APPENDIX A

Opinion of the United States Court of Appeals for the Eleventh Circuit denying motion for Certificate of Appealability on February 21, 2020.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12465
Non-Argument Calendar

D.C. Docket No. 1:18-cv-20872-CMA

ANTHONY ATES,

Petitioner-Appellant,

versus

STATE OF FLORIDA,

Respondent-Appellee.

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

(February 21, 2020)

Before WILLIAM PRYOR, JORDAN and TJOFLAT, Circuit Judges.

PER CURIAM:

Anthony Ates, a Florida prisoner, appeals the *sua sponte* dismissal of his petition for a writ of habeas corpus as untimely. We issued a certificate of appealability on the issue whether the district court erred in *sua sponte* determining that Ates's petition was untimely without reviewing the complete, official state court record. We affirm.

Ates is serving a thirty-year sentence in Florida for aggravated battery, armed robbery, and violation of community control. After filing several postconviction motions in state court, Ates filed a petition for a writ of habeas corpus in federal court. *See* 28 U.S.C. § 2254. A magistrate judge reviewed Ates's petition for timeliness. Because the one-year period in which a petitioner must file his petition is tolled while he has a pending state postconviction motion, *id.* at § 2244(d)(2), the magistrate judge took judicial notice of the online state trial and appellate court dockets from Ates's state proceedings to determine the relevant dates for the limitations period. It concluded that Ates's petition was untimely and recommended dismissing the petition on that ground.

Ates objected to the magistrate judge's report. He acknowledged that he filed his petition after the limitations period but argued that he was entitled to statutory and equitable tolling. Yet he did not object to the dates the magistrate judge used to calculate the timeliness of his petition, nor did he ask to be heard on the issue of the court taking judicial notice. The district court adopted the

magistrate judge's report and dismissed the petition as untimely after concluding that Ates filed his petition well beyond the one-year limitations period and that he was not entitled to equitable tolling. Ates appealed and now argues that the district court erred in dismissing his petition after taking judicial notice of his online state-court records instead of considering the official state-court records.

We review for an abuse of discretion the 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.*, 947 F.3d 649, 651 (11th Cir. 2020).

Our recent decision in *Paez* controls this appeal. In *Paez*, a magistrate judge took judicial notice of online-state-court docket entries as part of its preliminary assessment of the petition and, based on the dates for those entries, recommended *sua sponte* dismissing the petition as untimely. *Id.* at 651. The petitioner had the opportunity to object to the magistrate judge's report but did not ask to be heard on the issue of the court taking judicial notice, nor did he contest the dates on which the magistrate judge relied. *Id.* at 651, 653. The district court *sua sponte* dismissed the petition as untimely, and we affirmed. *Id.* at 655. We held that a district court may take judicial notice of online-state-court docket entries when it uses necessary safeguards, which are present when it provides the petitioner with "an opportunity to ask to be heard on the propriety of judicial notice." *Id.* at 652–53. We also held that a district court may *sua sponte* dismiss a petition at the screening stage for

untimeliness if it provides the petitioner with notice and an opportunity to be heard. *Id.* at 653.

The same is true here. The district court did not abuse its discretion in taking judicial notice of the electronic state court docket entries because Ates had ample notice and opportunity to be heard. The magistrate judge made the electronic dockets part of the record, and the clerk mailed a copy of them to Ates. Ates never alleged that he did not receive the records or was otherwise unaware of them. He had the opportunity to challenge the accuracy of the electronic dockets or to ask to be heard on the issue when he objected to the magistrate judge's recommendation, but he did not.

Nor did the district court abuse its discretion in *sua sponte* dismissing the petition for untimeliness because it provided Ates with notice and an opportunity to be heard. *Id.* at 653; *see also Day v. McDonough*, 547 U.S. 198, 209–10 (2006). Ates had the opportunity to object to the magistrate judge's report and to dispute its conclusion that his petition was untimely. And the state was notified of the magistrate judge's recommendation but never stated an intent to waive the limitations bar. We discern no error in the ruling that Ates's petition was untimely and not entitled to equitable tolling.

We **AFFIRM** the *sua sponte* dismissal of Ates's petition as untimely.

APPENDIX B

Order from the United States District Court for the Southern District of Florida denying Petitioner's petition for writ of habeas corpus and request for an evidentiary hearing, dated May 15, 2018.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-20872-CIV-ALTONAGA/White

ANTHONY ATES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

ORDER

On March 7, 2018, Petitioner, Anthony Ates, filed a *pro se* Petition for Relief From a Conviction or Sentence By a Person in State Custody [ECF No. 1], and accompanying Memorandum of Law [ECF No. 3]. The Clerk referred the case to Magistrate Judge Patrick A. White under Administrative Order 2003-19 for a ruling on all pre-trial, non-dispositive matters and for a report and recommendation on any dispositive matters. (*See* [ECF No. 2]). On March 12, 2018, Magistrate Judge White entered a Report of Magistrate Judge [ECF No. 7], recommending the Petition, filed under 28 U.S.C. section 2254, be denied as untimely. (*See generally* Report). On April 17, 2018, Petitioner filed his Motion to Object ("Objections") [ECF No. 10] to the Report.

When a magistrate judge's "disposition" has been properly objected to, district courts must review the disposition *de novo*. Fed. R. Civ. P. 72(b)(3). Although Rule 72 is silent on the standard of review, the Supreme Court of the United States has determined Congress's intent was to require *de novo* review only when objections were properly filed, not when neither party objects. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate[] [judge]'s factual or legal conclusions,

id. 3). The state court docket indicates there was no further activity involving case number 94-CF-11073.

With regard to case number 95-CF-34118, the judgment and sentence were imposed on July 5, 1996. (*See id.* 3). Petitioner filed a direct appeal, which the Florida Third District Court of Appeal denied in a *per curiam* decision dated November 26, 1997. *See Bates v. State*, 702 So. 2d 501 (Fla. 3d DCA 1997).[2] Petitioner proceeded to file several motions for postconviction relief. (*See* Report 3). The mandate for the case issued on April 21, 2017. (*See id.*). The state court docket indicates there was no further activity involving case number 95-CF-34118.

From the date state court activity for case number 94-CF-011073 came to an end on January 23, 2015, until the instant Petition was filed on March 6, 2018, 1,138 untolled days elapsed. (*See id.* 5–6). For case number 95-CF-34118, the convictions and sentence became final on February 24, 1998 — the last day Petitioner could have timely filed a petition for writ of certiorari. (*See id.* 7–8 (citing *Williams v. Sec'y, Fla. Dep't of Corr.*, 674 F. App'x 975, 976 (11th Cir. 2017); *Clay v. United States*, 537 U.S. 522, 527 (2003))).

Petitioner's first postconviction motion related to case number 95-CF-34418 was filed on October 29, 1998. (*See id.* 8). Assuming the October 29, 1998 motion was properly filed, 246 untolled days elapsed between February 24, 1998 and October 29, 1998. (*See id.*). From April 21, 2017, the last date of state court activity in case number 95-CF-34418, until March 6, 2018, an additional 319 untolled days elapsed. (*See id.*). In total, 565 untolled days elapsed before the Petition was filed. (*See id.* 9).

The Report correctly calculates well over one year elapsed untolled when combining the time period between finality of the convictions and sentences and Petitioner's first motion for postconviction relief (246 untolled days), and the time period between the final decision on

[2] The Third District Court of Appeal refers to Petitioner as Anthony Bates.

Petitioner's last effort to seek postconviction relief and the date of the instant Petition (319 untolled days). (*See* Report 8–9). In total, at least 565 untolled days elapsed. (*See id.* 9).

The AEDPA establishes a one-year statute of limitations on petitions for the writ of habeas corpus filed by state prisoners. *See* 28 U.S.C. § 2244(d)(1). The statute of limitations begins to run one year after 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.

Id. §§ 2244(d)(1)(A)–(D). However, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation." *Id.* § 2244(d)(2) (alteration added).

Petitioner acknowledges he bears the burden of establishing (1) he has been diligently pursuing his case, and (2) an extraordinary circumstance stood in his way in timely filing his Petition. (*See* Objs. (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990))). Petitioner states he filed "over '200 motions,'" and argues the state courts' delay in adjudicating his post-conviction motions is an extraordinary circumstance that caused delay in his filing. (Mem. 2). Petitioner argues he is entitled to equitable tolling. (*See id.*).

Equitable tolling "is an extraordinary remedy limited to rare and exceptional

circumstances and typically applied sparingly." *Cadet v. Fla. Dep't of Corr.*, 742 F.3d 473, 477 (11th Cir. 2014) (internal quotation marks and citation omitted). Equitable tolling is required where a petitioner shows reasonable diligence, *see Holland v. Florida*, 560 U.S. 631, 645 (2010), and a causal connection between the alleged extraordinary circumstances and the late filing of the petition, *see San Martin v. McNeil*, 633 F.3d 1257, 1267 (11th Cir. 2011).

While Petitioner spent over a decade litigating in state court, he has not shown reasonable diligence in waiting 319 days between the final denial of his many requests for postconviction relief and the filing of the instant Petition. (*See* Report 10 (citing *Holland*, 560 U.S. at 653)). Furthermore, Petitioner does not show a causal connection between the state courts' delay in adjudicating Petitioner's postconviction requests and Petitioner's delay in filing the Petition once the state courts denied him final relief. (*See id.* 10–11). Therefore, the Report rightly finds there are no exceptional circumstances warranting the extraordinary remedy of equitable tolling. (*See id.* 11).

Petitioner does not contend the government created any other impediment to timely filing beyond its delay in adjudicating requests for postconviction relief, nor does he rely on an alternative commencement date for the limitations period, or state his claim is based on a newly-recognized constitutional right or new facts of which he became aware in the year prior to the filing of his Petition. (*See generally* Pet.; Mem.). Petitioner has not provided any other express argument to excuse the lateness in filing the Petition. He does not raise a claim of actual innocence, but rather attacks claimed sentencing errors and improper designation as a habitual felony offender. (*See* Report 13). As such, Petitioner "has not presented sufficient evidence to undermine the court's confidence in the outcome of his criminal proceedings" to warrant relief on the basis of actual innocence or to show a fundamental miscarriage of justice is likely if the

Court declines to review Petitioner's claims on the merits. (Report 13 (citing *Milton v. Sec'y, Dep't of Corr.*, 347 F. App'x 528, 531–32 (11th Cir. 2009))). For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Report **[ECF No. 7]** is **AFFIRMED AND ADOPTED**. The Petition **[ECF No. 1]** is **DISMISSED** for lack of jurisdiction. No certificate of appealability shall issue. The Clerk of Court is directed to **CLOSE** this case.

DONE AND ORDERED in Miami, Florida, this 15th day of May, 2018.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Patrick A. White;
Anthony Ates, *pro se*

APPENDIX C

Opinion of the United States Court of Appeals for the Eleventh Circuit denying motion for rehearing, dated February 11, 2021.

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

For rules and forms visit
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February 11, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-12465-DD
Case Style: Anthony Ates v. State of Florida
District Court Docket No: 1:18-cv-20872-CMA

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Bradly Wallace Holland, DD/lt
Phone #: 404-335-6181

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12465-DD

ANTHONY ATES,

Petitioner - Appellant,

versus

STATE OF FLORIDA,

Respondent - Appellee.

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

BEFORE: WILLIAM PRYOR, JORDAN and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Anthony Ates is DENIED.

ORD-41