petition the Supreme Court of the United States for a writ of certiorari. See Sup. Ct. R. 13.

See Bond v. Moore, 309 F.3d 770, 774 (11th Cir. 2002) (holding that the one-year period of limitation does not begin to run until the ninety-day period for filing a petition for certiorari with the Supreme Court of the United States has expired). Thus, under Section 2244(d)(1)(A), the judgment of conviction became final on November 17, 2014, and Petitioner had through November 17, 2015, absent any tolling, to file a federal habeas corpus petition.

Under Section 2244(d)(2), the limitations period tolls during the pendency of "a properly filed application for State post-conviction or other collateral review." The question before the Court is, therefore, whether Petitioner's "Motion for Post Conviction Relief with Special Request to Temporarily Hold Proceedings in Abeyance" ("Motion") constitutes a properly filed application for state post-conviction or other collateral review. To answer that question, the Court must decide: "(1) whether [Petitioner's Motion] was an 'application for State post-conviction or other collateral review' at all; (2) if so, whether it was 'filed', and (3) whether it was filed 'properly.' " *Sibley v. Culliver*, 377 F. 3d 1196, 1200 (11th Cir. 2004).

Although Petitioner contends that the Motion was properly filed, the Court does not decide that issue because Petitioner's claim for timeliness fails, instead, at the first step. The Eleventh Circuit has explained that:

> the defining factor of an application for review is that it seeks review. . . . "Giving the term 'application' its natural meaning, a filing that purports to be an application for State post-conviction or other collateral review with respect to the pertinent judgment or claim must set forth the grounds upon which it is based, and must state the relief desired; it must attack collaterally the relevant conviction or sentence."

Sibley, 377 F.3d at 1200 (quoting *Voravongsa v. Wall*, 349 F.3d 1, 6 (1st Cir. 2003)). A document filed with a state court cannot be viewed as an "application for State post-conviction or other collateral review" if it "does not even attempt to make a good faith effort to offer at least a potentially plausible or coherent basis for granting [the petitioner] relief." *Id.*

Petitioner's Motion was titled as a motion for post-conviction relief. She further stated in the Motion that:

> By her motion for Florida Rules of Criminal Procedure, Rule 3.850, Ashley Dunn asserts that her conviction and sentence were obtained in violation of the 6th and 14th Amendment of the United States Constitution and the corresponding provision of the State of Florida Constitution for the reasons set forth below.

(Doc. 7-4 at 726.) However, the remainder of the Motion failed to contain any facts or analysis that could reasonably be construed to attack her convictions or sentences. At most, Petitioner's Motion vaguely implied that she may eventually amend the motion to allege unspecified constitutional violations.

Under these circumstances, the Motion is not an "application for State post-conviction or other collateral review" within the meaning of Section 2254(d)(2). *See e.g.*, *Sibley*, 377 F.3d at 1200 ("[A] document captioned 'Application for Post-Conviction or Other Relief,' which contained nothing more than the phrase 'Let me out!,' would not trigger § 2244(d)(2)'s tolling provisions. Instead, the document must contain something vaguely approaching legitimate, relevant, coherent legal analysis. . . . [W]here a

petitioner fails to include any meaningful federal or state legal analysis, we need not consider [the] filing an application for state post-conviction review.").

Therefore, the tolling provision of Section 2244(d)(2) does not apply to Petitioner's September 10, 2015 Motion. Although Petitioner subsequently filed an "amended" Rule 3.850 motion on September 7, 2016, that motion also did not toll the Section 2254 limitations period. Although it contained thirteen grounds for relief, it was filed after the November 17, 2015 deadline. *See Sibley*, 377 F.3d at 1204 ("[O]nce a deadline has expired, there is nothing left to toll. . . . Petitioner may not attempt to resurrect a terminated statute of limitations by subsequently filing documents that purport to 'relate back' to previously submitted documents that were, in themselves, insufficient to toll the statute.").

In her Reply, Petitioner argues that she correctly relied on the post-conviction court's order granting her request to hold the proceedings in abeyance, that the correctional institution in which she was housed did not have enough law clerks available to efficiently provide her assistance, and that she did not intend to circumvent the prescribed time limitations. (Doc. 8 at 2–4.) To the extent this argument may be construed as one in support of equitable tolling, it does not entitle Petitioner to relief.

The Supreme Court has held that "that § 2244(d) is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). "Equitable tolling may apply 'when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Johnson v. Fla. Dep't of Corr.*, 513 F.3d 1328, 1332 (11th Cir. 2008) (quoting *Arthur v. Allen*, 452 F.3d 1234, 1252

(11th Cir. 2006)) (citing *Helton v. Sec'y for the Dep't of Corr.*, 259 F.3d 1310, 1313 (11th Cir. 2001); *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001)).

Petitioner has not demonstrated extraordinary circumstances or due diligence here. *See e.g., Lumadue v. Sec'y, Dep't of Corr.*, No. 6:16-cv-1574-Orl-37TBS, 2017 WL 4271706, at *4 (M.D. Fla. Sept. 26, 2017) (citing *Miller v. Florida*, 307 F. App'x 366, 368 (11th Cir. 2009); *Paulcin v. McDonough*, 259 F. App'x 211, 213 (11th Cir. 2007); *Dodd v. United States*, 365 F.3d 1273, 1282–83 (11th Cir. 2004); *Akins v. United States*, 204 F.3d 1086 (11th Cir. 2000)) ("Petitioner's summary allegations regarding the incompetence of a prison law clerk and her 'extreme difficulties' with the prison law library simply do not rise to the level of extraordinary circumstances beyond her control which warrant equitable tolling of the one-year limitations period."); *Johnson*, 513 F.3d at 1333 (citing *Howell v. Crosby*, 415 F.3d 1250, 1251–52 (11th Cir. 2005); *Tinker v. Moore*, 255 F.3d 1331, 1334–35 (11th Cir. 2001)) ("[O]ur precedent provides that federal habeas petitioners who rely upon the timeliness of state post-conviction court proceedings to satisfy the requirements of AEDPA do so at their peril.").

The Court notes that, although Petitioner claims her intent was not to circumvent the federal limitations period, her Motion demonstrated to the contrary. After recounting the procedural history of the case, and in place of any argument related to specific grounds for collateral relief, Petitioner argued:

> Pursuant to 28 U.S.C. § 2254, Dunn has only a year within which to seek review of her case in federal distrcourt, which time limitation is tolled during the pendency of state court proceedings, the latter of which are conditions

> precedent to ripeness of any federal claim. That is to say, under the principle of exhaustion of available State court remedies a movant in federal court must first seek relief in the State courts, even though the "deadline" for collateral review in the federal court system expires first, absent applicable tolling provisions.
>
> The practical effect of such an illogical and incongruous litigation rubric is to effectively reduce the time limitation for a timely post conviction motion under Florida Rules of Criminal Procedure [Rule] 3.850 by half. Under Florida Law, Dunn is actually entitled to another full year in order to investigate and prepare her request for collateral review of judgment and sentence. Dunn should not be forced to choose between her federal and State court rights to pursue collateral review and relief from a sentence of life imprisonment.

(Doc. 7-4 at 726–27.) Moreover, Petitioner's "impermissible choice" argument, as expressed in the Motion, has long been foreclosed in this circuit. *See Tinker*, 255 F.3d at 1334–35 (rejecting the petitioner's argument that he was "force[d] . . . to choose between exercising his right to meaningful access to the state courts which provide a two-year limitation period and the right to petition for federal habeas relief.").

Any of Petitioner's allegations that attempt to excuse her failure to file a petition within the one-year period of limitation that are not specifically addressed herein are without merit.

III. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims

debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims and procedural rulings debatable or wrong. Further, Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

IV. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** that:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**;
2. Petitioner is **DENIED** a certificate of appealability; and
3. The Clerk of Court shall enter judgment in favor of Respondents and close this case.

DONE and **ORDERED** in Orlando, Florida on June 28, 2019.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party

OrlP-4 6/24

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ASHLEY L. DUNN,

Petitioner,

v. **Case No: 6:18-cv-759-Orl-37GJK**

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

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Petition for Writ of Habeas Corpus is DENIED, and this case is DISMISSED WITH PREJUDICE. Judgment is entered in favor of Respondents.

Date: July 2, 2019

ELIZABETH M. WARREN,
CLERK

s/L. W., Deputy Clerk