5.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10619-D

WALTER PATRICK,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

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

ORDER:

Walter Patrick is an Alabama prisoner serving a 30-year sentence after a jury convicted him of first-degree sodomy in 2004. In 2016, proceeding pro se, he filed a motion under 28 U.S.C. § 2254, alleging ineffective assistance of counsel. The District Court dismissed the motion as time-barred under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). He moves this Court for a certificate of appealability ("COA"), in order to appeal the District Court's dismissal of his motion.

I.

Mr. Patrick appealed his conviction to the Alabama Court of Criminal Appeals, which affirmed his conviction on September 23, 2005. He then filed a petition for a writ of certiorari in the Alabama Supreme Court, which was denied on December 9, 2005.

On August 28, 2009, Mr. Patrick filed a pro se motion for post-conviction relief under Alabama Rule of Criminal Procedure 32. He acknowledged the Rule 32 was untimely, but said it was due to circumstances outside of his control, namely, attorney abandonment. The Alabama circuit court denied the Rule 32 motion as time-barred without holding an evidentiary hearing, but the Alabama Court of Criminal Appeals reversed and remanded. The court applied Ex parte Ward, 46 So. 2d 888 (Ala. 2007), and held that Mr. Patrick's case "demonstrate[s] extraordinary circumstances justifying the application of the doctrine of equitable tolling" because his "failure to file a timely Rule 32 petition was unavoidable even with the exercise of due diligence, given [his attorney's] misrepresentations to Patrick and his wife and [his attorney's] evasive behavior." Patrick v. State, 91 So. 3d 756, 760 (Ala. Crim. App. 2011).[1]

[1] The State appealed the ruling to the Supreme Court of Alabama, which initially granted a writ of certiorari on January 11, 2012. The writ was quashed and a certificate of judgment entered on April 6, 2012.

On remand, the Alabama circuit court denied Mr. Patrick's Rule 32 motion on September 24, 2014. Mr. Patrick appealed and the Alabama Court of Criminal Appeals affirmed in an unpublished memorandum opinion on August 7, 2015. His petition for rehearing was denied on September 18, 2015, and a certificate of judgment issued on October 7, 2015. On October 3, 2016, Mr. Patrick filed this § 2254 petition, and amended it on January 30, 2017. In his amended petition, he argued that his petition was timely, having been filed within one year of his Rule 32's denial, and that he was actually innocent. In support of his actual innocence, Mr. Patrick submitted a passing polygraph report and an affidavit from the victim recanting her statements that he had sodomized her.

A magistrate judge reviewed the petition, the State's response, and Mr. Patrick's reply. The Magistrate Judge determined the petition was untimely and issued a show cause order. Mr. Patrick responded, reasserting his actual innocence claim and requesting counsel. The Magistrate Judge then issued a report and recommendation ("R&R"), recommending the dismissal of Mr. Patrick's § 2254 petition as time-barred. The Magistrate Judge determined Mr. Patrick's one-year statute of limitations began running on March 10, 2006, 90 days after the Alabama Court of Criminal Appeals affirmed his conviction. The Magistrate Judge determined statutory tolling did not apply because Mr. Patrick did not file any qualifying post-conviction motion from March 10, 2006 until August 28, 2009.

The court also concluded that the Alabama court's decision that equitable tolling applied to make his Rule 32 motion timely "did not dictate that Patrick's Rule 32 petition was properly filed and pending for purposes of tolling the AEDPA statute of limitations prior to August 28, 2009."

The Magistrate Judge determined equitable tolling did not apply because Mr. Patrick did not argue it and thus there was "no showing of due diligence, coupled with extraordinary circumstances." Finally, the court rejected the actual innocence claim because the polygraph report was available at the time of trial and the Alabama court had found the victim's recantation testimony during the Rule 32 proceedings was a result of family pressure, indicating it was unreliable and untruthful. The Magistrate Judge recommended a COA be denied.

Mr. Patrick filed objections, arguing the R&R ignored that equitable tolling was warranted based on his attorney's abandonment, which delayed the filing of his Rule 32 motion by years. He also disputed the R&R's rejection of his actual innocence claim and argued any failure to effectively present it was due to the failure to appoint counsel. The District Court summarily adopted the R&R and dismissed Mr. Patrick's § 2254 petition.

II.

To get a COA, a § 2254 petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court

denies a § 2254 motion on procedural grounds, the petitioner must show that reasonable jurists could debate whether (1) the motion "states a valid claim of the denial of a constitutional right" and (2) "the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000).

Under AEDPA, § 2254 petitions must be filed within one year of the latest of four dates:

> (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,

could not file any more after EQ petition was filed

28 U.S.C. § 2244(d)(1). To determine whether a petition was timely filed within one year after the conviction became final, the court must determine: (1) when the prisoner filed the federal collateral petition, and (2) when the prisoner's judgment of conviction became final. Adams v. United States, 173 F.3d 1339, 1340–41 (11th Cir. 1999) (per curiam). "A conviction becomes final when the opportunity

for direct appeal of the judgment of conviction has been exhausted." Akins v. United States, 204 F.3d 1086, 1089 n.1 (11th Cir. 2000). A petitioner has a 90-day period in which to file a certiorari petition with the Supreme Court of the United States before a judgment of conviction is deemed to have become final. Nix v. Sec'y, Dep't of Corr., 393 F.3d 1235, 1236–37 (11th Cir. 2004) (per curiam).

AEDPA's one-year limitations period is statutorily tolled while "a properly filed application for State post-conviction or other collateral relief . . . is pending." 28 U.S.C. § 2244(d)(2). State post-conviction proceedings begun after the expiration of the AEDPA's limitation period do not toll or reset the limitation period. Sibley v. Culliver, 377 F.3d 1196, 1204 (11th Cir. 2004).

The federal limitation period also may be equitably tolled, but the petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Holland v. Florida, 560 U.S. 631, 649, 130 S. Ct. 2549, 2563 (2010) (quotation omitted). Attorney abandonment—as evidenced by lack of communication and other violations of "fundamental canons of professional responsibility"—can be an "extraordinary circumstance." Id. at 652–53, 130 S. Ct. at 2564–65. And "[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." Id. at 653, 130 S. Ct. at 2565 (quotation omitted).

Finally, "actual innocence, if proved, serves as a gateway through which a petitioner may pass" despite any procedural default or expired statute of limitations. McQuiggin v. Perkins, 569 U.S. 383, 386, 133 S. Ct. 1924, 1928 (2013). "To be credible, [an actual innocence] claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 865 (1995). The court must be persuaded that "in light of the new evidence, no juror, acting reasonably, would have voted to find [the petitioner] guilty beyond a reasonable doubt." Id. at 329, 115 S. Ct. at 868.

III.

Reasonable jurists would not debate the District Court's conclusion that statutory tolling did not apply to make Mr. Patrick's § 2254 motion timely. The Alabama Supreme Court denied his petition for a writ of certiorari on December 9, 2005. His conviction thus became final 90 days later on March 9, 2006. See Nix, 393 F.3d at 1237. Although state post-conviction proceedings can toll the limitation period, the state proceedings must begin before the expiration of the one-year period. Mr. Patrick's state court post-conviction proceedings did not begin until August 28, 2009 when he filed his Rule 32 motion. Thus, the filing of the

Rule 32 motion could not toll the one-year AEDPA period. See Sibley, 377 F.3d at 1204; 28 U.S.C. § 2244(d)(1).

However, reasonable jurists could debate the District Court's conclusion that equitable tolling was not warranted. The Alabama Court of Criminal Appeals determined Mr. Patrick's attorney abandoned him and delayed the filing of his Rule 32 petition until August 28, 2009. The circumstances of Mr. Patrick's case, as described by the Alabama court, are remarkably similar to that of the petitioner in Holland: the attorney failed to communicate over a number of years, leading to the loss of opportunities for state and federal post-conviction review. See Holland, 560 U.S. at 652–53, 130 S. Ct. at 2564–65. Even more egregious here, Mr. Patrick's attorney affirmatively misled him and told him a Rule 32 petition had been filed on his behalf, which is a violation of a fundamental canon of professional responsibility. See id.

As to whether Mr. Patrick has demonstrated "due diligence," reasonable jurists could debate Mr. Patrick's efforts through the years to determine the status of his Rule 32 petition, including his filing of a § 2254 petition within one year of the denial of his out-of-time Rule 32 petition. Beyond that, in his reply to the State, Mr. Patrick alleged his Rule 32 counsel failed to file a writ of certiorari to the Alabama Supreme Court. If true, Mr. Patrick may be able to show equitable tolling excuses any delay in his filing his § 2254 petition. See id. at 653–54, 130 S.

Ct. at 2565 (remanding for determination whether record supported equitable tolling or whether evidentiary hearing was needed to develop facts).

Finally, reasonable jurists would not debate the District Court's determination that Mr. Patrick did not support his claim with new reliable evidence. As Mr. Patrick concedes, his polygraph report was available at the time of trial, so it is not new evidence. See Schlup, 513 U.S. at 324, 115 S. Ct. at 865 (requiring "new reliable evidence" to make a credible showing of actual innocence). And the court determined the victim recantation was not reliable in light of the findings by the Alabama courts that the statement was made under family pressure. See id.; see also United States v. Santiago, 837 F.2d 1545, 1550 (11th Cir. 1988) (noting "recantations are viewed with extreme suspicion by the courts").

Because Mr. Patrick has alleged ineffective assistance of counsel and reasonable jurists could debate the correctness of the District Court's procedural ruling that he is not entitled to equitable tolling, a COA is GRANTED on the following issues:

1) Did the District Court err by denying equitable tolling without considering whether attorney abandonment constituted extraordinary circumstances?

2) Did the District Court err in denying equitable tolling without holding an evidentiary hearing to determine whether Mr. Patrick could prove "reasonable diligence" under Holland v. Florida, 560 U.S. 631, 649, 653, 130 S. Ct. 2549, 2563, 2565 (2010) (quotation omitted)?

Mr. Patrick's motion for a COA is DENIED as to all other claims.

Barrett D. Martin
UNITED STATES CIRCUIT JUDGE

16. APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10619

D.C. Docket No. 1:16-cv-00525-CG-N

WALTER PATRICK,

Petitioner - Appellant,

versus

WARDEN,

Respondent - Appellee.

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

(September 16, 2020)

Before NEWSOM and BRANCH, Circuit Judges, and RAY,* District Judge.

PER CURIAM:

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* Honorable William M. Ray II, United States District Judge for the Northern District of Georgia, sitting by designation.

Walter Patrick appeals from the district court's decision to dismiss his 28 U.S.C. § 2254 petition for writ of habeas corpus as time-barred, alleging that the district court erred by failing to consider whether he was entitled to equitable tolling. We hold that because Patrick did not present his equitable-tolling argument to the magistrate judge, the district court had the discretion to refuse to consider that argument under our decision in *Williams v. McNeil*, 557 F.3d 1287 (11th Cir. 2009). Accordingly, we affirm.

I

In April 2004, a jury in Washington County, Alabama, found Walter Patrick guilty of first-degree sodomy. He was sentenced to 30 years' imprisonment. The Alabama Court of Criminal Appeals affirmed Patrick's conviction and sentence, and the Alabama Supreme Court denied certiorari review. On December 9, 2005, the Alabama Court of Criminal Appeals issued a certificate of judgment.

Patrick alleges that, after he had exhausted his direct appeal, he repeatedly asked his appellate lawyer—Vader Al Pennington—to file a petition for state post-conviction relief under Alabama Rule of Criminal Procedure 32, which allows a petitioner to seek review of his case within one year after the issuance of the certificate of judgment. Patrick alleges that between 2005 and 2009 he and his wife repeatedly tried to contact Pennington about the status of his Rule 32 petition,

but that they were met with repeated avoidance and—at least on one occasion—outright lying. Specifically, Patrick claims that when his wife was finally able to get ahold of Pennington, he told her that the Rule 32 petition had been filed. In 2009, however, Patrick learned that no Rule 32 petition had ever been filed on his behalf.

Patrick took matters into his own hands and filed a *pro se* Rule 32 petition alleging ineffective assistance of counsel on August 27, 2009. In response, the State of Alabama filed a motion asking that the petition be denied as untimely, as it was filed more than four years after the issuance of the certificate of judgment, and thus well-beyond Rule 32's one-year limitations period. The Circuit Court of Washington County agreed and dismissed Patrick's petition as time-barred, without considering whether he was entitled to equitable tolling. Patrick appealed, and the Alabama Court of Criminal Appeals reversed and remanded, holding that Patrick had demonstrated "extraordinary circumstances justifying the application of the doctrine of equitable tolling."

In June 2010, Patrick filed an amended Rule 32 petition in the Washington County Circuit Court, adding a claim that challenged his conviction based on a recantation from the alleged victim. On September 24, 2014, the Circuit Court denied Patrick's petition, holding (1) that Patrick was not denied the effective assistance of counsel and (2) that the victim's recantation was not credible. On

appeal, the Alabama Court of Criminal Appeals affirmed. After Patrick's application for rehearing was denied, Patrick did not file a petition for certiorari in the Alabama Supreme Court. On October 7, 2015, the Alabama Court of Criminal Appeals issued a certificate of judgment.

Nearly one year later, Patrick took his claims to federal court. On October 3, 2016, Patrick mailed a *pro se* petition for writ of habeas corpus, under 28 U.S.C. § 2254, to the U.S. District Court for the Southern District of Alabama. On January 30, 2017, Patrick filed an amended petition that challenged his conviction on three grounds: (1) ineffective assistance of trial counsel; (2) newly discovered evidence—*i.e.*, the victim's recantation; and (3) actual innocence. His form petition said nothing about equitable tolling—it marked "N/A" next to the "Timeliness" section, which warns that "[i]f your judgment of conviction became final over one year ago, you must explain . . . why the one-year statute of limitations . . . does not bar your petition." The State of Alabama filed an answer to Patrick's petition, asserting that it was time-barred under the one-year limitations period in 28 U.S.C. § 2244(d). In Patrick's response, he reiterated the grounds for his habeas petition, generally denied that his claim was barred, and maintained that he was actually innocent—but he said nothing about equitable tolling. In August 2017, a magistrate judge entered an order stating that "it appears that Patrick's Writ is time-barred" and, accordingly, ordered Patrick "to show

cause why his petition should not be dismissed." In his response, Patrick once again reiterated the grounds for his habeas petition, generally denied that his claim was barred, and maintained that he was actually innocent. Significantly, though, he again said nothing about equitable tolling.

On December 6, 2017, the magistrate judge issued a report and recommendation recommending that Patrick's habeas motion be dismissed with prejudice because it was time-barred. Importantly for our purposes, the report and recommendation stated that Patrick was not entitled to equitable tolling of the limitations period because he had failed to "present any arguments in favor of equitable tolling."

On December 29, 2017, Patrick filed objections to the report and recommendation in the district court. In his objections, Patrick argued—for the first time—that he was entitled to equitable tolling. Specifically, he stated that "the Alabama Criminal Court of Appeals . . . f[ound] [that] the [his] case f[ell] under equitable tolling" and noted that the Alabama State Bar disbarred his appellate lawyer, Pennington, who had failed to file his Rule 32 petition.

On January 16, 2017, the district court adopted the report and recommendation in a one-sentence order that did not address Patrick's equitable-tolling argument—it simply stated that the court had given "due and proper consideration of the issues raised" and made a "de novo determination of those

portions of the Recommendation to which objection is made." On that same day, the district court issued a judgment dismissing Patrick's § 2254 motion with prejudice as time-barred and held that he was not entitled to either a certificate of appealability or to appeal *in forma pauperis*.

On February 14, 2018, Patrick filed a notice of appeal with our Court. On July 25, 2018, a judge of this Court concluded that "reasonable jurists could debate the District Court's conclusion that equitable tolling was not warranted" and granted a COA on two grounds: (1) "Did the District Court err by denying equitable tolling without considering whether attorney abandonment constituted extraordinary circumstances?"; and (2) "Did the District Court err in denying equitable tolling without holding an evidentiary hearing to determine whether Mr. Patrick could prove 'reasonable diligence' under *Holland v. Florida*, 560 U.S. 631, 649, 653, 130 S. Ct. 2549, 2563, 2565 (2010) (quotation omitted)?"

This is Patrick's appeal.

II

Despite its procedural complexity, this case presents us with a relatively straightforward threshold question: Did the district court err by failing to address Patrick's equitable-tolling argument, which he presented for the first time in his

objections to the magistrate judge's report and recommendation?[1] The answer is no.

As the State of Alabama points out, this case is remarkably similar to—and, in the end, controlled by—our decision in *Williams v. McNeil*, 557 F.3d 1287 (11th Cir. 2009). Like Patrick, the petitioner in *Williams* filed a *pro se* petition for habeas corpus relief under § 2254. *Id.* at 1289. The State responded by arguing that the petitioner's habeas petition was time-barred under § 2244's one-year limitations period. *Id.* The district court referred the timeliness issue to a magistrate judge, who instructed the petitioner to file a response to the State's timeliness arguments. *Id.* But the petitioner never did so. *Id.* The magistrate judge then issued a report and recommendation that the district court dismiss the petitioner's habeas petition as time-barred. *Id.* The petitioner objected to the report and recommendation and—for the first time—raised a timeliness argument under the "prison mailbox rule." *Id.* at 1289–90. The district court, however, refused to consider the petitioner's timeliness argument, concluding that it "may decline to consider arguments raised for the first time in the objections to the magistrate judge's report and recommendation." *Id.* at 1290. We affirmed this holding on appeal, stating that "the district court has broad discretion in reviewing

[1] We review *de novo* a district court's legal rulings on a petition for a writ of habeas corpus. *Gill v. Mecusker*, 633 F.3d 1272, 1286 (11th Cir. 2011).

a magistrate judge's report and recommendation, and, therefore, the district court did not abuse its discretion in declining to consider [the petitioner's] timeliness argument that was not presented to the magistrate judge." *Id.* at 1291.

The State argues, and we agree, that just as the district court in *Williams* was entitled to refuse to consider the petitioner's late-breaking timeliness argument, so too was the district court here entitled to refuse to consider Patrick's timeliness argument—which was made under nearly the exact same circumstances. Just like the petitioner in *Williams*, Patrick first raised the relevant timeliness argument in his objections to the magistrate judge's report and recommendation. As *Williams* makes clear, the district court therefore had the discretion to refuse to consider it. *Id.*

Patrick's attempt to distinguish *Williams* is unconvincing. In his reply brief and at oral argument, Patrick argued that, in fact, he *did* address timeliness before the magistrate judge. Specifically, he argued that although he never used the phrase "equitable tolling," he did enough—especially given that he was proceeding *pro se*—to alert the magistrate judge that equitable tolling was at issue. *See* Oral Arg. at 6:00–6:50. But even if this claim weren't waived, *see Holland v. Gee*, 677 F.3d 1047, 1066 (11th Cir. 2012) ("[W]e do not consider arguments not raised in a party's initial brief and made for the first time at oral argument." (quotation omitted)), we would reject it. The closest Patrick came to raising equitable tolling

before the magistrate judge was in his response to the State's answer to his petition, in which he cited *Martinez v. Ryan*, 566 U.S. 1 (2012), and stated that because his "Rule 32 counsel failed to file a writ of certiorari," he had established a "claim that the narrow *exception* to the general rule . . . [that] ineffective assistance of counsel on post-conviction [review] does not qualify as cause to excuse a procedural[ly] defaulted claim . . . is present in this case." Patrick made a similar argument in response to the magistrate judge's show-cause order on timeliness. We think that that this was insufficient, however, to raise an equitable-tolling claim. First, *Martinez* has nothing to do with equitable tolling—that case is about procedural default, which addresses when *state* procedural rules bar federal courts from considering certain habeas claims. *See* 566 U.S. at 17–18; *Henderson v. Campbell*, 353 F.3d 880, 891 (11th Cir. 2003) ("The doctrine of procedural default was developed as a means of ensuring that federal habeas petitioners first seek relief in accordance with established state procedures." (quotation omitted)). Second, in none of Patrick's filings before the magistrate judge did he allege the facts that underlie his claim for equitable tolling—namely, that his lawyer had abandoned him and lied about the status of his Rule 32 petition. Although we liberally construe *pro se* habeas petitions, *see Williams v. Griswald*, 743 F.2d 1533, 1542 (11th Cir. 1984), that does not mean we are "required to construct a party's legal arguments for him." *Small v. Endicott*, 998 F.2d 411, 417–18 (7th Cir. 1993).

* * *

Accordingly, we hold that under our decision in *Williams v. McNeil*, 557 F.3d 1287 (11th Cir. 2009), the district court did not abuse its discretion in declining to consider Patrick's equitable-tolling argument.[2]

AFFIRMED.

[2] Because the district court did not abuse its discretion in declining to consider Patrick's equitable-tolling argument, it likewise did not abuse its discretion in failing to conduct an evidentiary hearing on the issue, particularly in light of the fact that Patrick bore the burden of establishing the need for a hearing. *See Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011).

(15)

Received September 30 - 2020

15.

SOUTHERN DISTRICT OF ALABAMA
FEDERAL DEFENDERS ORGANIZATION

Executive Director
Carlos A. Williams
www.federaldefender.org

Reply to:

Assistant Federal Defenders
Latisha V. Colvin
Christopher Knight
Peter Madden
LaWanda O'Bannon
Kristen Gartman Rogers
Fred W. Tiemann
Research & Writing Attorney
Patricia Kemp

September 18, 2020

ATTORNEY-CLIENT PRIVILEGE COMMUNICATION
OPEN ONLY IN PRESENCE OF INMATE

Mr. Walter Patrick
AIS Inmate No.: 109647
Bibb County Correctional Facility
565 Bibb Lane
Brent, Alabama 35034

Re: ***The federal appellate court has issued an opinion affirming denial of your federal habeas motion. Because I do not believe there are any more viable issues to challenge in your case, I will not be filing any more motions on your behalf in any court.***

Dear Mr. Patrick,

On September 16, 2020, the Eleventh Circuit Court of Appeals issued a written opinion in your appeal that affirms the district court's denial of your federal habeas petition. A copy of the appellate court's decision has been included with this letter for you to review.

1. There are no grounds to file a motion for rehearing in the Eleventh Circuit Court of Appeals.

A motion for rehearing may be filed in your case within 21 days after the entry of the appellate judgment. *See* 11th Cir. R. 40-3. This means, to be timely, a motion for rehearing must be filed **no later than October 7, 2020.** I am not aware of any grounds to file such a motion on your behalf.

2. You have 90 days to file a writ of certiorari in the U. S. Supreme Court.

After a court of appeals issues a final decision in a case, a defendant may continue to challenge his case in the U.S. Supreme Court by filing a writ of certiorari within 90 days of the court's decision. The time to file a writ of certiorari in your case will be **on or before December 15, 2020.**

The U.S. Supreme Court receives hundreds of petitions each year and rarely reviews them. The U.S. Supreme Court will only decide legal issues that will affect courts throughout the nation. At this time, I am unaware of any grounds to file a petition on your behalf.

3. You have 1 year to file a 28 U.S.C. §2255 petition in the district court that sentenced you.

A 28 U.S.C. §2255 habeas petition may be filed in the district court that sentenced you within 1 year (12 months) from the date of the Eleventh Circuit's order affirming your conviction and sentence. A habeas petition allows you to argue that your conviction and/or sentence should be set aside, vacated, or corrected because:

1. your sentence was imposed in violation of the Constitution or federal law;
2. the federal court in your case did not have jurisdiction to impose the sentence in your case;
3. the sentence in your case was in excess of the maximum authorized by federal law;
4. your lawyer made a mistake in your case, or
5. there are other reasons why you feel your conviction and sentence violates federal law.

To be timely, a §2255 petition must be filed in the district court that sentenced you on or before one (1) year from the date of the Eleventh Circuit's judgment in your case or 1 year from the final decision issued by the U.S. Supreme Court. Thus, if you do not file a writ to the U.S. Supreme Court, you must file your §2255 **on or before September 16, 2021.** At this time, I am unaware of any grounds to file a habeas petition on your behalf. You may file a *pro se* motion for rehearing, writ of certiorari, or §2255 petition on your own if you choose.

Cordially,

Patricia Kemp

Patricia Kemp, Esq.
Assistant Federal Defender
Southern District of Alabama
Federal Defenders Organization, Inc.

Enc: 9-16-20 Eleventh Circuit Court of Appeals Opinion

11 North Water Street, Suite 11290 • Mobile, Alabama 36602 • (251) 433-0910 Fax: (251) 433-0686

IN THE UNITED STATES SUPREME COURT

DKt. Number:

Walter Patrick, Appellant
Petitioner
versus

State of Alabama, Appellee
Respondent

Writ of Certiorari Petition By Pro Se Incarcerated Inmate"

Come Now, Inmate Patrick, incarcerated in A.D.O.C. that is undergoing a COVID-19 Pandemic request any technical shortcomings be forgiven Camp on lock-down no law library access. This Writ is now being submited as follows:

I.

In April 2004 in Washington County, Alabama the Petitioner Walter Patrick was found Guilty of first-degree sodomy. He was sentenced to 30 years imprisonment. The Alabama Court of Criminal Appeals Affirmed Patrick's conviction and sentence, and the Alabama Supreme Court denied certiorari review. On December 9, 2005, the Alabama Court of Criminal Appeals issued a certificate of Judgment.

Patrick hired his Appellate counsel to file a Rule 32 Petition Vader Al Pennington - to file a Petition for state post-conviction relief under Alabama Rule of Criminal Procedure 32. Atty Pennington kept lying to Patrick his that his Rule 32, Pennington claim was being prepared or had now been filed

between 2005 through 2009, each time Patrick wife repeatedly contact him about his Rule 32 status thist being inmate Patrick.

In Aug. 2009 Patrick filed a Rule 32 petition Pro Se, he claimed Pennington was ineffective because he lied claiming he had filed Patrick's Rule 32 timely. In which said Attorney did not file a Rule 32 At all! The Rule 32 court dismissed Patrick Rule 32 Petition as untimely, the Alabama Criminal Court of Appeals: dismissed the Petition as untimely, was REVERSED and Remanded. In 2010, Patrick amended the Rule 32 Petition, and Added the newly evidence the Victim recantation via Affidavit Attesting Patrick did not "sodomise" her. In Sept. 24, 2014 the Washington County Circuit Court denied Patrick's Petition finding Pennington was not ineffective and the victim recantation was not credible. The Criminal Court of Appeals Affirmed the denial of the Rule 32 Petition. On Oct. 7, 2015 Certificate of Service of final judgment by the ACCA was issued.

In Oct. 3, 2016, Patrick filed a §2254 Petition in the US. District Court for the Southern District of Alabama. On Jan. 30, 2017, filed an amended petition that challenged his conviction on three Grounds (1) ineffective Assistance of trial counsel; (2) newly discovered evidence - i.e., the victim's recantation; and (3) Actual innocence. In Aug. 2017 the magistrate judge entered order stating Patrick claim was time barred, informing Patrick to show cause why the court should not dismiss the Petition. Patrick objected and reiterated his petition can not be barred because he is actually innocent! On Dec. 6, 2017 the magistrate judge issued a report and recommendation Patrick's Petition be dismissed with Prejudice As time barred. On Dec. 29, 2017, Patrick filed objections to the report and recommendation in the district court.

On Jan. 16, 2017, the district court adopted the report and recommendation in a one-sentence order that did not address Patrick's equitable tolling argument- it simply stated that the court had given "due and proper consideration of the issues raised", etc. The District Court denied Patrick COA request, but the 11th Circuit Granted his pro se COA Request on whether he was entitled to equitable tolling. Eventually, Patricia Kemp, Esq was Appointed to Patricks case, an hearing was held in the U.S. District Court on equitable tolling. Patrick was not at the hearing. The District Court denied Patrick should receive equitable tolling and his Attorney Appealed on Sept. 16, 2020 Patrick Appeal was not successful. The 11th Circuit in written opinion denied the Appeal, 11th Circuit - No. 18-10619; D.C. Docket No. 1:16-cv-00525-CG-N. This Certiorari follows:

GROUND

Inmate Patrick contends that the 11th Circuit overlooked or failed to Apprehend that "Actual innocent" is a Gateway through which a petitioner may pass," despite any procedural default or expired statute of limitations. McQuiggin v. Perkins, 569 U.S. 383, 386, 133 S. Ct. 1924, 1928 (2013). The Allege VICTIM Affidavit sworn; that clearly states Patrick did not sodomise her and the fact Patrick Passed the Polygraph test that he was Given in concern he did not Rape or sodomise the VICTIM At All, should be enough for any untimelyness to be forgiven. The 11th Circuit totally ignored Patrick's Objections and Pleadings that his Rule 32 Counsel at the evidentiary hearing held in the State Court Atty. Lila V. Cleveland was ineffective as well for not subpoening Juliana Fort M.D. the psychiatris that dianosed Elizabeth as Bipolar disorder on 9-29-09, to whom expert testimony would've buttress Elizabeth testimony At the hearing her original statements against Petitioner was a by-Product of her mental disorder, that he did not sodomize, she confessed she lied on him. Also Dr. Linda Farmer who diannosised Elizabeth as Bi-Polar, borderline personality disorder

on Feb. 13, 2012 was not subpoenaed, as well for the evidentiary hearing held in State court on Petitioner's Rule 32 petition.

Petitioner argued the exception to the general rule ineffective assistance of counsel on post-conviction do not qualify as cause to excuse a procedural defaulted claim, is present in his case as announced by, Martinez v. Ryan, 182 L.Ed. 2d 272 (2012); Trevino v. Thaler, No: 11-10189, May 28, 2013. The failure of the doctors identified above present at the Rule 32 hearing allowed the D.A. to discredit Elizabeth testimony recanting as a product of family pressure as agreed by the hearing judge. Elizabeth's affidavit and testimony at the hearing she lied on the Petitioner fell on death ear's, the pro-State approach in the South is prevalent in this case. Alabama judges are under great political pressure to continue the lock them up and throw away the key approach to justice. See. i.e, Woodward v. Alabama, 187 L.Ed. 2d 499, 452, 571 U.S. 1045 (2013).

At bottom, actual innocence is the gateway to forgive procedurally barred, time barred claims. The 11th Circuit once again fails to adhere Schulp v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed. 2d 808 (1995), standard. And denied the Petitioner due process of the law in disallowing the Petitioner to argue his actual innocent claim on appeal from the denial of his §2254. 14th Amend. Petitioner pray Certiorari is granted and Attorney appointed.

s/ Walter Patrick

Be Thy duly submitted this the 2 day of December 2020.

Certificate of Service

I hereby certify this matter has been served on the Alabama Atty. General office - Atty. General - Steve T. Marshall 501 Washington Ave - Montsomery, Alabama 36130, by placing a copy of the same in the Bibb Corr. mail box, Pre-paid postage, properly addressed, first Class Rate. Done this the ___ day of _____ 2020. A.D.

s/ Walter Patrick

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WALTER PATRICK

Petitioner

Versus

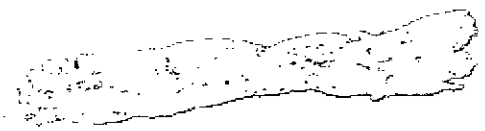
State of ALABAMA,
Republic
Respondent

From 11th Circuit Court of
Appeals, Alabama Republic

Brief / Writ

of

Walter Patrick, #109647
565 Bibb Lane
Brent, Alabama
35034



AFFIDAVIT

I declare that the following statement is made of my own free will without any promise or hope of reward or fear of threat of harassment, without coercion and it is based upon my personal knowledge of the facts as follows;

I, WALTER PATRICK, AIS # 109647, AGE 75; DO KNOWINGLY AND WILLINGLY SUBMIT THIS AFFIDAVIT TO THE CLERK OF THE UNITED STATES SUPREME COURT OF MY OWN FREE WILL AND ACCORD.
I SUBMIT TO THE COURT THAT I AM FILING THE ATTACHED WRIT OF CERTIORARI AND WILL BE PAYING MY OWN COURT COSTS AND FILING FEES IN THIS MATTER AND THAT I HEREBY WAIVE MY RIGHT TO PROCEED IN FORMA PAUPERIS.
I AM REQUESTING THAT THE UNITED STATES SUPREME COURT NOTIFY ME IN WRITING AT THE FACILITY ADDRESS BELOW OF THE EXACT AMOUNT OF THE FEES REQUIRED TO PROCEED.

ADDRESS WHERE I AM CURRENTLY HOUSED:

BIBB COUNTY CORRECTIONAL FACILITY
565 BIBB LANE
BRENT, ALABAMA 35034

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge.

3-29-21
Date

Walter Patrick
Signature of Declarant

SWORN and SUBSCRIBED before me on this 29th day of March 2021

Official Seal and Ford
NOTARY PUBLIC

MY COMMISSION EXPIRES: 8-8-2021

RECEIVED
APR 13 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WALTER PATRICK, #109647,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CIVIL ACTION NO. 16-0525-CG-N**
	)	
WARDEN THOMAS,	)	
	)	
Respondent.	)	

JUDGMENT

In accordance with the Order entered this date, it is **ORDERED, ADJUDGED,** and **DECREED** that this action is **DISMISSED with prejudice** as time-barred; therefore, **JUDGEMENT** is entered in favor of the Respondent and against the Petitioner. The Court further finds that the Petitioner is not entitled to either a Certificate of Appealability or to appeal in forma pauperis.

DONE and ORDERED this 16th day of January, 2018.

/s/ Callie V. S. Granade
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WALTER PATRICK,	)	
#109647,	)	
Petitioner,	)	
	)	
v.	)	**Civil Action No. 16-0525-CG-N**
	)	
WARDEN THOMAS,	)	
Respondent.		

REPORT AND RECOMMENDATION

Petitioner, Walter Patrick, an Alabama prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. (Doc. 9). [1] The Respondent, through the Office of the Attorney General of the State of Alabama, has timely filed an Answer to the petition with exhibits (Doc. 10), and Petitioner has responded. (Docs. 13-14). At the conclusion of this briefing, the Court entered an order to show cause as to why the petition should not be dismissed as untimely pursuant to 28 U.S.C. § 2244(d) (Doc. 16), and Petitioner filed a timely response (Doc. 17).

Under S.D. Ala. GenLR 72.2(b), the petition has been referred to the undersigned Magistrate Judge for entry of a recommendation as to the appropriate disposition, in accordance with 28 U.S.C. § 636(b)(1)(B)-(C), Rule 8(b) of the Rules Governing § 2254 Cases in the United States District Courts, and S.D. Ala. GenLR 72(a)(2)(R). Upon consideration, the Court **RECOMMENDS** that the petition be **DISMISSED** as time barred.

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[1] Petitioner initially filed his habeas petition on October 3, 2016 (Doc. 1), on an outdated form. This Court ordered Petitioner to re-file his petition on the correct form resulting in the current operative petition. (Doc. 9).

I. Background

On April 21, 2004, following a jury trial, Patrick was convicted of first degree sodomy in the Circuit Court of Washington County, Alabama. (Doc. 5 at 2). On June 2, 2004, he was sentenced to thirty years imprisonment. (Doc. 10 at 1). Patrick appealed his conviction to the Alabama Court of Criminal Appeals, and on September 23, 2005, the Alabama Court of Criminal Appeals affirmed Patrick's conviction. (Doc. 10-1 at 1; Doc. 10-7; Doc. 10-9). On October 21, 2005, the Court of Criminal Appeals overruled the Patrick's Petition for Rehearing. (Doc. 10-10; Doc. 10-11). On November 5, 2005, Patrick filed a Petition for Writ of Certiorari to the Alabama Supreme Court (Doc. 10-12), which was denied on December 9, 2005. (Doc. 10-13). Both the Alabama Supreme Court and the Alabama Court of Criminal Appeals entered Certificates of Judgment the same day, December 9, 2005. (Docs. 10-13 and 10-14).

Nearly four years later, on September 8, 2009, Patrick filed an untimely Alabama Rule of Criminal Procedure 32 ("Rule 32") petition and motion for enlargement of time to file his Rule 32 petition in state court. (Doc. 10-19 at 3-4). Ultimately, the trial court determined Patrick was entitled to equitable tolling but denied the motion on the merits.[2] On October 7, 2015, the Alabama Court of

[2] On September 15, 2009, the trial court granted Patrick's motion for enlargement of time. *Id.* On June 4, 2010, the trial court determined Patrick's Rule 32 petition was time barred. *Id.* An appeal followed and before addressing the merits of his Rule 32 petition, on December 3, 2010, the Alabama Court of Criminal Appeals remanded Patrick's case to the state court on for clarification as to whether the state court, in granting Patrick's motion for time, had determined that equitable tolling was warranted. (Doc. 10-19 at 5). On remand, the court entered an order clarifying that equitable tolling was not applicable. (*Id.*) On March, 25, 2011, the Alabama Court of Criminal Appeals reversed and remanded Patrick's case after determining that Patrick's Rule 32 petition should not have been denied as time-barred because Patrick had demonstrated that he was entitled to equitable tolling. (Doc. 10-19).

Criminal appeals entered a Certificate of Judgment. (Doc. 10-31).

On October 3, 2016, Patrick filed his initial habeas petition (Doc. 1), which has been superseded by the instant petition (Doc. 9). Petitioner identifies the grounds on which habeas relief is due, as follows: (1) ineffective assistance of counsel and (2) newly discovered evidence. (Doc. 9 at 6-7). In response to Paragraph 19, which requires a Petitioner to explain why his/her claim is not time-barred, Patrick wrote "N/A". (Doc. 9 at 11). In his brief attached to his habeas petition, Patrick asserts that AEDPA "prescribes a one year limitation from the final conclusion of proper [sic] filed application for state post-conviction the final conclusion concerning the denial of Mr. Patrick's Rule 32, petition was Aug. 7th (2015)."[3] (Doc. 9-1 at 9). Patrick also asserts he is actually innocent. (*Id.* at 4-5).

On February 21, 2017 the State of Alabama filed a timely Answer to Patrick's habeas petition asserting, among other things, that Patrick's petition is time-barred. (Doc. 10). Patrick filed a Response to Respondent's Answer on April 14, 2017. (Doc. 14). Therein, Patrick reiterated the grounds for his habeas petition, denied that his claim is barred, and, again claimed he is actually innocent. (*Id.*, generally). On August 25, 2017, the Court entered an order providing Petitioner

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On April 8, 2011, the State of Alabama filed an application for rehearing (Doc. 10-20), which was overruled on May 13, 2011. (Doc. 10-21). On May 27, 2011, the State filed a Writ of Certiorari, which was quashed on April 6, 2012. (Docs. 10-22 and 10-23). On April 25, 2012, the Alabama Supreme Court entered a Certificate of Judgment. (Doc. 10-24).

On September 24, 2014, the trial court denied Patrick's Rule 32 Petition on the merits. (Doc. 10-25 at 65-66). On November 4, 2014, Patrick appealed to the Court of Criminal Appeals on and the appeals court affirmed the decision on August 7, 2015. (Doc. 10-25 at 67; Doc. 10-30). On September 18, 2015, the Alabama Court of Criminal Appeals overruled' Patrick's Petition for Rehearing. (Doc. 10-31). He did not file a petition for writ of certiorari in the Alabama Supreme Court. On October 7, 2015, the Alabama Court of Criminal appeals entered a Certificate of Judgment. (Doc. 10-31).

[3] August 7, 2015 is the date on which the Alabama Court of Criminal Appeals affirmed the trial court's denial of Petitioner's Rule 32 petition. (Doc. 10-25 at 67; Doc. 10-30).

with another opportunity to address and provide grounds for his claim of actual innocence. (Doc. 16). Patrick timely filed a response. (Doc. 17).

II. DISCUSSION

Through his § 2254 petition, Patrick alleges that his conviction should be vacated or his sentence reduced. (Doc. 9). The Anti-Terrorism and Effective Death Penalty Act of 1996, § 101 (Supp. II 1997) ("AEDPA"), which became effective on April 24, 1996, provides that a petitioner has one year from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" to file a federal habeas corpus petition. 28 U.S.C. § 2244(d)(1)(A). The statute specifically provides as follows:

> (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.

28 U.S.C. § 2244(d)(1). Where a defendant convicted in state court fails to pursue any direct appeal, his conviction is considered "final" for purposes of § 2244(d)(1)(A)

when the time lapses under state law for the defendant to have filed an appeal; in Alabama, the time to appeal is forty-two (42) days after entry of the final judgment. *McCloud v. Hooks*, 560 F.3d 1223, 1228 (11th Cir. 2009); *see also* Ala. R. App. P. 4(b)(1). Here, Patrick filed a direct appeal, and on December 9, 2005, both the Alabama Supreme Court and the Alabama Court of Criminal Appeals entered Certificates of Judgment pertaining to that appeal. (Docs. 10-13 and 10-14). On March 9, 2006, 90 days after the entry of judgment, his conviction became final as his time to file a writ of certiorari to the United States Supreme Court expired. *See McCloud v. Hooks,* 560 F.3d 1223, 1227 (11th Cir.2009); *Pugh v. Smith,* 465 F.3d 1295, 1299 (11th Cir. 2006). Accordingly, the AEDPA statute of limitations began to run on March 10, 2006, and the time for Patrick to file a habeas petition expired March 10, 2007, approximately nine years before Patrick filed the subject petition. Pursuant to § 2244(d)(1), Petitioner's § 2254 petition is untimely. Despite this, Petitioner argues that he is entitled to tolling of the limitations period.

A. Petitioner is Not Entitled to Statutory Tolling

Once the federal statute of limitations is triggered and begins to run, it can be tolled in two ways: through statutory tolling or equitable tolling. *Brown v. Barrow*, 512 F.3d 1304, 1307 (11th Cir. 2008). Statutory tolling arises from 28 U.S.C. § 2244(d)(2), which tolls the one-year limitation period during the pendency of "a properly filed application for State post-conviction or other collateral review" of the underlying judgment. *See also McCloud v. Hooks*, 560 F.3d 1223, 1227 (11th Cir. 2009). "However, the pendency of properly filed state post-conviction proceedings only *pauses* § 2244(d)(1)'s one-year clock; it does not *reset* it." *Roby v.*

Mitchem, No. 11-2197, 2012 WL 1745529 at * 3 (N.D. Ala. May 1, 2012) (citing *Trapp v. Spencer*, 479 F.3d 53, 58-59 (1st Cir. 2007); *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000)); *see McCloud*, 560 F.3d at 1227.

Patrick argues that his one-year AEDPA statute of limitations did not begin to run until August 7, 2015, at the conclusion of his Rule 32 Petition that was filed on August 28, 2009. (Doc. 9-1 at 9). According to Patrick, he is entitled to statutory tolling pursuant to § 2244(d)(2) due to the pendency of his state court collateral review. Patrick filed his Rule 32 Petition on August 28, 2009, more than two years after the AEDPA clock lapsed. Moreover, even though Patrick's Rule 32 was ultimately decided on the merits after the Alabama Court of Criminal Appeals determined Patrick was entitled to equitable tolling, such a decision did not dictate that Patrick's Rule 32 petition was properly filed and pending for purposes of tolling the AEDPA statute of limitations, prior to August 28, 2009. *See Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003)("[W]e hold that the petitioner's belated appeal motion was not pending during the limitations period. The statutory tolling provision does not encompass a period of time in which a state prisoner does not have a 'properly filed' post-conviction application actually pending in state court. A state application filed after expiration of the limitations period does not relate back so as to toll idle periods preceding the filing of the federal petition ... While a 'properly filed" application for postconviction relief tolls the statute of limitations, it does not reset or restart the statute of limitations once the limitations period has expired. In other words, the tolling provision does not operate to revive the one-

year limitations period if such period has expired."). The Eleventh Circuit also observed,

> ...[A] difference exists between giving a petitioner credit for time needed to exhaust his state remedies prior to filing a federal habeas petition and "retroactively" tolling periods in which the petitioner is not attempting to exhaust state remedies. Such an interpretation would permit a petitioner to avoid the preclusive effect of a time-bar ruling by allowing a belated appeal beyond the one-year statute of limitations. This would be contrary to the purposes of the AEDPA.

Moore v. Crosby, 321 F.3d 1377, 1381 (11th Cir. 2003). Patrick's one year § 2244 limitation period expired roughly two years before he filed his Rule 32, and approximately nine years before this § 2254 petition was filed. As a result, Patrick is not entitled to statutory tolling and his petition is time-barred.

B. Petitioner is Not Entitled to Equitable Tolling

The Eleventh Circuit has stated:

> Section 2244 is a statute of limitations, not a jurisdictional bar. Therefore, it permits equitable tolling "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269[, 1271 (11th Cir. 1999)]. Equitable tolling is an extraordinary remedy which is typically applied sparingly. *See Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).

Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000). The Eleventh Circuit has also held:

> [M]ere attorney negligence is not a basis for equitable tolling. *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1313 (11thCir. 2001); *Steed v. Head*, 219 F.3d 1298, 1300 (11thCir. 2000); *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir. 1999). Moreover, even if a prisoner shows that extraordinary circumstances" occurred, the prisoner must still establish that he acted with due diligence in order to be entitled to equitable tolling. *See Helton*, 259 F.3d at 1313.

Powe v. Culliver, 205 F. App'x. 729, 732 (11th Cir. 2006). As a general rule, "the 'extraordinary circumstances' standard applied in this circuit focuses on the circumstances surrounding the late filing of the federal habeas petition, rather than the circumstances surrounding the underlying conviction." *Helton v. Secretary of Dept. of Corrections*, 259 F.3d 1310, 1314 (11th Cir. 2001), *cert. denied*, 535 U.S. 1080 (2002); *Drew v. Department of Corrections*, 297 F.3d 1278, 1286-87 (11th Cir. 2002).

Patrick does not argue that his petition was untimely due to excusable neglect, or present any arguments in favor of equitable tolling. As such, the Court finds that no showing of due diligence, coupled with extraordinary circumstances has been made. Thus, Petitioner is not entitled to equitable tolling.

C. Petitioner Has Not Demonstrated Actual Innocence

Patrick asserted an actual innocence claim based on new evidence, *i.e.*, his passing of a polygraph test and a recantation by the victim. The Supreme Court has held that a petitioner's showing of "actual innocence" under *Schlup v. Delo*, 513 U.S. 298 (1995), can overcome the expiration of AEDPA's statute of limitations. *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). *Accord, e.g., Tamayo v. Stephens*, 740 F.3d 986, 990 (5th Cir. 2014) (*per curiam*) ("In [*McQuiggin v.*]*Perkins* the Court concluded that a properly supported claim of actual innocence of the crime charged could excuse the failure to comply with the statute of limitations of the Anti–Terrorism and Effective Death Penalty Act ('AEDPA') for a first-time habeas petition."). The Court "caution[ed], however, that tenable 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.' " *McQuiggin*, 133 S. Ct. at 1928 (quoting *Schlup*, 513 U.S. at 329). *See also Gore v. Crews*, 720 F.3d 811, 817 (11th Cir. 2013) (*per curiam*) ("*McQuiggin*...hold[s] that there is an 'equitable exception' to the statute of limitations applicable to habeas claims, 28 U.S.C. § 2244(d), but only when the petitioner presents new evidence that 'shows it is more likely than not that no reasonable juror would have convicted the petitioner.' *Id.* at 1931, 1933 (alteration and quotation marks omitted)."). The Court "stress[ed]...that the *Schlup* standard is demanding" and that "[t]he gateway should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.' " *McQuiggin*, 133 S. Ct. at 1936 (quoting *Schlup*, 513 U.S. at 316).

Neither Patrick's petition nor his Responses satisfied the threshold requirement for tolling the statute of limitations based on an actual innocence claim. More specifically, the polygraph test to which Patrick refers is not new evidence, but rather, was in existence at the time of his trial. Further, with regard to the alleged recantation, the Alabama Court of Criminal of Appeals, noted that "at the time [the victim] executed her affidavit, she had recently separated from her husband and explained that the only place she had to go was her mother's house. According to [the victim], after [Patrick]'s trial, her 'family had basically shunned [her].' The victim explained that, after she separated from her husband and went back to her family, her mother took her to [Patrick]'s attorney's office to sign the

affidavit in order 'to make things right.'" (Doc 10-30 at 8-9). The trial court also found that the victim's alleged recantation was not a truthful recantation. Rather the court found that it was the result of pressure from her family to recant her allegations against Patrick (also a family member). (Doc. 9-1 at 28-29; Doc. 10-25 at 65-66; Doc. 10-30). Like the polygraph, the alleged recantation is not new evidence in light of which no reasonable juror would have convicted Patrick.

Despite this, the Court gave Patrick an additional opportunity to properly establish that his petition is not time-barred. (Doc. 16). The Court has reviewed Patrick's response. (Doc. 17). Again, Patrick has failed to raise any grounds establishing the actual innocence exception. Rather, he makes conclusory statements that reiterate arguments he has already raised, none of which are sufficient to justify tolling of the statute of limitations.

As a result, the undersigned finds that Patrick is not entitled to statutory tolling of the limitations period to make his claim timely. He is also not entitled to equitable tolling, since he has not established any "extraordinary circumstance" which prevented him from seeking § 2254 relief. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Brown v. Barrow*, 512 F.3d 1304, 1307 (11th Cir. 2008). Further, he has failed to satisfy his burden with regard to the actual innocence exception. Thus, the claims and petition brought by Patrick are barred by the AEDPA statute of limitations, and his present habeas petition is due to be **DISMISSED with prejudice.**

III. Certificate of Appealability

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, the undersigned **RECOMMENDS** that a certificate of appealability in this case be **DENIED**. 28 U.S.C. § 2254, Rule 11(a) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). The habeas corpus statute makes clear that an applicant is entitled to appeal a district court's denial of his habeas corpus petition only where a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2243(c)(2). Where, as here, a habeas petition is being denied on procedural grounds without reaching the merits of the underlying constitutional claim, "a COA should issue [only] when 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. 473, 484 (2000); *see Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003) ("Under the controlling standard, a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." (citations omitted and punctuation modified)).). In the present action, Petitioner's habeas petition is unquestionably time-barred under AEDPA, and he has indisputably failed to demonstrate either entitlement to equitable tolling of the statute of limitations or actual innocence excusing the expiration of the statute of limitations.

Rule 11(a) further provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by petitioner, he may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation. *See, e.g.*, *Brightwell v. Patterson*, No. CA 11-0165-WS-C, 2011 WL 1930676, at *6 (S.D. Ala. Apr. 11, 2011), *report & recommendation adopted*, 2011 WL 1930662 (S.D. Ala. May 19, 2011)[4]; *Griffin v. DeRosa*, No. 3:10cv342/RV/MD, 2010 WL 3943702, at *4 (N.D. Fla. Sep. 20, 2010) (providing for same procedure), *report & recommendation adopted sub nom. Griffin v. Butterworth*, 2010 W: 3943699 (N.D. Oct. 5, 2010).

IV. Appeal *In Forma Pauperis*

"An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3). A district court's finding "that an appeal would not be in good faith because no certificate of appealability had been issued . . . is not enough to explain why the appeal on the merits would not be in good faith, because the standard governing the issuance of a certificate of appealability is not the same as the standard for determining whether an appeal is in good faith. It is more demanding . . . [T]o determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit." *Walker v. O'Brien*, 216 F.3d 626, 631-32 (7th Cir. 2000). In other words,

[4] It should be noted that in that proceeding, the Eleventh Circuit (Judge Hull) also denied the petitioner's motion for certificate of appealability on October 11, 2011. (*See* Doc. 14 in CA-11-0165-WS-C.)

> [a] party demonstrates good faith by seeking appellate review of any issue that is not frivolous when examined under an objective standard. *See Coppedge v. United States,* 369 U.S. 438, 445, 82 S. Ct. 917, 921, 8 L. Ed. 2d 21 (1962). An issue is frivolous when it appears that "the legal theories are indisputably meritless." *Carroll v. Gross,* 984 F.2d 392, 393 (11th Cir. 1993) (citations omitted). In other words, an IFP action is frivolous, and thus not brought in good faith, if it is "without arguable merit either in law or fact." *Bilal v. Driver,* 251 F.3d 1346, 1349 (11th Cir. 2001). More specifically, "arguable means capable of being convincingly argued." *Sun v. Forrester,* 939 F.2d 924, 925 (11th Cir. 1991) (internal quotations and citations omitted). Nevertheless, where a "claim is arguable, but ultimately will be unsuccessful," it should be allowed to proceed. *Cofield v. Ala. Pub. Serv. Comm'n,* 936 F.2d 512, 515 (11th Cir. 1991).

Ghee v. Retailers Nat. Bank, 271 F. App'x 858, 859-60 (11th Cir. 2008) (per curiam) (unpublished).

Considering the foregoing analysis, the undersigned **RECOMMENDS** the Court certify that any appeal by Patrick in this action would be without merit and therefore not taken in good faith, thus denying him entitlement to appeal *in forma pauperis*.[5]

V. CONCLUSION

In accordance with the foregoing analysis, it is **RECOMMENDED** that Patrick's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 (Doc. 9) be **DISMISSED with prejudice** as time-barred, that final judgment be entered accordingly in favor of the Respondent, and that the Court find Patrick is not entitled to either a Certificate of Appealability or to appeal *in forma pauperis*.

[5] Should the Court adopt this recommendation and deny leave to appeal *in forma pauperis*, the petitioner may file a motion to proceed on appeal *in forma pauperis* with the Eleventh Circuit Court of Appeals in accordance with Federal Rule of Appellate Procedure 24(a)(5).

VI. NOTICE OF RIGHT TO FILE OBJECTIONS

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. *See* 28 U.S.C. § 636(b)(1); Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts; S.D. Ala. GenLR 72(c). The parties should note that under Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice." 11th Cir. R. 3-1. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this the **6th** day of **December 2017**.

/s Katherine P. Nelson
KATHERINE P. NELSON
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WALTER PATRICK, #109647,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CIVIL ACTION NO. 16-0525-CG-N**
	)	
WARDEN THOMAS,	)	
	)	
Respondent.	)	

ORDER

After due and proper consideration of the issues raised, and a de novo determination of those portions of the Recommendation to which objection is made, the Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) is adopted as the opinion of this Court.

DONE and ORDERED this 16th day of January, 2018.

/s/ Callie V. S. Granade
SENIOR UNITED STATES DISTRICT JUDGE