No. 487906
Division "D"

22nd Judicial District Court
Parish of St. Tammany
State of Louisiana

JESSIE E. SHELTON,

v.

ROBERT C. TANNER, WARDEN
B.B. RAYBURN CORRECTIONAL CENTER,

Filed: 9-4-12

Teresa A. Cooper,
Deputy Clerk "s/"

ORDER DISMISSING APPLICATION FOR POST-CONVICTION RELIEF

Petitioner filed an application for post-conviction relief asserting three claims following his guilty plea to Aggravated Incest. First, Petitioner contends he was not advised of his right to appeal his guilty plea conviction and was otherwise denied his appeal due to failure of his trial counsel to timely perfect an appeal for him. Petitioner, clearly waived his right to appeal by any action of defense counsel because he knowingly and intelligently waived that right. It should be also noted that petitioner was represented by counsel at each appearance before the court. Accordingly, this claim is without merit. In second claim petitioner attacks the plea bargain as an absolute nullity. The court has thoroughly reviewed and likewise finds this claim, including allegations that he was not sentenced harshly enough, completely without merit. Finally, in the third claim, petitioner

states that his plea was unknowing and involuntary "given the scope of the court's canvassing". Again, the court has reviewed the Boykin transcript and finds petitioner's assertions without merit.

Accordingly, after considering the application for post-conviction relief filed by Jessie Shelton, the law and the entire record of this matter,

IT IS ORDERED that the Application for Post-Conviction Relief filed by Jessie Shelton be dismissed. Louisiana Code of Criminal Procedure Article 929.

IT IS FURTHER ORDERED that the Clerk of Court for the Parish of St. Tammany give notice of this dismissal to the petitioner, petitioner's custodian, and the District Attorney for the Parish of St. Tammany.

Covington, Louisiana this 29th day of August, 2012.

PETER J. GARCIA "s/"
Judge Division "D"

TWENTY-SECOND JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. TAMMANY STATE OF LOUISIANA

NO. 487906 DIVISION "D"

STATE'S RESPONSE TO JESSIE SHELTON'S MOTION TO RECUSE DIVISION D

MAY IT PLEASE THE COURT:

Jessie Shelton is a sex offender who pleaded guilty to aggravated incest in 2010 under case number 487906 in Division "D" of the 22nd Judicial District Court. This matter is before Division "H" of the 22nd Judicial District Court for the sole reason that Shelton has filed a "Motion to Recuse Division D". this case is next docketed for May 3, 2017.

The only question before the Court is whether there exists valid grounds to recuse the Judge in Division D, The Honorable Peter Garcia.

The grounds for recusing a judge are set forth in Article 671 of the Code of Criminal Procedures, as follows:

> In a criminal case a judge of any court, trial, or appellate, shall be recused when he:
>
> (1) Is biased, prejudiced, or personally interest in the cause to such an extent that he would be unable to conduct a fair and impartial trial;
>
> (2) Is the spouse of the accused, of the party injured, of an attorney employed in the case, or of the district attorney; or is

related to the accused or the party injured, or to the spouse of the accused or party injured, within the fourth degree; or
is related to an attorney employed in the cause or to the district attorney, or to the
spouse of either, within the second degree;

[1]

(3) Has been employed or consulted as an attorney in the cause, or has been associated with an attorney during the
latter's employment in the cause;

(4) Is a witness in the cause;

(5) Has performed a judicial act in the case in another court; or

(6) Would be unable, for any reason, to conduct a fair and impartial trial.

La. C.Cr.P. art. 67 (A) .

(1) Is a witness in the cause;

(2) Has performed a judicial act in the case
in the case in another court; or

Upon review of the allegations contained in the motion to recuse, the State respectfully submits that Shelton has failed to demonstrate-or-even allege-that there exist valid grounds for recusal of Judge Garcia.

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[1] [1] The filing of a motion to recuse has specific legal consequences: the judge who Jessie Shelton has moved to recuse no longer has the authority to act, and motion to recuse is to be "referred to another judge of the court through a random process as provided by the rules of the court "La. C.Cr.P arts. 673; 675(B); State v. Price 274 So.2d 194, 197 (La. 1973).

The State therefore respectfully prays that the *Motion to Recuse* be denied, and that the matter be returned to Division D for resolution of the merits of the petitioner's *Application for Post-Conviction Relief.*

Respectfully submitted,

Matthew Caplan LSBA#31650 "s/"
Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleading to the petitioner through his attorney of record on this the 28th day of April, 2017, by sending it United States Postal Service first class mail, addressed as follows:

Robert Stamps
1226 Antonine St.
New Orleans, LA 70115

Matthew Caplan, LSBA#3160 "s/"
Assistant District Attorney

TWENTY-SECOND JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST TAMMANY
STATE OF LOUISIANA

NO. 487906 DIVISION D

STATE OF LOUISIANA

VS.

JESSIE SHELTON

STATE'S RESPONSE TO JESSIE SHETON'S APPLICATION

Jessie Shelton is a sex offender who plead guilty to aggravated incest in 2010. He filed an application for post-conviction relief on November 16, 2016 is time-barred and without merit, and that it can and should be dismissed summarily pursuant to Article 929(A) of the Code of Criminal Procedure.

PERTINENT FACTS AND PROCEDURAL HISTORY

The petitioner, Jessie Shelton, pleaded guilty as charged to aggravated incest (La. R.S. 14:78.1) on August 5, 2010. He did not appeal his conviction or sentence. His conviction and sentence became final upon the expiration of time for seeking appellate review, which occurred 30 days later, on September 4, 2010. See La.C.Cr.P. art 914(B).

PETITIONERS CLAIMS

The petitioner claims that there has been a "violation of allotment rules".

RESPONSE TO THE PETITIONER'S CLAIMS

I. The post-conviction relief application untimely.

Article 930.8(A) of the Code of Criminal Procedure provides a time limitation for the filing of post-conviction relief applications as follows:

No application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgement of conviction and sentence has become final under the provisions of Article 914 or 922, unless any of the following apply;

(1) The application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicated were not known to the petitioner or his prior attorneys…

(2) The claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of the constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case, and the petition is filed within one year of the finality of such ruling.

(3) The application would already be barred by the provisions of this Article, but the application is filed on or before October 1, 2001, and the date on which the application was filed is within three years after the judgement of conviction and sentence has become final.

(4) The person asserting the claim has been sentenced to death.

The exception created by Paragraph (A)(1) does not apply because the petitioner does allege the existence of newly-discovered facts. The exception created by Paragraph (A)(2) does not apply because the petitioner's claim is not "based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law." The exception created by Paragraph (A)(3) does not apply because the

petitioner's application was not filed "on or before October 1, 2001." The exception created Paragraph (A)(4) does not apply because the petitioner was not sentenced to death. Shelton's conviction became final in 2010. His application was filed in 2016. The application was filed more than two years after the judgement of conviction and sentence became final. None of the exceptions to the two-year time bar apply. The application is untimely.

II. The Petitioner's Claim is waived by the entry of Guilty Plea

Shelton entered an unconditional guilty plea. Such a plea "waives all non-jurisdictional defects in the proceedings prior to the plea". *State v. Crosby,* 338 So.2d 584, 586 (La. 1976). The difference between "jurisdictional" and "non-jurisdictional" defects has been explained by the Louisiana Supreme Court as follows: "jurisdictional" defects are "those which", even conceding the accused's factual guilt, do not permit his conviction of the offense charged". Id. At 588.

The Louisiana First Circuit Court of Appeal has held that a conviction may stand even in the face of an allotment error. See, e.g., *State v. Jones,* 600 So.2d 875, 879 (La. App. 1 Cir. 1992) (allotment error was harmless); *State v. Claxton,* 603 So.2d 247, 249-250 (La. App. 1 Cir. 1992) (allotment error was harmless); *State v. Weisinger,* 618 So.2d 293, 933 (La. App. 1 Cir. 1993) (error not preserved for review; defendant did not object to the method of allotment prior to trial).

Because the First Circuit Court of Appeal has affirmed convictions even in the presence of an allotment error, any error in the allotment-if one occurred-is not the type of error "which, even conceding the accused's factual guilt, do(es) not permit his conviction of the offense charged". Crosby *supra.* Accordingly, the alleged error is not "jurisdictional".

Because non-jurisdictional errors are waived by the entry of an unconditional plea of guilty, and because Jessie Shelton entered an unconditional plea of guilty, the petitioner is not entitled to relief: this claim was waived by the entry of the guilty plea.

CONCLUSION AND PRAYER

Shelton's claim is time-barred and without merit. The State therefore respectfully prays that his application for post-conviction relief be DENIED.

Matthew Caplan, LSBA #31650 "s/"
Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleading to the petitioner through his attorney of record on this 28th day of April, 2017, by sending it by United States Postal Service first-class mail, addressed as follows:

Robert Stamps
1226 Antonine
New Orleans, LA 70115

Matthew Caplan, LSBA #31650 "s/"
Assistant District Attorney

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

State of Louisiana No. 2017- KW 0749

Verse

Jessie Eugene Shelton

In Re: Jessie Eugene Shelton, applying for supervisory writs, 22nd Judicial District Court, Parish of St. Tammany, No. 487, 906.

Before: Whipple, C.J., Theriot and Chutz, JJ.

Writ Denied. A motion to recuse the judge was not the proper procedural device to challenge the allotment of this case on due process grounds. Criminal cases in St. Tammany Parish are not allotted based upon the date of arrest. At the Motion hearing, the deputy criminal court clerk indicated that when the date of offense occurs over a period of time or is uncertain, the case is randomly allotted by the clerk without the involvement of the district attorney. This type of random allotment was found to be constitutional by the Louisiana Supreme Court. See **State v. Nunez**, 2015-1473 (La. 1/27/16, 187 So. 3d 964, 972. Accordingly, the district Court did not err by denying the motion to recuse or relator's request for re-allotment.

MRT
WRC
VGW

COURT OF APPEAL, FIRST CIRCUIT

Tiffany S. Pucheu "s/"
DEPUTY CLERK OF COURT
FOR THE COURT

THR SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA NO. 2017-KP-1389

VS

JESSIE EUGENE SHELTON

IN RE: Jessie Eugene Shelton; - Defendant; Applying For Supervisory and/or Remedial Writs, Parish of St. Tammany, 22nd Judicial District Court Div. H, No. 487906; to the Court of Appeal, First Circuit, No. 2017- KW 0749;

December 17, 2018

Denied.

JTG
BJJ
JLW
GGG
MRC
JDH
SJC

Supreme Court of Louisiana
December 17, 2018

Theresa McCarthy "s/"
Deputy Clerk of Court
For the Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JESSIE EUGENE SHELTON
PETITIONER

CIVIL ACTION

NO. 19-cv-0470

VERSUS

SECTION "E" (2)

ROBERT TANNER, WARDEN
RESPONDENT

REPORT AND RECOMMENDATION

This matter was referred to a United States Magistrate Judge to conduct hearings, including an evidentiary hearing, if necessary, and to submit proposed findings and recommendations for disposition pursuant to 28 U.S.C. 636 (b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 cases. Upon review of the entire record, I have determined that a federal evidentiary hearing is unnecessary. See 28 U.S.C. 2254(e)(2).[1]

RESPONSE TO PETITION FOR HABEAS CORPUS RELIEF

OVERVIEW

Jessie Eugene Shelton is a state prisoner incarcerated at the Rayburn Correctional Center in Angie, LA. He is serving a twenty year sentence as a result of his 2010 conviction for aggravated incest (La. R.S. 14:78.1). For the following reasons, I recommend that the instant petition for habeas corpus relief be **DISMISSED WITH PREJUDICE** as time barred.

[1] Under 28 U.S.C. 2254(e)(2), whether to hold an evidentiary hearing is a statutorily mandated determination. Section 2254(e)(2) authorizes the district court to hold an evidentiary hearing only when the petitioner has shown either that the claim relies on a new, retroactive rule of constitutional law that was previously unavailable, 28 U.S.C. 2254(e)(2)(A)(i), or the claim relies on a factual basis that could not have been previously discovered by exercise of due diligence, 28U.S.C. 2254(e)(2)(A)(ii); and the facts underlying the claim show by clear and convincing evidence that, but for the constitutional error, no reasonable jury would have convicted the petitioner. 28 U.S.C. 2254(e)(2)(B).

I. FACTUAL BACKGROUND

The petitioner, Jessie Eugene Shelton, appearing through counsel, is a convicted inmate incarcerated in the B.B. "Sixty" Rayburn Correctional Center in Angie, LA. On May 10, 2010, Shelton was charged by bill of information in St. Tammany Parish with aggravated incest and oral sexual battery upon his daughter. On May 20, 2010, Shelton entered a not guilty plea to the charges.

At an August 5, 2010 hearing, the state trial court granted Shelton's motion to quash the oral sexual battery charge. At the same hearing, Shelton withdrew his former plea to enter a guilty plea to aggravated incest. On August 31, 2010 the state trial court sentenced Shelton to 20 years in prison at hard labor, with one year suspended, followed by five years of supervised probation.

Shelton's conviction became final 30 days later, on September 30, 2010, when he did not seek reconsideration of the sentence or pursue a direct appeal. *Roberts v Cockrell,* 319 F3d. 690, 694-95 (5th Cir. 2003) (under federal habeas law, a conviction is final when the state defendant does not timely proceed to the next available step in the state appeal process); see *Cousin v. Lensing,* 310 F3d. 843, 845, (5th Cir. 2002) (petitioner's guilty pleas became final at the end of the period for seeking leave to file a notice of appeal under La. Code Crim. P. art 914). [2]

More that 22 months later, on August 2, 2012, Shelton signed and submitted to the state trial court an application for post-conviction relief asserting the following: (1) He was denied the right to direct appeal because the state trial court did not advise him of the right after sentencing. (2) The plea agreement was an absolute nullity because the sentencing was contingent on the victim impact statement. (3) The guilty plea was not entered knowingly, intelligently or voluntarily.

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[2] The *Cousin* court recognized that failure to move timely for appeal under La. Code Crim. P. art. 914 renders the conviction and sentence final at the expiration of that period, citing *State v Counterman,* 475 So.2d 336, 338 9La 1985). At the time of *Cousin*, La. Code Crim P. Art. 914 required a criminal defendant to move for leave to appeal within five (5) days of the order or judgement being appealed or of a ruling on a timely motion to reconsider a sentence. Article 914 was later amended by La. Acts 2003, No. 949, 1 to provide thirty (30) days for filing of the notice of appeal.

On August 29, 2012, the state trial court denied relief, finding no merit in the claims. Shelton did not seek review of this ruling.

More than four years later, on October 15, 2016, Shelton signed and submitted to the state trial court a second application for post-conviction relief asserting the following: (1) He was denied due process in the allotment of his case. (2) The court lacked jurisdiction because the crime was committed in Washington Parish. (3) Prosecutorial misconduct was involved in the allotment of his case and the choice of jurisdiction. (4) His counsel provided ineffective assistance of counsel because they did not challenge the allotment, jurisdiction of the state trial court or the prosecutorial misconduct.

That same day and during the next few months, Shelton's retained counsel filed several motions for recusal of the trial judge (Division D), recusal of the judge (Division H) presiding over the motion to recuse the trial judge and re-allotment of the proceedings to the judge in Division I. The motions and Shelton's post-conviction application alleged that his original criminal charges were allotted to Division I and by manipulation of the prosecutor, and because of his subsequent arrest on a different rape charge, the entire matter was moved to Division D, where Shelton eventually entered his guilty plea. He urges that this denied him due process and the matter should be renewed before Division I.

On April 5, 2017, the state judge in Division H heard argument on the motion to recuse and re-allot and ordered additional briefing, including the State's responses to the motions and the post-conviction application. At a May 3, 2017, hearing, the court denied the motions to recuse and re-allot, because allotment to Division D for trial was proper under the rules of the court. The record and independent research of staff of the undersigned magistrate judge indicate that the state trial court has not yet ruled on the Shelton's second application for post-conviction relief.

On July 25, 2017, The Louisiana First Circuit denied Shelton's counsel-filed writ application seeking review of the

denial of the motions to recuse and re-allot. On December 17, 2018, The Louisiana Supreme Court denied the related writ application. [4]

II. FEDERAL HABEAS PETITION

On January 30, 2019 the clerk filed Shelton's federal habeas corpus petition in which he asserts the following grounds for relief: (1) He was denied due process in the allotment process. (2) The state trial court in St. Tammany Parish lacked jurisdiction over his case, because the alleged crime in Washington Parish. (3) Ineffective assistance of counsel when his counsel failed to challenge the allotment and jurisdiction of the court. (4) There was prosecutorial misconduct during the allotment process, and he received ineffective assistance when his counsel did not challenge it.

On March 6, 2019, the State filed a response in opposition to Shelton's federal petition, asserting that the petition is time-barred and reserving its right to assert lack of exhaustion and other defense and/or address the merits of Shelton's claims, if necessary.

III. GENERAL STANDARDS OF REVIEW

The antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214, Comprehensively revised federal habeas corpus legislation, including 28 U.S.C. 2254. The AEDPA went into effect on April 24, 1996[5] and applies to habeas petitions filed after that date. *Flanagan v Johnson*, 154 F.3d 196, 198 (5th Cir. 1998) (citing *Lindh v Murphy,* 521 U.S. 320 (1997). The AEDPA

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[4] *State v Shelton* No. 2017-KW-0749, 2017 WL 3165978 at *1 (La. App. 1st Cir. Jul. 25, 2017); St. Rec. Vol. 3 of 4, 1st Cir. Order, 2017-KW-0749, 7/25/17; 1st Cir. Writ Application, 2017-KW-0749, 5/26/17.

[5] The AEDPA, which was signed into law on that date, does not specify an effective date for its non-capital habeas corpus amendments. Absent legislative intent to the contrary, statutes become effective at the moment they are signed into law. *United States v Sherrod,* 964 F.2d 1501, 1505 (5th Cir. 1992).

Therefore, applies to this petition deemed filed on January 14, 2019, when it was signed by Shelton, and filed on January 30, 2019, when the filing fee was paid by his counsel.[6]

The threshold questions in habeas review under the amended statute are whether the petition is timely and whether petitioner's claims were adjudicated on the merits in state court; i.e., the petitioner must have exhausted state court remedies and must not be in "procedural default" on a claim. *Nobles v Johnson,* 127 F. 3d 409, 419-20 (5th Cir. 1997) (Citing 28 U.S.C. 2254(b), (c).

The State correctly asserts that Shelton's federal petition was *not* timely filed. For the following reasons, Shelton's petition must be dismissed with prejudice because it is clearly time-barred.

IV. STATUTE OF LIMITATIONS

The ADEPA requires that a Section 2254 petition must ordinarily be filed within one year of the date of conviction

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[6] Shelton's petition was filed under the signature of retained counsel but received by mail in an envelope bearing Shelton's prison return address in Angie, Louisiana. Under the prison mailbox rule, the date when prison officials receive a pleading from the inmate for delivery to the court is considered the time of filing for limitation purposes. *Houston v Lack,* 487 U.S. 266 (1988); *Coleman v Johnson,* 184 F3d 398, 401 (5th Cir. 1999); *Spotville v Cain*, 149 F3d 374, 378 (5th Cir. 1998). The rule, however, applies only if an inmate relies on the prison mail system for mailing items to a court. Rule 3(d), Rules Governing Section 2254 Cases; *Dison v Whitley,* 20 F3d 185, 187 (5th Cir. 1994) ("use of an unknown agent does not trigger the *Houston* exception…limited to filings with prison officials, over whom a prisoner has no control"); *Driscoll v Thaler,* No. 12-CV-330, 2012 WL 3656296 at *1 n.2 (N.D. Tex. Aug. 27, 2012) (mailbox rule not applicable if pleading sent to third party to file with court); *Llovera v. Florida* No. 13-859, 2013 WL 5468256, at *3n.2 (D.S.C. Sep. 30, 2013) (mailbox rule not applicable if "there" was nothing on the envelope to indicate mailing from a place of confinement."). Shelton's envelope bears no indication it was mailed through the prison mail system. The envelope has no prison stamp noting that is contains inmate mail and no prison processing/receipt stamp. Instead, the envelope was sent certified, priority mail from Mandeville, Louisiana, not Angie, Louisiana where the prison is located. Rec. Doc. No. 3-1, o. 10. Nevertheless, affording Shelton every benefit, I will consider the prison mailbox rule to apply and deem Shelton's petition filed on January 14, 2019, when he (and his counsel) signed the form petition. This is the earliest date appearing in the record on which it could have been given to prison officials for mailing to a federal court. Payment of the filing fee does not alter the application of the federal mailbox rule. *Cousin*, 310 F.3d at 847.

being final.[7] *Duncan v. Walker,* 533 U.S. 167, 179-80 (2001). Shelton's conviction was final on September 20, 2010, when he did not seek review of sentence or guilty plea. Applying Section 2244 literally, Shelton had one year from finality of his conviction, until September 30, 2011, to file his federal habeas corpus petition, which he did not do. His petition must be dismissed as untimely, unless the one-year statute of limitations was interrupted or otherwise tolled on either of the following two ways recognized in the applicable law.

First, the United States Supreme court has held that AEDPA's one-year statute of limitations period in Section 2244(d)(1) may be equitably tolled only when the petitioner has pursued his rights diligently and rare or extraordinary circumstances exist which prevented timely filing. *Pace v DiGuglielmo,* 544 U.S. 408, 418 (2005); *Fisher v. Johnson,* 174 F3d. 710, 713 (5th Cir. 1999), cert. denied, 531 U.S. 1164 (2001); cert. denied *CantuTzin v Johnson,* 162 F.3d 295, 299, (5th Cir. 1998); *Davis v Johnson,* 158 F.3d 806, 810 (5th Cir.

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[7] The statute of limitations provision of the AEDPA in 28 U.S.C. 2244(d) provides for other triggers which do not apply here:

(1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgement of a State court. The limitation period shall run from the latest of—

A. The date on which the judgement 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 actions;

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 case 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 judgement or claim is pending shall not be counted toward any period of limitation under this subsection.

1999), cert. denied, 526 U.S. 1074 (1999). Equitable tolling is warranted only in situations in which the petitioner was actively misled or is prevented in some extraordinary way

from asserting his rights. *Pace*, 544 U.S. at 418-19; *Cousin,* 310 F3d. at 848.

Shelton has asserted no reason, and I can find none, that might constitute rare or exceptional circumstances why the one-year statute of limitations period should be considered equitably tolled in his case. The record does not establish circumstances that might fit the restrictive boundaries of "exceptional circumstances" described in binding precedent to warrant equitable tolling in this case. See *Holland v Florida*, 560 U.S. 631, 651-54 (2010) (equitable tolling would be warranted where attorney was more than negligent when he failed to satisfy professional standards of care by ignoring the client's requests timely to file a federal petition and in failing to communicate with the client over a period of years in spite of the client's letters); *Hardy v Quarterman,* 577 F.3d 596, 599-600 (5th Cir. 2009) (equitable tolling was warranted where petitioner suffered a significant state-created delay when, for nearly one year, the state appeals court failed in its duty under Texas law to inform him that his state habeas petition had been denied, petitioner diligently pursued federal habeas relief, and he persistently inquired to the court); *United States v Wynn,* 292 F.3d 226 (5th Cir. 2002) (tolling warranted when defendant was deceived by attorney into believing that a timely motion to vacate was filed); *Coleman v. Johnson,* 184, F3d 398, 402 (5th Cir. 1999), cert. denied, 529 U.S. 1057 (2000) ("A garden variety claim of excusable neglect does not support equitable tolling"). *Fisher,* 174 F.3d 715 (tolling not justified during petitioner's 17-day stay in psychiatric ward, during while he was confined, medicated, separated from his glasses and this rendered legally blind, and denied meaningful access to the courts); *Cantu-Tzin,* 162 F.3d at 3—(State's alleged failure to appoint competent habeas counsel did not justify tolling); *Davis,* 158 F.3d at 808 n.2 (assuming without deciding that equitable tolling was warranted when federal district court three times extended petitioner's deadline to file habeas corpus petition beyond expiration of AEDPA grace period).

In addition to equitable tolling, the AEDPA itself provides for interruption of the one-year limitations period, in stating that "(t)he time during which a properly filed application for State post-conviction or other collateral review with respect

to the pertinent judgement or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. 2244(d)(2) (emphasis added). By its plain language, this provision does not create a new, full, one-year term within which a federal habeas petition may be filed at the conclusion of state court post-conviction proceedings. *Flanagan,* 154 F.3d at 199 n.1. The Supreme Court has clearly described this provision as a tolling statute. *Duncan,* 533 U.S. at 175-78.

The decision of the Fifth Circuit and other federal courts have held that, because this statute is a tolling provision, the time during which state court post-conviction proceedings are pending must merely be subtracted from the one-year limitations period:

> (Section) 2244(d)(2) provides that the period during which a properly filed state habeas application is pending must be excluded when calculating the one(-)year period. Under the plain language of the statute, any time that passed between the time that (petitioner's) conviction became final and the time that his state application for habeas corpus was properly filed must be counted against the one(-)year period of limitation.

Flanagan, 154 F.3d at 199 n.1; *accord Bisbane v. Beshears,* 161 F.3d 1, 1998 WL 609926, at *1 (4th Cir. Aug. 27, 1998)(Table, Text in Westlaw); *Gray v Waters,* 26 F. Supp. 2d 771, 771-72 (D. Md. 1998).

For post-conviction application to be considered "properly filed" within the meaning of Section 2244(d)(2), the applicant must "conform with a state's applicable procedural filing requirements", such as timeliness and location of filing. *Pace,* 544 U.S. at 414 ("When a post-conviction application is untimely under state law, 'that is the end of the matter' for purposes of 2244(d)(2)"). *Williams v Cain,* 217 F.3d 303, 306-307 n.4 (5th Cir. 2000) (quoting *Villegas v Johnson,* 184 F.3d 467, 469 (5th Cir. 1999); *Smith v Ward,* 209 F.3d 383-85 (5th

Cir. 2000). The timeliness consideration in Louisiana, for purposes of the AEDPA, requires application of a prison mailbox rule to state pleadings filed by a prisoner. *Carey v.*

Saffold, 536 U.S. 214, 219-20 (2002); *Williams,* 217 F. 3d at 310 (a matter is "pending" for Section 2244(d)(2) purposes until "further appellate review (is) unavailable under [Louisiana's] procedures").

The phrase "other collateral review" in the statute refers to state court proceedings challenging the pertinent judgement subsequently challenged in the federal habeas petition. *Dillworth v Johnson, 215* F.3d.497, 501 (5th Cir. 2000) (state habeas petition challenging prior conviction in one county was other collateral review even though filed as a challenge to a second conviction in a different county); *Nara v Frank,* No. 99-3364, 2001 WL 995164, at *5 (3rd Cir. Aug. 30, 2001) (motion to withdraw a guilty plea is "other collateral review"). A "pertinent judgement claim" requires that the state filings for which tolling is sought must have challenged the same conviction being challenged in the federal habeas corpus petition and must have addressed the same substantive claims now being raised in federal habeas corpus petition. *Godfrey v. Dretke,* 396 F.3d 681, 686-88 (5th Cir. 2005).

In this case, the one-year AEDPA statute of limitations began to run on October 1, 2010, the day after Shelton's conviction was final under federal law. The period continued to run uninterrupted for one year, until September 30, 2011, when it expired. Shelton had no properly filed application for state post-conviction relief or other collateral review during that time period that might have tolled the AEDPA one-year statute of limitations.

Shelton's first state court application for post-conviction relief was filed on August 2, 2012, which was more than 10 months after the AEDPA one-year filing period expired on September 30, 2011. In addition, Shelton allowed a period of more than four years to pass between denial of his first state court application on August 29, 2012, and the filing of his second application for post-conviction relief on October 15, 2016. Shelton is not entitled to tolling for these state filings made after expiration of the AEDPA limitations period. See

Scott v Johnson, 227 F.3d 260, 263 (5th Cir. 2000) (state application for habeas corpus relief filed after limitations period expired does not toll the limitations period); *Higginbotham v. King,* 529 F. App's 313, 314 (5th Cir. 2015); see also, *Lookingbill v Cockrell,* 293 F.3d 256, 264 (5th Cir.

2002) (missing the AEDPA deadline by even one day renders a federal petition untimely).

Shelton's federal petition was filed under the mailbox rule (and with counsel) on January 14, 2019, which was more than seven years and three months after the AEDPA one-year statute of limitations expired on September 30, 2011. His federal petition was not timely filed and must be dismissed with prejudice for that reason. [8]

RECOMMENDATION

For the foregoing reasons, it is RECOMMENDED that Jessie Eugene Shelton's petition for issuance of a writ of

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[8] Shelton has exerted no excuse to avoid the expiration of the limitations period. He has not asserted his actual innocence and has brought no new, reliable evidence to meet the high burden set forth in *McQuiggin v. Perkins*, 569 U.S. 383 (2013). Furthermore, the holding in *Martinez v. Ryan*, 566 U.S. 1 (2-12), is not relevant to this timeliness discussion. In *Martinez,* the Supreme Court held that a procedural bar imposed by state courts "will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [state's] initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective". *Trevino v Thaler*, 569 U.S. 413, (2013) (quoting *Martinez*, 566 U.S. at 13). First, the state courts have not barred review of Shelton's ineffective assistance of counsel claims, which are still pending resolution in the state trial court. Second, this dismissal is based not on a state procedural bar but on Shelton's failure to timely file his federal habeas petition. The *Martinez* and *Trevino* decisions do not address or excuse untimely filing of a federal habeas petition. See, *Arthur v. Thomas*, 739 F.3d 611 631, (11th Cir. 2014) ("Thus, we also hold that the reasoning of the *Martinez* rule does not apply to AEDPA's limitations period in 2254 cases or any potential tolling of that period"); *Smith v Rogers*, No. 14-0482, 2014 WL 2972884, at *1 (W.D. La. Jul. 2, 2014); *Falls v Cain*, No 13-5091, 2014 WL 2702380, at *3(E.D. La. Jun. 13, 2014) (Order adopting Report and Recommendation). *Martinez* and *Trevino* also are not new rules of constitutional law made retroactive on collateral review to start a new one-year statute of limitations period under the AEDPA. *See in re Paredes*, 587 F.App'x 805, 813(5th Cir. Oct. 25, 2014)("…the Supreme Court has not made either *Martinez* or *Trevino* retroactive to cases on collateral review, within the meaning of 28 U.S.C. 2244."); *Adams v. Thaler*, 679 F.3d 312, 322 n.6(5th Cir. 2012). Neither *Martinez* nor Trevino provide equitable or statutory relief from Shelton's untimely filing.

habeas corpus under 28 U.S.C. 2254 be DISMISSED WITH PREJUDICE as time-barred.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen days

after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the Un-objected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result
from a failure to object. *Douglas v. United Servs. Auto. Ass'n.* 79 F.3d 1415, 1430 (5th Cir. 1996) (en-blanc) (citing 28 U.S.C. 636(b)(1)0. [9]

New Orleans, LA this 12th day of June, 2019.

JOSEPH C. WILKINSON, JR. "s/"
UNITED STATES MAGISTRATE JUDGE

[9] Douglas referenced the previously applicable ten-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. 636(b)(1) was amended to extend the period to fourteen days.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JESSIE EUGENE SHELTON	CIVIL ACTION
VERSUS	NO. 19-470
ROBERT TANNER, WARDEN RAYBURN CORRECTIONAL CENTER	SECTION "E"(2)

ORDER AND REASONS

Before the Court is a Report and Recommendation issued by Magistrate Judge Wilkinson, Jr. recommending Petitioner Jessie Eugene Shelton's petition for federal habeas corpus relief be dismissed with prejudice as time barred. Petitioner timely objected to the Magistrate Judge's Report and Recommendation. For the reasons that follow, the Court **ADOPTS** the Report and Recommendation as its own, and hereby **DENIES** Petitioner's application for relief.

BACKGROUND

Petitioner is an inmate currently incarcerated in the B.B. "Sixty" Rayburn Correctional Center in Angie, LA . On May 10, 2010, Petitioner was charged by bill of information in St. Tammany Parish with aggravated incest and oral sexual battery.[1] On May 20, 2010, Petitioner entered a not guilty

[1] Petitioner challenges "The magistrate in his report, states that on May 10, 2010 the defendant was charged with aggravated incest and oral sexual battery on his daughter. That statement is **NOT** true. In count 1, Defendant was charged with R.S. 14:78.1, with the victim being 14 years old. In count 2, he was charged with oral sexual battery on another person in 1983. R. Doc. 11 at 2-3 (emphasis original). The

plea to the charges. On August 5, 2010, the state trial court granted Petitioner's motion to quash the bill of information on the oral sexual battery count. On the same date, Petitioner withdrew his former plea to enter a guilty plea to

aggravated incest. On August 31, 2010, the state trial court sentenced Petitioner to twenty years in prison at hard labor, with one year suspended, followed by five years of supervised probation.

On August 2, 2012, Petitioner signed and submitted to the state trial court an application for post-conviction relief. On August 29, 2012, the state trial court denied relief, finding no merit in the claims. Petitioner did not seek review of this ruling. On October 15, 2016, Petitioner signed and submitted to the state trial court a second application for post-conviction relief. To the Court's knowledge, the state trial court has not yet ruled on Petitioner's second application for post-conviction relief. Also on October 15, 2016 and over the course of the following few months, Petitioner's counsel filed several motions for recusal of the trial judge (Division D), recusal of the judge (Division H) presiding over the motion to recuse the trial judge and re-allotment of the proceedings to the judge in Division I. On May 3, 2017, the state judge in Division H, denied the motions to recuse and re-allot. On July 25, 2017, the Louisiana First Circuit denied Petitioner's writ application seeking review of the denial of motions to recuse and re-allot. On December 17, 2018, the Louisiana Supreme Court denied Petitioner's writ application.

On January 30, 2019, Petitioner filed the instant petition for habeas corpus relief. Petitioner seeks federal habeas corpus relief on the following grounds: (1) he was denied due process in the allotment process; (2) the state trial court in St. Tammany Parish lacked jurisdiction over his case, because the alleged crime occurred in Washington Parish; (3) he was denied effective assistance of counsel when his counsel failed to challenge the allotment and jurisdiction of the court; (4) there was prosecutorial misconduct during the allotment process, and he received ineffective assistance

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court notes Petitioner is correct. However, the identity of the victims involved in Count 1 and Count 2 has no bearing on the magistrate judge's finding that Petitioner's federal habeas petition was filed untimely.

when his counsel did not challenge it. On March 6, 2019, the Government filed an opposition to Petitioner's federal petition. In his Report Recommendation, Magistrate Judge Wilkinson concluded Petitioner's claims should be dismissed with prejudice as time-barred. Petitioner filed a timely objection on June 24, 2019 and a memorandum in support thereof o June 27, 2019.

ANALYSIS

I. STANDARD OF REVIEW

In reviewing the magistrate judge's Report and Recommendations, the Court must conduct a de novo review of any of the magistrate judge's conclusions to which a party

has specifically objected. As to the portions of the report that are not objected to, the Court needs only review those portions to determine whether they are clearly erroneous or contrary to law.

II. STATUTE OF LIMITATIONS

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides "[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 judgement of a State court. The limitation period runs from the latest of:

(A) **The date on which the judgement 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.

The one-year period of limitation is subject to certain exceptions. First, the AEDPA expressly allows the one-year limitations period to be interrupted in the following

way: "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgement or claim is pending shall not be counted toward any period of limitation under this subsection ". Second, the one-year period of limitation may be equitably tolled in extraordinary circumstances. Third, a plea of actual innocence can overcome the AEDPA's one-year limitations for filing a habeas petition. Magistrate Judge Wilkinson recommended this Court dismiss Petitioner's petition as untimely because Petitioner failed to file his federal habeas petition within the one-year statute of limitations period.
This Court agrees with the magistrate judge's recommendation.

A. ONE YEAR LIMITATION PERIOD

When a petitioner does not appeal or timely seek reconsideration, the date on which a conviction becomes final is at the end of the period for seeking leave to file a notice of appeal under La. Code Crim. P. art. 914. La. Code Crim. P. art. 914 requires a motion for an appeal be made no later than "thirty days after the rendition of the judgement or ruling from which the appeal is taken." In this case, Petitioner did not seek reconsideration of his sentence imposed on August 31, 2010 or purse direct appeal, and therefore his conviction became final on September 30, 2010. According, Petitioner was required to file his federal habeas petition by no later than September 30, 2019, his petition

was filed untimely unless the one-year statute of limitations was interrupted or otherwise tolled.[2]

B. STATUTORY TOLLING

Section 2244(d)(2) of the AEDPA provides the "time during which a properly filed application for State post-

conviction or other collateral review with respect to the pertinent judgement or claim is pending" shall not be counted towards the one-year limitation period. Notably, a state habeas application does not interrupt the one-year limitation period if it is "not filed until after the period of limitation has expired." In this case the AEDPA one-year limitation period expired September 30, 2011, on year from the finality of his conviction. Petitioner's first state court application for post-conviction relief was filed on August 2, 2012, ten months after the AEDPA one-year period of limitation expired. Petitioner does not dispute this fact. Accordingly, no time may be subtracted from the one-year limitations period under Section 2244(d)(2).

C. EQUITABLE TOLLING

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way". In his Report and Recommendation Magistrate Judge Wilkinson states:

> Shelton has asserted no reason, and I can find none, that might constitute rare or exceptional circumstances why the one-year statute of limitations period should be considered equitably tolled in his case. The record does not establish circumstances that might fit the restrictive boundaries of "exceptional circumstances" described in binding precedent to warrant equitable tolling in this case.

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[2] *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (citing *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990)). *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). See *Cousin v. Lansing*, 310 F.3d 843, 845 (5th Cir. 2002) "[The petitioner] did not appeal or timely seek reconsideration, so the convictions became final on February 7, 1996" after the petitioner was convicted in January 1996 (citing La. Code Crim. P. art. 914)); La. C. Cr. P. art 914(B)(1).

In his Memorandum in Opposition to the Findings of Magistrate Judge, Petitioner argues: "Jessie Shelton did not have legal counsel after his conviction. His two private attorney's did not seek motion to reconsider sentence nor appeal. They did not do anything for Jessie Shelton between September 30, 2010 and September 30, 2011." Although ineffective assistance of counsel may constitute "extraordinary circumstances" warranting equitable tolling, "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." Rather, more than "simple negligence" is required for an attorney's actions

to be extraordinary. In any event, the record reflects, as Petitioner states, Petitioner "did not have legal counsel after his conviction." Accordingly, ineffective assistance of counsel in timely filing Petitioner's federal habeas petition cannot supply circumstances warranting equitable tolling. The Court agrees with Magistrate Judge Wilkinson that Petitioner has asserted no other reason "that might constitute rare or exceptional circumstances why the one-year statute of limitations period should be considered equitably tolled in his case."

D. ACTUAL INNOCENCE

In this case, Petitioner has not asserted his actual innocence. However, because the Government argues Petitioner is not actually innocent, the Court addresses the effect of a claim of actual innocence on the AEDPA's one-year limitations period. "[A]ctual innocence, if provided, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar…or, in this case, expiration of the statute of limitations." [T]enable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." As previously stated, petitioner has not asserted his actual innocence and had brought no new, reliable evidence to meet the high burden set forth by the Supreme Court in *McQuiggin.* Accordingly, the one-year limitation period under the AEDPA is not tolled any actual innocence claim.

The Court, having considered the record, the applicable law, relevant filings, and the magistrate judge's Report and Recommendation finds the magistrate judge's findings of fact and conclusions of law are correct and hereby approves the United States Magistrates Judge's Report and Recommendation and **ADOPTS** it as its opinion in this matter.

CONCLUSION

IT IS ORDERED that Petitioner Jessie Shelton's petition against Robert Tanner be and hereby is **DISMISSED WITH PREJUDICE.**

New Orleans, Louisiana, this 2nd day of August, 2019.

SUSIE MORGAN "s/"
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JESSIE EUGENE SHELTON	CIVIL ACTION
VERSUS	NO. 19-470
ROBERT TANNER, WARDEN RAYBURN CORRECTIONAL CENTER	SECTION "E"(2)

JUDGEMENT

The Court having approved the Report and Recommendation of the United States Magistrate Judge and having adopted it as its opinion herein; accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgement in favor of Defendant, Robert Tanner, and against Plaintiff, Jessie Eugene Shelton, dismissing with prejudice Shelton's petition for issuance of a writ of habeas corpus under 28 U.S.C. 2254 a time-barred.

New Orleans, Louisiana, this 2nd day of August, 2019.

SUSIE MORGAN ("s/"

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JESSIE EUGENE SHELTON	CIVIL ACTION
VERSUS	NO. 19-470
ROBERT TANNER, WARDEN RAYBURN CORRECTIONAL CENTER	SECTION "E"(2)

CERTIFICATE OF APPEALABILITY

Having separately issued a final order in connection with the captioned habeas corpus proceeding, in which the detention complained of arises out of process issued by a state court, the Court, after considering the record and the requirements of 28 U.S.C. 2253 and Fed. R. App. P. 22(b), hereby orders that,

_____ a certificate of appealability shall be issued having found that petitioner has made a substantial showing of the denial of a constitutional right related to the following issue(s).

_____

___X_____ a certificate of appealability shall not be

Issued for the following reason(s).

Petitioner had failed to make a substantial showing of the denial of a constitutional right for the reasons set forth in the Magistrate Judge's Report and Recommendations.

New Orleans, Louisiana, this 2nd day of August, 2019.

SUSIE MORGAN ("s/")

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UNITED STATES DISTRICT JUDGE
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19-30664

JESSIE EUGENE SHELTON
Petitioner-Appellant

v.

ROBERT C. TANNER, WARDEN, B.B. RAYBURN CORRECTIONAL CENTER
Respondent-Appellee

Appeal from the United States District Court
For the Eastern District of Louisiana

ORDER:

Jessie Eugene Shelton, Louisiana Prisoner #574125, moves the court for a certificate of appealability (COA) to appeal the district court's dismissal of his 2254 application as untimely. Shelton first filed the application to challenge his conviction and 20-year sentence for aggravated incest. He contends that he was denied due process in the allotment process and that the trial

court lacked jurisdiction over his case. Shelton also raises ineffective assistance of counsel and prosecutorial misconduct claims.

To obtain a COA, Shelton must make a "substantial showing of the denial of a constitutional right". 28 U.S.C. 2253(c)(2). When the district court's denial of relief is based on procedural grounds, as herein, a COA may not issue unless the prisoner shows 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." *Slack v. McDaniel*, 529, U.S. 476, 484 (2000).

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By failing to challenge the district court's procedural ruling, Shelton has abandoned the argument on appeal. See *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813, F.2d 744, 748 (5th Cir. 1987); *Beasley v. McCotter*, 798 F. 2d 116, 118 (5th Cir. 1986). Accordingly, Shelton's Request for a COA is DENIED.
See *Slack,* 529 U.S. at 484.

KURT D. ENGLEHARDT "s/"
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
Fifth Judicial Circuit Seal
A True Copy Certified order issued June 30, 2020
T.W.C."s/"
Clerk, U.S. Court of Appeals, fifth Circuit

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No.

In The

Supreme Court of the United States

JESSIE E. SHELTON,

Petitioner,

v.

ROBERT C. TANNER, WARDEN
B.B. RAYBURN CORRECTIONAL CENTER,

Respondent,

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT J. STAMPS
Counsel of Record
Bar # 12393
Supreme Court Bar #74308
1226 Antonine St.
New Orleans, LA 70115
(504)453-4323
bs33pdo@yahoo.com

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