APPENDIX A-I

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10982-D

COURTNEY ROBINSON,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

ORDER:

Courtney Robinson, a Florida prisoner, moves this Court for a certificate of appealability ("COA"), to appeal the district court's order dismissing as untimely his 28 U.S.C. § 2254 petition. To merit a COA, Robinson must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas petition on procedural grounds, Robinson must show that jurists of reason would find debatable (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), § 2254 petitions are governed by a one-year statute of limitations that begins to run on the latest of four triggering events, including "the date on which the judgment became final by the conclusion of direct review

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A

or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The limitations period, however, is statutorily tolled for "[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." 28 U.S.C. § 2244(d)(2). The AEDPA limitations 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 (2010) (quotation omitted).

Here, reasonable jurists would not debate the district court's procedural ruling. Robinson's judgment became final on January 4, 2011, 90 days after the Third DCA affirmed his convictions and sentences, upon expiration of the period to petition the Supreme Court for a writ of *certiorari*. *See Clay v. United States*, 537 U.S. 522, 527 (2003). Accordingly, his limitations period began to run the next day, on January 5, 2011, and, absent tolling, he had until January 5, 2012, to file this petition, which he did not do. Instead, he waited several years to file his first state habeas petition, on March 6, 2014.

To the extent that Robinson was entitled to equitable tolling, based on him being unable to access his legal papers for at least 18 months, any such tolling ultimately does not affect the timeliness of this petition, which he did not file until September 2018. Additionally, the equitable rule announced in *Martinez v. Ryan*, 566 U.S. 1 (2012), does not apply to the AEDPA limitations period, *see Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014), and Robinson has not presented newly-discovered evidence of his factual innocence, *see Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001).

Accordingly, Robinson's motion for a COA is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 18-23821-CIV-MORENO

COURTNEY ROBINSON,

Petitioner,

vs.

STATE OF FLORIDA and FLORIDA ATTORNEY GENERAL,

Respondents.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

THE MATTER was referred to the Honorable Lisette M. Reid, United States Magistrate Judge, for a Report and Recommendation on Petitioner's Amended Petition for Writ of Habeas Corpus made pursuant to 28 U.S.C. § 2254. The Magistrate Judge filed a Report and Recommendation **(D.E. 39)** on **December 23, 2019**. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues presented in the Magistrate Judge's Report and Recommendation. The Court notes that no objections have been filed and the time for doing so has now passed, even though the Court granted the Petitioner an extension of time to file objections. Being otherwise fully advised in the premises, it is

ADJUDGED that Magistrate Judge Reid's Report and Recommendation is **AFFIRMED** and **ADOPTED**, and thus, the Petition for Writ of Habeas Corpus is **DISMISSED** as time-barred pursuant to the reasons detailed in the Report and Recommendation. Petitioner's conviction in the underlying state case became final on January 4, 2011, and Petitioner waited over three years, until March 6, 2014, before filing his first motion for post-conviction relief. Pursuant to the

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Antiterrorism and Effective Death Penalty Act, Petitioner had one year following the state court judgment to file a federal habeas petition. 28 U.S.C. § 2244(d)(1). While the one-year statute of limitations period may be equitably tolled by properly filing an application for state post-conviction or other collateral review proceedings, *see* 28 U.S.C. § 2244(d)(2), Petitioner still waited too long (over three years until March 6, 2014) to file his motion for post-conviction relief.

Petitioner did file numerous grievances with prison officials regarding lost property and legal documents between October 6, 2011 and December 27, 2011. After his last grievance, he waited another 414 days, until February 13, 2013, to file a motion to toll appellate time. Those grievances and motion to toll, however, do not toll the statute of limitations since they do not qualify as "application[s] for State post-conviction or other collateral review" within the meaning of section 2244(d)(2). As noted above, while Petitioner did file an application for post-conviction relief on March 6, 2014, it was too late and could not revive the already expired statute of limitations. *See Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003) ("While a 'properly filed' application for post-conviction 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.").

As outlined in the Report and Recommendation, Petitioner also cannot account for the additional delays in bringing the instant petition. He fails to account for the two years that passed between the Florida Third District Court of Appeal's mandate affirming the denial of his motion for post-conviction relief and his appeal to the Florida Supreme Court (March 30, 2015 to April 3, 2017), and the 431 days he waited to file the instant petition after the Florida Supreme Court dismissed his appeal (September 10, 2018 to July 6, 2017).

Accordingly, because the one-year statute of limitations period expired long ago,

Petitioner's ability to file the instant petition is time-barred. *See Luda v. Sec'y, Fla. Dep't of Corr.*, 469 F. App'x 834, 835 (11th Cir. 2012) ("Because [the petitioner] has failed to demonstrate either that his untimely filing was the result of extraordinary circumstances or that he acted with diligence in pursuing his habeas rights, he is unentitled to equitable tolling.").

Therefore, based on the above, it is

ADJUDGED that the Petition for Writ of Habeas Corpus is DISMISSED as time-barred, that all pending motions are DENIED as MOOT, and that no certificate of appealability issue.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st of January 2020.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Magistrate Judge Lisette M. Reid

Counsel of Record

Courtney Robinson
M19154
Santa Rosa Correctional Institution Annex
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5850 East Milton Road
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PRO SE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case Number: 18-23821-CIV-MORENO

COURTNEY ROBINSON,

Petitioner,

vs.

STATE OF FLORIDA and FLORIDA ATTORNEY GENERAL,

Respondents.
_____/

FINAL JUDGMENT

Pursuant to Federal Rules of Civil Procedure 58 and 54, and in accordance with the Court's dismissal of Petitioner's Amended Petition for Writ of Habeas Corpus made pursuant to 28 U.S.C. § 2254, filed on **September 10, 2018**, final judgment is entered in favor of Respondents.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st of January 2020.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Magistrate Judge Lisette M. Reid

Counsel of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-23821-CV-MORENO
MAGISTRATE JUDGE REID

COURTNEY ROBINSON

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The *pro se* petitioner, Courtney Robinson, a convicted state felon, has filed an amended petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his conviction and sentence for fleeing to elude a police officer, a third-degree felony in violation of Fla. Stat. 316.1935(1); burglary of an unoccupied dwelling, a second-degree felony in violation of Fla. Stat. 810.02(3); and certain misdemeanor offenses, following a jury verdict in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County **Case No. F07-**

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6340.[1] [ECF No. 11]. For the reasons stated below, the petition should be DENIED as TIME-BARRED.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and the Rules 8(b) and 10 Governing Section 2254 Cases in the United States District Courts.

The Court reviewed the amended petition with its attached exhibits [ECF No. 11] and the memorandum of law [ECF No. 18] together with the online state court criminal docket[2] (hereinafter referred to as "Online Trial Docket") and the relevant online appellate dockets of the Third District Court of Appeals ("Third DCA"). Before the Eleventh Circuit issued its opinion in *Paez v. Sec'y, Fla. Dep't of Corr.*, 931 F.3d 1304 (11th Cir. 2019), a Report was entered recommending dismissal of this amended petition as time-barred without requiring a response from the State. [ECF No. 22]. Following *Paez*, the Court vacated the Report and issued a limited show cause order to the State to address the timeliness issue. [ECF Nos. 28, 29]. The State has now done so making this case ripe for review. [ECF Nos. 32, 33]. Petitioner

[1] *See* online trial docket now a permanent part of the record. *See* information filed DE#11:22-27 and opinion issued in *Robinson v. State*, 25 So. 3d 1246 (Fla. 3d DCA 2010).

[2] The Court may take judicial notice of its own records. *See* Fed. R. Evid. 201; *see also, United States v. Glover*, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999) (finding the district court may take judicial notice of the records of inferior courts). The court also takes judicial notice of its own records in habeas proceedings, *McBride v. Sharpe*, 25 F.3d 962, 969 (11th Cir. 1994), *Allen v. Newsome*, 795 F.2d 934, 938 (11th Cir. 1986). These documents are a permanent part of the instant record and are located at ECF No. 20.

filed his Reply. [ECF No. 38]. The Court has reviewed both the Response and the Reply.

II. Claims

Construing the § 2254 motion liberally as afforded *pro se* litigants, pursuant to *Haines v. Kerner*, 404 U.S. 519, 520 (1972), Petitioner raises essentially five claims alleging:

1. Ineffective assistance of counsel for failure to object to jury instructions regarding the elements of resisting an officer without violence. [ECF No. 11, p. 6].

2. Ineffective assistance of counsel for failure to move for judgment of acquittal based on insufficient evidence. [*Id.*, p. 8].

3. Trial court error in denying counsel's motion for judgment of acquittal and motion to reduce the charges. [*Id.*, p. 9].

4. Ineffective assistance of counsel for failing to object to jury instructions regarding the elements of burglary. [*Id.*, p. 11].

5. Ineffective assistance of appellate counsel for failing to raise the above claims pursuant to *Martinez v. Ryan,* 566 U.S. 1, 8 (2012). [*Id.*, pp. 7-9, 11-13].

Petitioner asserts he is entitled to equitable tolling for two reasons. First, he claims relief pursuant to *Martinez*. [*Id.*, pp. 14-15]. In addition, Petitioner claims that, as a result of a prison transfer, his personal property and legal documents were lost requiring the filing of grievances during 2011 in an attempt to locate and recover

the property. [*Id.*]. Attempts in retrieving his lost property and documents resulted in a delay in appealing his case to the state courts. [*Id.*].

It bears noting that Petitioner's Reply to the State's Response to the limited show cause order mirrors his amended complaint and memorandum. [ECF No. 38]. Petitioner challenges the State's time-bar calculation [*Id.*, pp. 2-4), argues that he is entitled to equitable tolling [*Id.*, pp. 5-6], and reasserts his *Martinez* claim [*Id.*, pp. 6-7, 9-10]. Alternatively, Petitioner submits a claim of actual innocence without any factual support. [*Id.*, pp. 7-9].

III. Procedural History

Nearly eleven years ago, on **April 23, 2008**, a jury convicted Petitioner of the four counts enumerated above. [ECF No. 33-1, pp. 57-60]. "The trial court sentenced Robinson as a habitual violent offender on the two felony counts and imposed consecutive sentences of thirty years in prison for burglary, followed by ten years for fleeing to elude a police officer." *Robinson v. State*, 25 So. 3d 1246, 1247 (Fla. 3d DCA 2010); *see also* ECF No. 33-1, pp. 62-72). On **January 20, 2010**, the Third DCA affirmed Petitioner's conviction in part and reversed in part and remanded the case to the trial court for its error in imposing the consecutive sentences. *Id.* On March 5, 2010, the trial court issued an order correcting Petitioner's sentence. [ECF No. 33-1, p. 130].

Again, Petitioner appealed his sentence to the Third DCA in Case No. 3D10-791. [ECF No. 33-2, p. 2]. On **October 6, 2010**, the appellate court affirmed, *per curiam*, citing *Velez v. State*, 988 So. 2d (Fla 3d DCA 2000).[3] *Robinson v. State*, 45 So. 3d 924 (Fla. 3d DCA 2010). Petitioner did not seek discretionary review from the Florida Supreme Court. The time for doing so expired thirty days after the appellate court's affirmance of Petitioner's conviction, or no later than November 5, 2010.[4] Because he did not seek discretionary review from the Florida Supreme Court, Petitioner is not entitled to an additional ninety days to seek a writ of certiorari in the Supreme Court of the United States. *Gonzalez v. Thaler*, 565 U.S. 134 (2012).[5]

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[3] Defendant's presence was not necessary at resentencing where the controlling sentence is the life sentence and the reduction of the concurrent sentence to the legal maximum (thirty years) was a ministerial act. *Velez v. State*, 988 So. 2d 707, 708 (Fla. 3d DCA 2008).

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

[5] In applying *Gonzalez* to this case, Petitioner is not entitled to the ninety-day period for seeking certiorari review with the Supreme Court of the United States because after his judgment was affirmed on direct appeal, he did not attempt to obtain discretionary review by Florida's state court of last resort -- the Florida Supreme Court -- nor did he seek rehearing with the appellate court. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (holding that conviction becomes final upon expiration of time for seeking direct review); *Jimenez v. Quarterman*, 555 U.S. 113, 118-21 (2009) (explaining the rules for calculating the one-year period under § 2244(d)(1)(A)). *See also Clay v. United States*, 537 U.S. 522, 527 (2003) (holding that "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."); *Chavers v. Sec'y, Fla. Dep't. of Corr.*, 468 F.3d 1273, 1275 (11th Cir. 2006) (*per curiam*) (holding that one-year statute of limitations established by AEDPA began to run ninety days after Florida appellate court affirmed habeas petitioner's conviction, not ninety days after mandate was issued by that court). Accordingly, where a state prisoner pursues a direct appeal but does not pursue discretionary review in the state's highest court after the intermediate appellate court affirms his conviction, the conviction becomes final when time for seeking such discretionary review in the state's highest court expires. *Gonzalez, supra.*

See also Sup. Ct. R. 13. Therefore, at the earliest, Petitioner's convictions were final on November 5, 2010. However, assuming without deciding that Petitioner was entitled to appeal to the Supreme Court of the United States, then, alternatively, his conviction would have become final ninety days later, on **January 4, 2011**, when the time to appeal to the Supreme Court of the United States expired. Petitioner had only one year to file a federal habeas petition pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA") -- no later than **January 4, 2012**, absent any tolling motions. For purposes of this Report, the undersigned utilizes the later date because, even when giving Petitioner this additional time, this federal petition remains time-barred.

Petitioner waited **275 days** before filing numerous grievances with prison officials regarding lost personal property and legal documents between **October 6, 2011, and December 27, 2011**. [*See* exhibits ECF No. 11, pp. 29-37]. Yet, even after Petitioner filed his last grievance with the prison, he waited another **414 days**, until **February 13, 2013**, to file a motion to toll appellate time. [ECF No. 33-2, pp. 37-43]. On March 7, 2013, the state court denied the motion. [ECF No. 33-2, p. 45]. This period of time remained untolled because the grievances and the motion to toll appellate time are not "application[s] for State post -conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2). Accordingly, the statute of

limitations expired with **793 days** having passed by the time the motion to toll appellate time was denied.

Next, Petitioner waited an *additional* **364 days** after the denial of the motion to toll appellate time, until **March 6, 2014**,[6] when he filed a petition for writ of habeas corpus pursuant to Fla. R. Crim. P. 3.610. [ECF No. 33-2, p. 47-61]. Had the limitations period not previously expired, this petition would be considered a proper tolling motion. On September 9, 2014, the trial court denied relief as the claims were procedurally barred because they could have been raised on direct appeal. [*See* exhibit ECF No. 11, p. 18; ECF No. 33-2, p. 82]. Petitioner appealed to the Third DCA in Case No. 3D14-2526. [ECF No. 33-3, p. 2]. On February 11, 2015, the appellate court affirmed the denial of relief, *per curiam* and without written opinion. *Robinson v. State*, 160 So. 3d 443 (Fla. 3d DCA 2015). The appellate court issued the mandate on **March 30, 2015**. [ECF No. 33-3, p. 40].[7]

Seven-hundred and thirty-five days later, on or **April 3, 2017**, Petitioner filed a notice of inquiry in the case followed by a "motion to correct manifest

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[6] Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed. *See Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001); *see also Houston v. Lack*, 487 U.S. 266 (1988) (setting forth the "prison mailbox rule").

[7] Petitioner asserts in his Reply that the State failed to present that there were two orders from the Third DCA directing the State to answer the merits f his brief between November 10, 2014, through February 6, 2015. [ECF No. 38, p. 4]. However, these orders are of no consequence because they do not affect the limitations period. Had the limitations period not previously expired, the period of time for this entire proceeding – from March 6, 2014, through March 30, 2015 – would have been tolled.

injustice" and an appeal to the Florida Supreme Court, which was dismissed on **July 6, 2017**. [ECF No. 33-3, pp. 42-43, 47-49, 73.].

Finally, Petitioner waited an additional **431 days**, until **September 10, 2018,** before initiating the instant case in this Court with a filing entitled "Request to Correct Manifest Injustice," followed by his amended petition seeking habeas relief. [ECF Nos. 1, 11]. Petitioner's amended petition seeks equitable tolling and relief under *Martinez* in an apparent attempt to overcome the time bar. [ECF No. 11].

Yet, even if he were entitled equitable tolling, Petitioner cannot account for the **275 days** which elapsed prior to filing grievances seeking recovery of his personal property and legal documents, nor the years that elapsed between the time he filed his last grievance and the time he first sought post-conviction relief in the state court, nor the two years that elapsed following the appellate court's mandate affirming the denial of post-conviction relief. Finally, Petitioner presents no excuse for his delay in filing the instant federal petition **431 days** after the Florida Supreme Court dismissed his last proceeding.

IV. Discussion-Timeliness

The State asserts that the petition is untimely. [ECF No. 32]. As previously narrated, Petitioner admits his petition is untimely but seeks equitable tolling. [ECF No. 11]. Petitioner fails to present any scenario that rises to the level of an extraordinary circumstances that would equitably toll the statute of limitations.

A. General Principles of Timeliness

The Antiterrorism and Effective Death Penalty Act ("AEDPA") governs this proceeding. *See Wilcox v. Fla. Dep't of Corr.*, 158 F.3d 1209, 1210 (11th Cir. 1998) (*per curiam*). The AEDPA imposed for the first time a one-year statute of limitations on petitions for writ of habeas corpus filed by state prisoners. *See* 28 U.S.C. § 2244(d)(1). Specifically, the AEDPA provides that the limitations 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 action;
>
> C. the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> D. the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

See 28 U.S.C. § 2244(d)(1).

Here, as narrated above, in the underlying case, Petitioner's conviction became final on **January 4, 2011**. Petitioner waited ***1,157 days***, until **March 6, 2014**, before filing his first motion for post-conviction relief in the trial court. [ECF

No. 33-2, pp. 47-61]. By that time, the statute of limitations within which to file a federal habeas petition had long expired. Once the limitations period expired, it could not be revived. *Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004).

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

Although AEDPA establishes a one-year limitations period for filing § 2254 motions, the limitations period is tolled, however, for "[t]he time during which a properly filed application for post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Consequently, this petition is time-barred, pursuant to 28 U.S.C. § 2244(d)(1)(A), unless the appropriate limitations period was extended by properly filed applications for state post-conviction or other collateral review proceedings. *See* 28 U.S.C. § 2244(d)(2).

An application is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (footnote omitted). Consequently, if the petitioner sat on any claim or created any time gaps in the review process, the one-year clock would continue to run. *Kearse v. Sec'y, Fla. Dep't of Corr.*, 736 F.3d 1359, 1362 (11th Cir. 2013).

As narrated above, Petitioner's conviction became final on **January 4, 2011**.[8] Petitioner waited ***over three years***, until **March 6, 2014**, before filing his first motion for post-conviction relief in the trial court. He appealed the denial of post-conviction relief; yet, he waited more than ***two years*** after the issuance of the mandate before seeking further relief from the Third DCA and, later the Florida Supreme Court. By this point, the statute of limitations had expired and could not be revived. Lastly, Petitioner waited another **431 days** before initiating the instant habeas proceeding. [ECF No. 1].

While Petitioner attempts to blame some delays on the loss of property and legal documents, that period of time in which he filed grievances accounts for ***just four months***. Unfortunately, Petitioner cannot account for his delays amounting to well over ***six years*** in total. Accordingly, this federal habeas petition should be dismissed as time-barred.

C. § 2244(d)(1)(c) and Martinez, 566 U.S. 1 at 8

In addressing the timeliness of his petition, Petitioner claims that his appellate counsel was ineffective. To the extent Petitioner raises *Martinez* as extending *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) to overcome the time-bar and attempts to reset the statute of limitations through § 2244(d)(1)(c) (the time begins

[8] To maintain brevity, this Report does not repeat the citations as articulated in the procedural history above.

on the date "on which the constitutional right asserted was initially recognized by the Supreme Court), Petitioner's reliance on *Martinez* is misplaced.

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. However, "there is no constitutional right to an attorney in state post-conviction proceedings." *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). In *Martinez*, the Supreme Court made clear that it was not altering *Coleman's* constitutional ruling that there was no constitutional right to effective post-conviction counsel. Rather, *Martinez* qualifies *Coleman* "by recognizing a narrow exception: inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez v. Ryan*, 566 U.S. at 9. The rule in *Martinez* was extended to cases where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino v. Thaler*, 569 U.S. 413, 429 (2013).

However, the Eleventh Circuit held 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." *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014). "In *Martinez* and *Trevino*, it was how the state rules operated -- the rules precluded review of, or

a meaningful opportunity to raise, ineffective-trial-counsel claims, triggering a state procedural bar -- which created the cause to excuse the state bar." *Id.* at 630. Here, Petitioner does not demonstrate cause because there is no state procedural rule that barred his petition; to the contrary, he simply did nothing for years. Therefore, *Martinez* is wholly inapplicable here.

D. Equitable Tolling

Given the detailed procedural history narrated above, this federal habeas proceeding is due to be dismissed unless Petitioner can establish that equitable tolling of the statute of limitations is warranted.

The one-year limitations period set forth in § 2244(d) "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). In that regard, the Supreme Court has established a two-part test for equitable tolling, stating that a petitioner "must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevent timely filing." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007); *Holland v. Florida*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *see also, Brown v. Barrow*, 512 F.3d 1304, 1307 (11th Cir. 2008) (*per curiam*) (noting that the Eleventh Circuit "has held that an inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances that are both

beyond his control and unavoidable with diligence" and this high hurdle will not be easily surmounted).

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

While the record reveals that Petitioner was a proactive litigant during some post-conviction proceedings, here, he has not established any fact to support a finding that he is "entitled to the rare and extraordinary remedy of equitable tolling." *See San Martin v. McNeil,* 633 F.3d at 1271. This Court is not unmindful that Petitioner pursued collateral relief in the state forum. However, it is evident that there was well over one year of untolled time during which no properly filed post-conviction proceedings were pending which would act to toll the federal limitations period. As a result of Petitioner's failure to properly and diligently pursue his rights,

he has failed to demonstrate that he qualifies for equitable tolling of the limitations period.

As best as can be determined from the record, even if such an analysis could extend to the loss of personal property and legal documents due to a prison transfer, and the period of time during which Petitioner filed grievances, such a scenario is not extraordinary. Ultimately, Petitioner has not demonstrated that he was diligent in pursuing post-conviction relief and cannot account for the years he neglected to pursue federal habeas relief. Because this habeas corpus proceeding instituted on September 10, 2018, is untimely, Petitioner's claim challenging the lawfulness of his conviction and judgment is now time-barred pursuant to 28 U.S.C. § 2244(d)(1)-(2).

E. Fundamental Miscarriage of Justice/Actual Innocence

No fundamental miscarriage of justice will result if the court does not review on the merits Petitioner's grounds for relief raised herein. The law is clear that a petitioner may obtain federal habeas review of a procedurally defaulted claim, without a showing of cause or prejudice, if such review is necessary to correct a fundamental miscarriage of justice. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003). This exception is only available "in an extraordinary case, where a constitutional violation has

resulted in the conviction of someone who is actually innocent." *Henderson*, 353 F.2d at 892.

As a threshold matter, the Eleventh Circuit has never held that Section 2244(d)'s limitations period carries an exception for actual innocence; and it has declined to reach the issue whether the absence of such an exception would violate the Constitution. *See Taylor v. Sec'y, Dep't of Corr.*, 230 F. App'x. 944, 945 (11th Cir. 2007) (*per curiam*) ("[W]e have never held that there is an 'actual innocence' exception to the AEDPA's one-year statute of limitations, and we decline to do so in the instant case because [the petitioner] has failed to make a substantial showing of actual innocence."); *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1218-19 (11th Cir. 2000) (*per curiam*) (leaving open the question whether the § 2244 limitation period to the filing of a first federal habeas petition constituted an unconstitutional suspension of the writ). *But cf. United States v. Montano*, 398 F.3d 1276, 1284 (11th Cir. 2000) ("Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by appellant's failure to timely file his § 2255 motion."). However, several other circuits have recognized such an exception. *See, e.g., Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005); *Flanders v. Graves*, 299 F.3d 974 (8th Cir. 2002).

Even if there were an "actual innocence" exception to the application of the one-year limitations provisions of § 2244, the Court would still be precluded from

reviewing the claims presented in the instant petition on the merits. "To establish actual innocence, [a habeas petitioner] must demonstrate that ... 'it is more likely than not that no reasonable [trier of fact] would have convicted him.' *Schlup v. Delo*, 513 U.S. 298, 327-328 (1995)." *Bousley v. United States*, 523 U.S. 614, 623 (1998). "[T]he *Schlup* standard is demanding and permits review only in the "'extraordinary' case." *House v. Bell*, 547 U.S. 518, 538 (2006).

Courts have emphasized that actual innocence means factual innocence, not mere legal insufficiency. *Id.*; *see also High v. Head*, 209 F.3d 1257 (11th Cir. 2000); *Lee v. Kemna*, 213 F.3d 1037, 1039 (8th Cir. 2000); *Lucidore v. New York State Div. of Parole*, 209 F.3d 107 (2d Cir. 2000) (*citing Schlup v. Delo*, 513 U.S. at 299; *Jones v. United States*, 153 F.3d 1305, 1308 (11th Cir. 1998) (holding that appellant must establish that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him). *See also Bousley*, 523 U.S. at 623-624; *Doe v. Menefee*, 391 F.3d 147, 162 (2d Cir. 2004) ("As *Schlup* makes clear, the issue before [a federal district] court is not legal innocence but factual innocence."). To be credible, a claim of actual innocence requires the petitioner to "support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." *Schlup v. Delo*, 513 U.S. at 324.

Here, assuming, without deciding, that a claim of actual innocence might support equitable tolling of the limitation period, notwithstanding, Petitioner has failed to make a substantial showing of "actual innocence" of the crimes for which he was found guilty following a jury trial and the appellate court's affirmation of his conviction. *Robinson v. State*, 25 So. 3d 1246 (Fla. 3d DCA 2010).

On the record before this court, no fundamental miscarriage of justice will result by barring the claims raised in this habeas proceeding. Petitioner's conviction of guilt rests on the verdict of the jury. Petitioner has not presented sufficient evidence to undermine the Court's confidence in the outcome of his criminal proceedings sufficient to show that a fundamental miscarriage of justice will result if the claim(s) are not addressed on the merits.

Here, because Petitioner is not demonstrating actual, factual innocence, his claim warrants no habeas corpus relief. *See e.g., Scott v. Duffy*, 372 F. App'x 61, 63-64 (11th Cir. 2010) (*per curiam*) (rejecting habeas petitioner's actual innocence claim where no showing made of factual innocence of aggravated assault underlying his probation revocation and instead merely cited to evidence from probation revocation hearing and argued it did not support revocation of probation); *see also, Bousley v. United States*, 523 U.S. at 623.

Consequently, under the totality of the circumstances present here, this federal petition is NOT TIMELY and should be dismissed as time-barred.

V. Evidentiary Hearing

Based upon the foregoing, any request by Petitioner for an evidentiary hearing on the merits of any or all of his claims should be denied since the habeas petition can be resolved by reference to the state court record. 28 U.S.C. § 2254(e)(2); *Schriro v. Landrigan*, 550 U.S. at 474 (holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). *See also Atwater v. Crosby*, 451 F.3d 799, 812 (11th Cir. 2006) (addressing the petitioner's claim that his requests for an evidentiary hearing on the issue of trial counsel's effectiveness during the penalty phase of his trial in both the state and federal courts were improperly denied, the court held that an evidentiary hearing should be denied "if such a hearing would not assist in the resolution of his claim."). Petitioner has failed to satisfy the statutory requirements in that he has not demonstrated the existence of any factual disputes that warrant a federal evidentiary hearing.

VI. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a certificate of appealability (COA) to do so. 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009).

This Court should issue a COA only if Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Alternatively, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

After review of the record, Petitioner is not entitled to a certificate of appealability. Nevertheless, as now provided by the Rules Governing § 2254 Proceedings, Rule 11(a), 28 U.S.C. § 2254: "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 either party, that party may bring this argument to the attention of the District Court Judge in the objections permitted to this report and recommendation.

VII. Recommendations

Based upon the foregoing, it is recommended that this petition for habeas corpus relief be DISMISSED AS TIME-BARRED, that no certificate of appealability issue, and that the case be closed.

Objections to this report may be filed with the District Court Judge within fourteen days of receipt of a copy of the report. Failure to do so will bar a *de novo* determination by the District Court Judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate Judge. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn,* 474 U.S. 140, 149 (1985).

SIGNED this 23rd day of December, 2019.

UNITED STATES MAGISTRATE JUDGE

cc: Courtney Robinson
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Inmate Mail/Parcels
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PRO SE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10982-D

COURTNEY ROBINSON,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

Before: JORDAN and BRANCH, Circuit Judges.

BY THE COURT:

Courtney Robinson has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2 and 22-1(c), of this Court's June 30, 2020, order denying a certificate of appealability. Upon review, Robinson's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX
D

IN THE CIRCUIT COURT OF THE ELEVENTHY JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff

vs.
COURTNEY ROBINSON
Defendant

CASE NO. F07-6340
Section No. 10
Judge Brennan

FILED
SEP 10 2014
CLERK

ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE has come on to be heard upon the defendant's Petition for Writ of Habeas Corpus, and this court, having been advised of the premises therein, hereby **DENIES** the defendant's motion on grounds that it is legally insufficient, as follows:

The defendant raises three issues, all of which are matters he should have and could have raised in the appeal he took in this case on August 12, 2008. This petition cannot substitute for that, and as such his claims are procedurally barred.

WHEREFORE, the defendant's petition is hereby **DENIED.**

The defendant is on notice that he has thirty (30) days from the issuance of this order in which to file an appeal of this order, In the event that the Defendant takes an appeal of this order, the clerk is hereby directed to append to this order and deliver to the defendant and make as part any record on appeal the following:

1. The defendant's petition, filed August 20, 2014

2. This order

DONE and ORDERED in Miami-Dade County, Florida, this 9th day of September, 2014.

VICTORIA R. BRENNAN
CIRCUIT COURT JUDGE

TATE OF FLORIDA, COUNTY OF DADE
HEREBY CERTIFY that the foregoing is a true
id correct copy of the original on file in this office
SEP 18 2014 AD 20
ARVEY RUVIN, CLERK of Circuit and County Courts
eputy Clerk

CC: Defendant
Court file

CERTIFY that a copy of this order has been furnished to
the MOVANT, COURTNEY L. ROBINSON by mail this day
of SEP 18 2014, 20

Deputy Clerk

APPENDIX
F

Third District Court of Appeal

State of Florida

Opinion filed February 11, 2015.
Not final until disposition of timely filed motion for rehearing.

No. 3D14-2526
Lower Tribunal No. 07-6340

Courtney Robinson,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Victoria R. Brennan, Judge.

Courtney Robinson, in proper person.

Pamela Jo Bondi, Attorney General, for appellee.

Before WELLS, ROTHENBERG and LAGOA, JJ.

PER CURIAM.

Affirmed.

APPENDIX
F

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

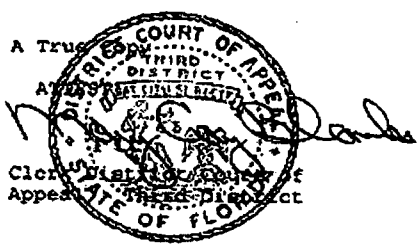
MARCH 13, 2015

COURTNEY ROBINSON,
Appellant(s)/Petitioner(s),
vs.
THE STATE OF FLORIDA,
Appellee(s)/Respondent(s),

CASE NO.: 3D**14-2526**

L.T. NO.: 07-6340

Upon consideration, appellant's pro se motion for rehearing en banc is treated as having included a motion for rehearing. The motion for rehearing is denied. WELLS, ROTHENBERG and LAGOA, JJ., concur. The motion for rehearing en banc is denied.



cc: Office Of Attorney General Courtney Letivus Robinson

la

APPENDIX
G

Supreme Court of Florida

THURSDAY, JULY 6, 2017

CASE NO.: SC17-1239
Lower Tribunal No(s).:
3D14-2526; 132007CF0063400001XX

COURTNEY ROBINSON vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This case is hereby dismissed. This Court lacks jurisdiction to review an unelaborated decision from a district court of appeal that is issued without opinion or explanation or that merely cites to an authority that is not a case pending review in, or reversed or quashed by, this Court. See Wells v. State, 132 So. 3d 1110 (Fla. 2014); Jackson v. State, 926 So. 2d 1262 (Fla. 2006); Gandy v. State, 846 So. 2d 1141 (Fla. 2003); Stallworth v. Moore, 827 So. 2d 974 (Fla. 2002); Harrison v. Hyster Co., 515 So. 2d 1279 (Fla. 1987); Dodi Publ'g Co. v. Editorial Am. S.A., 385 So. 2d 1369 (Fla. 1980); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

No motion for rehearing or reinstatement will be entertained by the Court.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

td
Served:

RICHARD L. POLIN
COURTNEY L. ROBINSON
HON. VICTORIA REGINA BRENNAN, JUDGE
HON. HARVEY RUVIN, CLERK
HON. MARY CAY BLANKS, CLERK

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

COURTNEY ROBINSON,
PETITIONER, PRO SE,

V.

STATE OF FLORIDA,
RESPONDENT. /

CASE NO.: 18-CV-23821-MORENO
MAGISTRATE JUDGE REID

OBJECTION

I. INTRODUCTION

THE PETITIONER, COURTNEY ROBINSON, PRO SE, WAS CONVICTED BY A JURY TRIAL IN ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA, FOR FLEEING TO ELUDE A POLICE OFFICER, A THIRD-DEGREE FELONY, FLA. STAT. 316.1935(1); BURGLARY OF AN OCCUPIED DWELLING, A SECOND-DEGREE FELONY, FLA. STAT. 810.02(3); AND CERTAIN MISDEMEANOR OFFENSES. PETITIONER WAS THEREFORE SENTENCED TO THIRTY (30) YEARS FOR ALLEGATIONS OF NON-VIOLENCE ACTIONS THAT DID [NOT] INVOLVE ANY FORM OF THREATS, HARM, NOR DEPRIVED, STOLEN, OR BROKEN PROPERTY. PETITIONER HAS RESPECTFULLY REQUESTED HABEAS CORPUS RELIEF PURSUANT TO 28 U.S.C. § 2254 RAISING THE FOLLOWING FIVE (5) CLAIMS:

1. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ERRONEOUS JURY INSTRUCTIONS, i.e., TRIAL COURTS FAILURE TO INSTRUCT THE JURY ON ALL FOUR (4) ELEMENTS OF 'RESISTING AN OFFICER WITHOUT VIOLENCE', THEREBY DEPRIVING PETITIONER OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION. (SEE: ECF 11, P. 6).

2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE THE COURT FOR A JUDGMENT OF ACQUITTAL ON GROUNDS THAT THE PETITIONER'S CONVICTION

APPENDIX
I

FOR BURGLARY WAS TOTALLY UNSUPPORTED BY THE EVIDENCE, i.e., ALL ELEMENTS FOR BURGLARY WAS NOT PROVEN BEYOND A REASONABLE DOUBT, DEPRIVING PETITIONER DUE PROCESS OF LAW. (U.S. CONST. AMEND. 14). (SEE: ECF 11, P.8).

3. TRIAL COURT ERRED IN DENYING TRIAL COUNSEL'S JUDGMENT OF ACQUITTAL/MOTION TO REDUCE PETITIONER'S CHARGE FROM BURGLARY TO TRESPASS, WHICH WAS PRESENTED AS A SAME-CLAIM-ISSUE AS GASKIN V. STATE, i.e., LEGALLY INSUFFICIENT INTENT, DEPRIVING PETITIONER OF DUE PROCESS OF LAW. (U.S. CONST. AMEND. 14). (SEE: ECF 11, P.9).

4. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ERRONEOUS JURY INSTRUCTIONS THAT WAS GIVEN TO THE JURY BY THE TRIAL COURT, AND THAT FAILED TO INSTRUCT THE JURY ON ALL THREE (3) ELEMENTS OF BURGLARY, THEREBY DEPRIVING PETITIONER OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION. (SEE: ECF 11, P. 11).

5. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE GASKIN V. STATE AS A SAME-CLAIM-ISSUE, IN WHICH WAS PROPERLY PRESERVED ON THE RECORD, AND THE OTHER FOUR (4) ABOVE CLAIMS, DEPRIVING PETITIONER DUE PROCESS OF LAW. (U.S. CONST. AMEND. 6). (SEE: GASKIN V. STATE, 869 So.2d 646 (FLA. 3RD DCA 2000); SEE ALSO: ECF 11, P. 11-13; ECF 30, P.10).

II. CORRECTION TO THE RECORD

ON JULY 26, 2019, THE MAGISTRATE JUDGE FILED HER REPORT AND RECOMMENDATION. (SEE: ECF 22). ON DECEMBER 23, 2019, THE MAGISTRATE JUDGE FILED A SECOND REPORT AND RECOMMENDATION. (SEE: ECF 39).

HOWEVER, IN BOTH OF THE MAGISTRATE JUDGES' REPORTS, SHE ERRONEOUSLY SUMMARIZED PETITIONERS FIFTH (5TH) CLAIM VIA STATING THAT PETITIONER'S FIFTH (5TH) CLAIM WAS 'HE RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN HIS APPELLATE COUNSEL FAILED TO RAISE THE ABOVE CLAIMS ON APPEAL [PURSUANT TO MARTINEZ V. RYAN, 566 U.S. 1, 8 (2012)]'. (SEE: ECF 22, P.3; ECF 39, P.3).

NEVERTHELESS, THE CORRECTION IS THAT PETITIONER'S 5TH CLAIM IS THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A GROUND THAT WAS PROPERLY PRESERVED DURING TRIAL AS

A SAME-CLAIM-ISSUE, (i.e. GASKIN v. STATE, SUPRA), AND THE OTHER ABOVE-SAID CLAIMS ON DIRECT APPELLATE REVIEW. (SEE: T.T. AT 432-434). PETITIONER CONTENDS THAT HIS 5TH CLAIM IS AS PREVIOUSLY STATED AS NUMBER (5) ON PAGE TWO(2). (SEE: INSTANT OBJECTION, #5 AT 2; SEE ALSO: ECF 30 AT 10, 15-16; ECF 11 AT 11-13).

THUS, PETITIONER REQUEST THAT THE ABOVE-SAID PORTION OF THE RECORD BE CORRECTED.

ALSO, IN BOTH OF MAGISTRATE JUDGE REPORTS, THE RETURNING MAILING ADDRESS FOR THE PETITIONER IS THAT OF AN INCORRECT LOCATION. (SEE: ECF 22 AT 19; ECF 39 AT 21). THE CORRECT ADDRESS IS AS FOLLOWS: COURTNEY ROBINSON #M19154, FLORIDA STATE PRISON - MAIN UNIT, P.O. BOX 800, RAIFORD, FLORIDA 32083.

THEREFORE, PETITIONER REQUEST THAT THE ABOVE-SAID PORTION OF THE RECORD BE CORRECTED.

III. MAGISTRATE JUDGES' REITERATION OF PREVIOUSLY REFUTED ARGUMENTS

ON JULY 26, 2019, THE MAGISTRATE JUDGE FILED A 'REPORT AND RECOMMENDATION'. (SEE: ECF 22). IN HER REPORT, SHE ALLEGED THE FOLLOWING:

1. PETITIONER WAITED UNTIL (275) DAYS AFTER JANUARY 4, 2011 TO PURSUE GRIEVANCES WITH PRISON OFFICIALS REGARDING LOST PERSONAL PROPERTY AND LEGAL DOCUMENTS, FIRST FILING ON OCTOBER 6, 2011, AND CONTINUING THROUGH DECEMBER 27, 2011. AFTER PETITIONER FILED HIS LAST GRIEVANCE, HE WAITED ANOTHER TWO YEARS AND SEVEN MONTHS TO FILE A HABEAS CORPUS PETITION SEEKING POST-CONVICTION RELIEF IN STATE COURT. (SEE: ECF 22 AT 5).

2. PETITIONER THEN WAITED ANOTHER TWO YEARS, WHEN ON OR ABOUT APRIL 3, 2017, HE FILED A NOTICE OF INQUIRY IN THE CASE FOLLOWED BY A "MOTION TO CORRECT MANIFEST INJUSTICE" AND AN APPEAL TO THE FLORIDA SUPREME COURT, WHICH EVENTUALLY DISMISSED THE CASE ON JULY 6, 2017. (Id. AT 6).

3. PETITIONER RESTED ON HIS LAURELS FOR AN ADDITIONAL (431) DAYS

BEFORE FILING THE INSTANT PETITION SEEKING EQUITABLE TOLLING AND RELIEF UNDER MARTINEZ IN AND APPARENT ATTEMPT TO OVERCOME THE TIME BAR. (Id.)

4. EVEN IF HE WERE ENTITLED EQUITABLE TOLLING, PETITIONER CANNOT ACCOUNT FOR THE (275) DAYS THAT ELAPSED PRIOR TO SEEKING RECOVERY OF HIS PERSONAL PROPERTY AND LEGAL DOCUMENTS, NOR THE TWO YEARS AND SEVEN MONTHS ELAPSING BETWEEN THE TIME HE FILED HIS LAST GRIEVANCE AND THE TIME HE SOUGHT POST-CONVICTION RELIEF IN THE STATE COURT, NOR THE TWO YEARS WHICH ELAPSED FOLLOWING THE APPELLATE COURTS MANDATE AFFIRMING THE DENIAL OF POST-CONVICTION RELIEF. EVEN MORE SO, PETITIONER RAISES NO EXCUSE FOR HIS DELAY IN FILING THE INSTANT FEDERAL PETITION 431 DAYS AFTER THE FLORIDA SUPREME COURT DISMISSED HIS LAST PROCEEDING. (Id. AT 6-7).

5. PETITIONER'S CONVICTION BECAME FINAL ON JANUARY 4, 2011. PETITIONER WAITED TWO YEARS AND SEVEN MONTHS, AFTER HIS LAST GRIEVANCE UNTIL AUGUST 20, 2014, BEFORE FILING HIS FIRST MOTION FOR POST-CONVICTION RELIEF IN THE STATE TRIAL COURT. PETITIONER ALSO DELAYED BY 431 DAYS AFTER THE FLORIDA SUPREME COURT DISMISSED HIS LAST PROCEEDING. (Id. AT 9).

6. THE PASSAGE OF TIME AND THE EXPIRATION OF THE LIMITATIONS PERIOD IS SUFFICIENTLY OUTLINED ABOVE AND NEED NOT BE REPEATED. WHILE PETITIONER ATTEMPTS TO BLAME SOME DELAYS ON THE LOSS OF PROPERTY AND LEGAL DOCUMENTS, THE PERIOD IN WHICH HE FILED GRIEVANCES ACCOUNTS FOR JUST FOUR MONTHS. PETITIONER CANNOT ACCOUNT FOR HIS DELAYS AMOUNTING TO WELL OVER SIX YEARS IN TOTAL. PETITIONER, AT CERTAIN TIMES, ACTIVELY PURSUED POST-CONVICTION RELIEF IN THE STATE COURT AND WITH THE STATE APPELLATE COURTS. (Id. AT 9).

FOLLOWING, ON AUGUST 15, 2019, PETITIONER FILED AN "OBJECTION TO THE MAGISTRATE JUDGES" REPORT AND RECOMMENDATION". (SEE: ECF 30). IN PETITIONER'S "OBJECTION", PETITIONER USED PORTIONS OF THE RECORD TO THOROUGHLY REFUTE THE ABOVE-SAID ALLEGATIONS, AND TO DEMONSTRATE EXCUSABLE CAUSE FOR THE EXTRAORDINARY CIRCUMSTANCE(S) THAT STOOD IN THE WAY PREVENTING PETITIONER FROM TIMELY FILING. (SEE: ECF 30 AT 2-7) (SEE ALSO: ECF 11, EXHIBITS D1-D9).

On August 20, 2019, the Magistrate Judge Vacated Her Report and Recommendation, (See: ECF 28), and issued the Respondent an Order to Show Cause Regarding Timeliness of Petitioner's §2254 Habeas Corpus Petition, and accompany the Show Cause with an Appendix. (See: ECF 29).

On September 10, 2019, the Respondent Responded to the Order, and with an Appendix. (See: Appendix, and Response to Show Cause Order). The Response argued, Basically, all the arguments in Magistrate Judges' Report and Recommendations. (Id.).

On October 21, 2019, Petitioner Filed His "Reply" to the Respondent's Response. (See: ECF 38). The Petitioner's "Reply" sufficiently used Portions of the Record to thoroughly refute [all] of the Respondent's (and Magistrate Judge) Allegations to overcome the Timeliness issue that was being argued, as well as to bright-light the Respondent's Refusal to include [all] Relevant Dockets [and] "Orders", (Id.), in which violated the Magistrate Judge Order. (ECF 29 at 3).

However, on December 23, 2019, After Petitioner Has Repeatedly sufficiently used Portions of the Record to thoroughly refute [all] of the Respondent's (and Magistrate Judge) Allegations, the Magistrate Judge Re-Filed Her Report and Recommendations alleging the [S]ame arguments that Has been thoroughly refuted [T]wice. (See ECF 39)(See also: ECF 30; and Petitioner's "Reply")(Especially concerning the Timeliness Issue. (See: ECF 39 at 6-9, 11; See also: ECF 30 at 2-7)).

The Repetitive usage of the number of days that Has been argued by the Respondent and both of Magistrate Judge "Reports" are a Mixture of Inaccuracy, Misapplication, and a Misleading Strategy in a seemingly intentional manner, especially after the issue of Timeliness Has been Previously factually refuted [twice] using Portions of the Record. (See: ECF 30 at 2-7; See also: Petitioner's Reply).

Therefore, Petitioner Respectfully Prays that His Previous "Objection", ECF 30, be credibly considered concerning the timeliness issue of Magistrate Judges' "Report", and that it also serves as a Demonstration showing Entitlement to Equitable Tolling, Actual Innocence, Performance of Diligence, Extraordinary Circumstances, and a Demonstration of Manifest Injustice.

IV. Relevant Orders

In Petitioner's "Objection", Petitioner made Reference to the Fact that the 3rd DCA issued the State of Florida two consecutive Twenty (20) day "Orders" To Answer Petitioners Claims on its Merits, In Case number: 3D14-2526, However, The State simply Refused to Answer the claims, of which one of the three claims argued a Manifest Injustice To Have Occurred. (See: Appendix-AB; see also: ECF 30 at 6, 12). Petitioners Reference was made to Bright-Light that States [Inability] to Refute His claims.

On August 20, 2019, the Magistrate Judge issued the Respondent a Show Cause Order with Precise Mandatory Instructions that is as Follows:

"3. The Response [shall] be Accompanied by an Appendix, which [shall] include copies of [all] Relevant Dockets, together with copies of [all] Pleadings Filed by Movant, Appellate Opinions, "Orders" and Mandates..." (See: ECF 29 at 3).

However, on September 10, 2019, the Respondent Filed its Response To the Show Cause Order, and simply Failed to Obey the Magistrate Judge Mandatory Order via Failing to Include the Two (2) above-said Consecutive Twenty (20) day "Orders", from the 3rd DCA, To its Appendix. (See: Respondents Response to the Show Cause Order).

On October 21, 2019, Petitioner Filed His "Reply" To the Respondents Response Bright-Lighting the above-said Failure to Obey. (See: ECF 38 at 4) (Among other Failures Throughout - Id).

Two Months Later, on December 23, 2019, the Magistrate Judge Filed Her second "Report". In the Report, it States that: "Petitioner asserts in His Reply that the State Failed to Present that there were two orders from the Third DCA Directing the State to answer the merits of His Brief between November 10, 2014, through February 6, 2015. However, these orders are of no consequence because they do not effect the Limitation Period." (See: ECF 39 at 7, FN-7).

However, the Petitioner contends that the two "Orders" [are] of [Great] Importance [and] Relevance, [and] is also apart of His argument for Relief via Showing that the State was Ordered [Twice], by the 3rd DCA, to Answer Petitioners claim of Manifest Injustice on its Merits, (as well as Her claims of Reversible Fundamental Errors), and

THAT THEY REFUSED TO DO SO, THEREBY SHOWING THAT THEY WERE [NOT-AT-ALL] CAPABLE OF PRODUCING AN ARGUMENT AGAINST PETITIONER'S CLAIMS OF FUNDAMENTAL ERRORS [AND] MANIFEST INJUSTICE, NOR WERE THEY CAPABLE TO REFUTE THE ABOVE-SAID CLAIMS IN [ANY] MANNER, ON ITS MERITS. IT ULTIMATELY SHOWS THAT THE PETITIONER [WERE], AND STILL [IS], ENTITLED TO HABEAS CORPUS RELIEF.

THEREFORE, THE TWO (2) ORDERS ARE VERY RELEVANT AND ESSENTIAL, AND THEREFORE IS REQUIRED TO BE APART OF THE RECORD.

V. EQUITABLE TOLLING

IN MAGISTRATE JUDGES' REPORT, IT STATES THAT: "GIVEN THE DETAILED PROCEDURAL HISTORY NARRATED ABOVE, THIS FEDERAL HABEAS PROCEEDING IS DUE TO BE DISMISSED [UNLESS] PETITIONER CAN ESTABLISH THAT EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS IS WARRANTED."(ECF 39 AT 13).

IN LAWRENCE V. FLORIDA, THE U.S. SUPREME COURT HELD THAT: "TO BE ENTITLED TO EQUITABLE TOLLING, A 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." (SEE: LAWRENCE V. FLORIDA, 549 U.S. 327, 335-6 (2007); PACE V. DIGUGLIELMO, 544 U.S. 408, 418 (2005); SEE ALSO: ECF 39 AT 13).

THUS, TO MAKE A SHOWING THAT PETITIONER PURSUED HIS RIGHTS DILIGENTLY, PETITIONER PROVIDE THE FOLLOWING CASE NUMBERS: 3D08-2129; 3D10-791; 3D14-2526; AND SC17-1239, AS NARRATED IN (ECF 1 AT 1-14; SEE ALSO: ECF 30 AT 4-7).

TO SHOW THAT SOME EXTRAORDINARY CIRCUMSTANCE STOOD IN THE WAY AND PREVENTED TIMELY FILING, THE PETITIONER DEMONSTRATE: THAT AT THE EARLIEST, PETITIONERS CONVICTION WOULD HAVE BEEN FINAL ON NOVEMBER 12, 2010. HOWEVER, THE NINETY DAYS FOR THE PETITIONER TO APPEAL TO THE U.S. SUPREME COURT WOULD HAVE BECAME FINAL ON FEBRUARY 7, 2011. THEREFORE, PETITIONER ONE YEAR TO FILE A FEDERAL HABEAS PETITION IN PROPER TIMING WOULD HAVE STARTED ON FEBRUARY 8, 2011, AND ENDED ON FEBRUARY 8, 2012. HOWEVER, IN MARCH OF 2011, ONE MONTH AFTER PETITIONER'S NINETY (90) DAYS TO APPEAL TO THE U.S. SUPREME COURT BECAME FINAL, [ALL] OF PETITIONER'S PERSONAL [AND] LEGAL PROPERTY WAS LOST BY FLORIDA D.O.C. OFFICIALS AS A RESULT OF A PRISON TRANSFER. PETITIONER EXHAUSTED HIS ADMINISTRATIVE REMEDIES. (SEE: ECF 11, EXHIBITS D1-D9). FOLLOWING, ON JANUARY 17, 2012, PETITIONER APPEALED THE MATTER TO THE SECOND JUDICIAL

CIRCUIT VIA WRIT of MANDAMUS. (SEE: CASE No.: 2012-CA-209). AFTERWARDS, DECEMBER 2, 2014, PETITIONER FURTHERED HIS APPEAL TO THE FIRST DCA OF FLORIDA VIA INITIAL BRIEF. (SEE: CASE No.: 1D14-2066). THIS PROCESS BEGAN FROM MARCH of 2011, THROUGHOUT DECEMBER 2, 2014, AS NARRATED IN (ECF 30 AT 2-7), CONSUMING ELEVEN (11) OF THE TWELVE (12) MONTHS THAT PETITIONER HAD TO FILE HIS FEDERAL HABEAS PETITION PURSUANT TO THE (AEDPA), AND THEREFORE, STOOD IN THE WAY AND PREVENTED TIMELY FILING.

THEREBY SUPRA, PETITIONER [HAS] DEMONSTRATED ENTITLEMENT TO EQUITABLE TOLLING.

VI. INACCURATE CALCULATION

IN MAGISTRATE JUDGES' "REPORT", IT INACCURATELY STATES THAT: "AT THE EARLIEST, PETITIONER'S CONVICTIONS WERE FINAL ON NOVEMBER 5, 2010." (ECF 39 AT 6) PETITIONER CONTENDS THAT THE MANDATE ON HIS CONVICTIONS WERE NOT FINAL UNTIL NOVEMBER 12, 2010. (SEE: APPX. C, SEQ. No. 240).

THE "REPORT" ALSO CALCULATED THAT ASSUMING PETITIONER TO HAVE BEEN ENTITLED TO AN APPEAL TO THE U.S. SUPREME COURT, THEN HIS CONVICTION WOULD HAVE BECOME FINAL NINETY DAYS LATER, ON JANUARY 4, 2011, AND ABSENT ANY TOLLING MOTIONS, HIS ONE YEAR TO FILE A FEDERAL HABEAS PETITION PURSUANT TO (AEDPA) WOULD END NO LATER THAN JANUARY 4, 2012. (SEE: ECF 39 AT 6).

HOWEVER, EVEN [IF] PETITIONER'S CONVICTION BECAME FINAL ON NOVEMBER 5, 2010, THEN JANUARY 4, 2011 WOULD ONLY BE A SIXTY-THREE (63) DAY DIFFERENCE, (NOT NINETY (90) DAYS AS STATED IN THE REPORT) (Id. AT 6).

THEREFORE, THE REPORT DEMONSTRATED INACCURATE CALCULATION.

VII. ENTITLEMENT TO HABEAS CORPUS RELIEF

BOTH of MAGISTRATE JUDGE "REPORTS" STATES THAT: "PETITIONERS CONVICTION OF GUILT REST ON THE VERDICT OF THE JURY." (SEE: ECF 22 AT 16; ECF 39 AT 18). HOWEVER, ON MAY 28, 2013, THE U.S. SUPREME COURT HELD: WHILE RECOGNIZING THE HISTORIC IMPORTANCE of FEDERAL HABEAS CORPUS PROCEEDINGS AS A METHOD FOR PREVENTING INDIVIDUALS FROM BEING HELD IN CUSTODY IN VIOLATION OF FEDERAL LAW, AND GOING ON TO FURTHER HOLD THAT, "IN GENERAL, IF A CONVICTED STATE CRIMINAL DEFENDANT CAN SHOW A FEDERAL HABEAS COURT THAT HIS CONVICTION RESTS UPON A VIOLATION

OF THE FEDERAL CONSTITUTION, HE MAY WELL OBTAIN A [WRIT OF HABEAS CORPUS] THAT [REQUIRES] A NEW TRIAL, A NEW SENTENCE, OR [RELEASE]." (SEE: TREVINO V. THALER, 569 U.S. 413, 421 (2013)).

PETITIONER CONTENDS THAT HE [HAS] DEMONSTRATED THE ABOVE-SAID SHOWING IN HIS PREVIOUS "OBJECTION", AND RESPECTFULLY REQUEST THAT HIS PREVIOUS "OBJECTION" BE HELD CREDIBLE FOR THE DEMONSTRATION OF THE ABOVE-SAID SHOWING. (SEE: ECF 30 AT 14-15).

THEREBY, PETITIONER HAS DEMONSTRATED ENTITLEMENT TO HABEAS CORPUS RELIEF.

VIII. MARTINEZ, TREVINO, AND STRICKLAND

PETITIONER RAISES THREE (3) CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL (IATC); ONE (1) CLAIM OF TRIAL COURT ERROR; AND ONE (1) CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL (IAAC). (SEE: ECF 11 AT 6-13; ECF 30 AT 9-10; ECF 22 AT 3; ECF 39 AT 3).

IN MARTINEZ V. RYAN, THE SUPREME COURT OF THE U.S. EXPLAINED THAT MARTINEZ'S "GROUND FOR RELIEF" IS HIS IATC CLAIM, A CLAIM THAT AEDPA DOES NOT BAR. HOWEVER, MARTINEZ RELIES ON THE INEFFECTIVENESS OF HIS POST-CONVICTION ATTORNEY TO EXCUSE HIS FAILURE TO COMPLY WITH ARIZONA'S PROCEDURAL RULES. (SEE: MARTINEZ V. RYAN, 132 S.CT. 1309, 1325 (2012)). THE SUPREME COURT ALSO RULED THAT: "ALTHOUGH AEDPA AND §2254(i) PRECLUDES HABEAS PETITIONER FROM RELYING ON THE INEFFECTIVENESS OF HIS POSTCONVICTION ATTORNEY AS A "GROUND FOR RELIEF", IT DOES [NOT] STOP PETITIONER FROM USING IT TO ESTABLISH "CAUSE" FOR HIS PROCEDURAL DEFAULT IN FAILING TO RAISE IATC CLAIM." (Id AT 1314).

THE SUPREME COURT ALSO HELD THAT: "AN ATTORNEY'S ERRORS DURING AN APPEAL ON DIRECT REVIEW MAY PROVIDE CAUSE TO EXCUSE A PROCEDURAL DEFAULT; FOR IF THE ATTORNEY APPOINTED BY THE STATE IS INEFFECTIVE, THE PRISONER HAS BEEN DENIED FAIR PROCESS AND THE OPPORTUNITY TO COMPLY WITH THE STATE'S PROCEDURES AND OBTAIN AN ADJUDICATION ON THE MERITS OF HIS CLAIM." (Id AT 1315) (SEE ALSO: COLEMAN V. THOMPSON, 501 U.S. 722, 111 S.CT. 2546 (1991)).

THE SAME SUPREME COURT JUSTICES IN MARTINEZ, ALSO HELD IN TREVINO THAT: "INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPELLATE REVIEW COULD AMOUNT TO "CAUSE," EXCUSING A DEFENDANT'S FAILURE TO

RAISE [AND THUS PROCEDURALLY DEFAULTING] A CONSTITUTIONAL CLAIM. (SEE: TREVINO v. THALER, 569 U.S. 413, 413 (2013)).

THE SUPREME COURT ALSO HELD, AS STATED IN MAGISTRATE JUDGE "REPORT", ": "WHERE A STATE PROCEDURAL FRAMEWORK, BY REASON OF ITS DESIGN AND OPERATION, MADE IT HIGHLY UNLIKELY IN A TYPICAL CASE THAT A DEFENDANT WOULD HAVE A MEANINGFUL OPPORTUNITY TO RAISE AN IATC CLAIM ON DIRECT APPEAL, A PROCEDURAL DEFAULT WOULD NOT BAR A FEDERAL HABEAS COURT FROM HEARING A SUBSTANTIAL IATC CLAIM... AND THE HOLDING IN MARTINEZ DO APPLY." (SEE: ECF 39 AT 12. SEE ALSO: TREVINO v. THALER, 569 U.S. 413, 429 (2013)).

IDENTICAL TO THE STATE OF TEXAS, THE STATE OF FLORIDA HAS A DESIGN IN ITS PROCEDURAL FRAMEWORK THAT MAKES IT HIGHLY UNLIKELY IN CASES SUCH AS THE PETITIONER'S TO HAVE A MEANINGFUL OPPORTUNITY TO RAISE AN IATC CLAIM ON DIRECT APPEAL, THEREFORE, PROCEDURAL DEFAULT SHOULD [NOT] BE USED, PER THE SUPREME COURT IN TREVINO, TO BAR THIS FEDERAL HABEAS COURT FROM HEARING PETITIONER'S CLAIMS OF IATC.

IN ADDITION, "TWO PRONGS MUST BE ESTABLISHED FOR A SUCCESSFUL INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM, BASED ON STRICKLAND V. WASHINGTON. FIRST, A DEFENDANT MUST ESTABLISH CONDUCT ON THE PART OF COUNSEL THAT IS OUTSIDE THE BROAD RANGE OF COMPETENT PERFORMANCE UNDER PREVAILING PROFESSIONAL STANDARDS. SECOND, THE DEFICIENCY IN COUNSEL'S PERFORMANCE MUST BE SHOWN TO HAVE SO AFFECTED THE FAIRNESS AND RELIABILITY OF THE PROCEEDINGS THAT CONFIDENCE IN THE OUTCOME IS UNDERMINED. STATED ANOTHER WAY, THIS A QUESTION OF WHETHER THE RESULT OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS." (SEE: STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. CT. 2052 (1984); BRUCE V. STATE, 879 So.2d 686, 687 (2004). ALSO, "FAILURE TO GIVE A [COMPLETE] OR ACCURATE INSTRUCTION CONSTITUTES FUNDAMENTAL ERROR IF IT RELATES TO AN ELEMENT OF THE CHARGED OFFENSE." [Id 686, 687). LASTLY, "FUNDAMENTAL ERROR IS HARMFUL ERROR, AND NECESSARILY PREJUDICIAL. THUS, FOR ERROR TO MEET THE STANDARD OF FUNDAMENTAL ERROR, IT MUST FOLLOW THAT THE ERROR PREJUDICED THE DEFENDANT. THEREFORE, [ALL] FUNDAMENTAL ERROR IS HARMFUL ERROR." (Id AT 686).

IN THE INSTANT CASE, THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON ALL (3) ELEMENTS OF 'BURGLARY.' (SEE: ECF 11 AT 11). ABSENT KNOWING IF PETITIONER HAD PERMISSION OR CONSENT FROM ANYONE AUTHORIZED TO ACT AS THE OWNER, WILL LEAVE THE CHARGE OF BURGLARY [INCOMPLETE], AND THEREFORE, CREATED THE ABOVE-SAID FUNDAMENTAL ERROR. TRIAL COUNSEL FAILED TO

OBJECT TO ERRONEOUS JURY INSTRUCTIONS, PROVIDING, THEREBY, INEFFECTIVE ASSISTANCE. PETITIONER'S APPELLATE COUNSEL FAILED TO RAISE THIS IATC CLAIM ON DIRECT APPEAL.

PETITIONER'S TRIAL COUNSEL ALSO FAILED TO OBJECT TO THE TRIAL COURT'S FAILING TO INSTRUCT THE JURY ON ALL FOUR (4) ELEMENTS OF 'RESISTING AN OFFICER WITHOUT VIOLENCE.' (SEE: ECF 11 AT 6). ABSENT THE PETITIONER KNOWING HIS PURSUER TO BE AN OFFICER WILL LEAVE THE CHARGE OF RESISTING AN OFFICER WITHOUT VIOLENCE [INCOMPLETE], THEREFORE CREATING THE ABOVE-SAID FUNDAMENTAL ERROR, AND INEFFECTIVENESS OF TRIAL COUNSEL. PETITIONER'S APPELLATE COUNSEL FAILED TO RAISE THIS IATC CLAIM, ALSO, ON DIRECT APPEAL. THEREBY SUPRA, PETITIONER [HAS] SATISFIED THE FIRST PRONG OF STRICKLAND.

TO SATISFY THE SECOND PRONG IN STRICKLAND, PETITIONER DEMONSTRATE THE FOLLOWING: HAD THE JURY BEEN INSTRUCTED ON THE ABOVE-SAID JURY INSTRUCTIONS AS BY LAW AND STATUTE, i.e. §810.02(3)(a) AND § 843.02, IT IS MORE LIKELY THAN NOT THAT THE JURY WOULD HAVE RENDERED A [NOT] [GUILTY] VERDICT, AND THEREFORE, RESULTING IN A DIFFERENT OUTCOME.

FINALLY, IN MARTINEZ, IT WAS HELD THAT: "FOR EQUITABLE REASONS, IN A CASE SUCH AS THE ONE BEFORE US, FAILING TO PROVIDE ASSISTANCE OF COUNSEL, OR PROVIDING ASSISTANCE OF COUNSEL THAT FALLS BELOW THE STRICKLAND STANDARD, CONSTITUTES "CAUSE" FOR EXCUSING PROCEDURAL DEFAULT."

THEREBY SUPRA, PETITIONER [HAS] DEMONSTRATED SUFFICIENT "CAUSE" FOR EXCUSING HIS PROCEDURAL DEFAULT.

IX. ACTUAL INNOCENCE

THE MAGISTRATE JUDGE 'REPORT' STATES: "ASSUMING WITHOUT DECIDING, THAT A CLAIM OF ACTUAL INNOCENCE MIGHT SUPPORT EQUITABLE TOLLING OF THE LIMITATION PERIOD, PETITIONER HAS FAILED TO MAKE A SUBSTANTIAL SHOWING OF "ACTUAL INNOCENCE" OF THE CRIMES FOR WHICH HE WAS FOUND GUILTY FOLLOWING A JURY TRIAL AND THE APPELLATE COURT'S AFFIRMATION OF HIS CONVICTION." (SEE: ECF 39 AT 18).

HOWEVER, PETITIONER CONTENDS THAT IN EACH OF HIS INITIAL FILINGS, (APPX. Y; APPX. AB; APPX. AD; APPX. AL; APPX. AO; AND THE 'MOTION TO CORRECT MANIFEST INJUSTICE' OF WHICH RESPONDENT MADE REFERENCE BUT FAIL TO INCLUDE IN ITS APPENDIX AS ORDERED - SEE: APPX. AH), HE HAS MADE A SHOWING OF ACTUAL INNOCENCE. THE MOST

RECENT SHOWING OF ACTUAL INNOCENCE IS DEMONSTRATED IN PETITIONER'S PREVIOUS "REPLY". (SEE: ECF 38).

THEREFORE, PETITIONER RESPECTFULLY REQUEST THAT HIS PREVIOUS "REPLY", (ECF 38), BE HELD CREDIBLE TO REFUTE THE ABOVE-SAID ALLEGATION OF THE MAGISTRATE JUDGES' 'REPORT'.

X. MANIFEST INJUSTICE

THE MAGISTRATE JUDGES 'REPORT', IT ADMITS THAT: "THE LAW IS [CLEAR] THAT A PETITIONER MAY OBTAIN FEDERAL HABEAS REVIEW OF A PROCEDURALLY DEFAULTED CLAIM, WITHOUT A SHOWING OF CAUSE OR PREJUDICE, IF SUCH REVIEW IS NECESSARY TO CORRECT A FUNDAMENTAL MISCARRIAGE OF JUSTICE." (SEE: ECF 39 AT 15). ALSO, THAT 'THIS EXCEPTION IS ONLY AVAILABLE IN AN EXTRAORDINARY CASE WHERE A CONSTITUTIONAL VIOLATION HAS RESULTED IN THE CONVICTION OF SOMEONE WHO IS ACTUAL INNOCENT.' (Id AT 15-16).

TO DEMONSTRATE "MANIFEST INJUSTICE", THE PETITIONER SHOWS THAT, ON APRIL 23, 2008, DURING PETITIONER'S TRIAL, THE COURT INSTRUCTED THE JURY: "TO PROVE THE CRIME OF BURGLARY AS CHARGED IN COUNT TWO OF THE INFORMATION, THE STATE MUST PROVE THE FOLLOWING TWO ELEMENTS BEYOND A REASONABLE DOUBT: ONE, COURTNEY ROBINSON ENTERED A STRUCTURE OWNED BY OR IN THE POSSESS OF LATIVIA BROWN; TWO, AT THE TIME OF ENTERING THE STRUCTURE, COURTNEY ROBINSON HAD THE INTENT TO COMMIT AN OFFENSE, TO WIT, RESISTING AN OFFICER WITHOUT VIOLENCE IN THAT STRUCTURE." (SEE: T.T. 495).

HOWEVER, JUST FOUR (4) YEARS PRIOR, IN '2004', THE SAME DISTRICT, THE 3RD DCA, HELD THAT: "THE DEFENDANT COULD [NOT] BE CONVICTED OF BURGLARY, GIVEN INSTRUCTION THAT JURY COULD FIND HIM GUILTY IF HE ENTERED OR REMAINED IN BUILDING WITH INTENT TO COMMIT ESCAPE AND/OR RESISTING ARREST WITHOUT VIOLENCE." (SEE: GASKIN V. STATE, 869 So. 2d 646 (FLA. 3d DCA 2004)). IN FOOTNOTE ONE (1), THE 3RD DCA HELD THAT: "OUR HOLDING MAKES IT UNNECESSARY TO CONSIDER THE POSSIBILITY THAT THE OTHER ALTERNATIVE BASIS FOR THE BURGLARY VERDICT, B. AND E. "WITH THE INTENT TO COMMIT THE OFFENSE OF... RESISTING ARREST WITHOUT VIOLENCE" IS ALSO LEGALLY INADEQUATE IN THE LIGHT OF THE RULE THAT A BURGLARY IS COMPLETE "THE MOMENT THE DEFENDANT ENTERS OR REMAINS WITHIN THE [STRUCTURE] WITH THE REQUISITE INTENT." IT IS DIFFICULT TO COMPREHEND

THAT GASKIN ENTERED THE BUILDING WITH THE INTENT TO LATER RESIST AN ARREST WHICH HE CLEARLY WANTED ONLY TO AVOID ENTIRELY." (Id AT 650)(THEREFORE, "REVERSING" THE CONVICTION FOR BURGLARY)(Id.)

HOWEVER, A SHOWING OF "MANIFEST INJUSTICE" IS WHERE A SIMILAR-SITUATED DEFENDANT IS DENIED THE BENEFIT OF THE SAME LAW. (SEE: HAAGER V. STATE, 36 So. 3d 883 (FLA. APP. 2 DIST. 2010)).

ALSO, IN CARSWELL V. STATE, 23 So. 3d 195 (FLA. APP. 4 DIST. 2009), THE 4TH DCA HELD THAT: "IT CREATED A "MANIFEST INJUSTICE" FOR ONE DEFENDANT TO BE DENIED THE [BENEFIT] OF THE [SAME LAW] AS A [SIMILAR-SITUATED DEFENDANT]." (SEE ALSO: ROSS V. STATE, 901 So. 2d 252 (FLA. 4TH DCA 2005); STEPHENS V. STATE, 974 So. 2d 455 (FLA. APP. 2 DCA 2008).

FURTHER, IN BELL V. STATE, THE 4TH DCA ALSO HELD THAT: "APPLYING PROCEDURAL BAR TO DENY RELIEF WOULD WORK MANIFEST INJUSTICE WHERE TWO CASES, PRESENTING IDENTICAL ISSUES, WERE DECIDED DIFFERENTLY BY THE SAME COURT WITHIN DAYS OF EACH OTHER." (SEE: BELL V. STATE, 876 So. 2d 712, 714 (FLA. 4TH DCA 2004)).

ON AUGUST 20, 2014, PETITIONER FILED FOR HABEAS CORPUS RELIEF IN THE TRIAL COURT, CLAIMING MANIFEST INJUSTICE. (SEE: APPX. Y). ON SEPTEMBER 10, 2014, THE TRIAL COURT IGNORED AND DENIED PETITIONER'S CLAIMS, THEREBY SOLIDIFYING A MANIFEST INJUSTICE. (SEE: APPX. Z).

ON NOVEMBER 6, 2014, PETITIONER APPEALED TO THE 3RD DCA, WHICH IS THE [SAME] COURT THAT [REVERSED] 'GASKIN'S' CONVICTION FOR BURGLARY FROM AN IDENTICAL ISSUE. (SEE: APPX. AB; SEE ALSO: GASKIN V. STATE, SUPRA).

EVEN AFTER THE STATE, BEING UNABLE TO REFUTE PETITIONER'S CLAIM(S) OF MANIFEST INJUSTICE, REFUSED TO ANSWER PETITIONER'S CLAIMS ON ITS MERITS, AFTER BEING "ORDERED" TO DO SO [TWICE], THE 3RD DCA, SEEING THAT PETITIONER'S CLAIMS OF MANIFEST INJUSTICE WAS PURSUANT TO "GASKIN V. STATE", A CASE THAT THEY HAD PREVIOUSLY GAVE RELIEF TO VIA "REVERSING" THE CONVICTION FOR BURGLARY, WENT AGAINST ITS PREVIOUS DECISION IN GASKIN BY AFFIRMING PETITIONER'S CONVICTION, AND THEREBY CREATING AN "INTRA-DISTRICT CONFLICT." (SEE: APPX. AC).

ON MAY 19, 2017, PETITIONER REFILED A 'MOTION TO CORRECT MANIFEST INJUSTICE' TO THE SAME DCA FOR THEM TO CORRECT THEIR ERRONEOUS RULING, AND IT WAS DENIED FIVE (5) DAYS LATER. (SEE: APPX. AH).

[Not Once] Have Petitioner's Claims of Manifest Injustice Been Addressed on its Merits, nor Has Explanation or Written Opinion Been Given/Filed in this Matter as to Why Petitioner's "Manifest Injustice" Claim Has Been [Repeatedly] Denied and PCA'd.

Thus, it is [very] [clear] that Petitioner Has Been Denied the [Benefit] of the [Same Law] as in Gaskin v. State, by the [same] Court, and Therefore Creating a "Manifest Injustice", Per the Ruling in: "Carswell v. State, 23 So.3d 195 (4th DCA 2009); Ross v. State, 901 So. 2d 252 (Fla. 4th DCA 2005); and Stephens v. State, 974 So.2d 455 (Fla. App. 2 Dist. 2008); As well as Bell v. State, 876 So.2d 712, 714 (Fla. 4th DCA 2004)."

Thereby Supra, Petitioner [Has] Demonstrated a Manifest Injustice.

To Show that a constitutional Violation Has Resulted in the conviction of Petitioner who is Actually Innocent, the Petitioner Demonstrates the Following: Respondents Response States: "To establish Actual Innocence, a Habeas Petitioner must Demonstrate that ... 'It is more likely than not that no Reasonable [Trier of Fact] would Have convicted Him!'" citing Bousley v. United States, 523 U.S. 614, 623 (1998). (See: Respondents Response at 15). Also stating that: "Actual Innocence means Factual Innocence." citing High v. Head, 209 F.3d 1257 (11th Cir. 2000); and Jones v. U.S., 153 F.3d 1305 (11th Cir. 1998) (Holding that Appellant must establish that in light of all the Evidence, it is more likely than not that no Reasonable Juror would Have convicted Him). (Id at 15).

The Facts of Petitioner's case is that, there are three (3) Elements to Prove To Establish the crime of 'Burglary' by §810.02(3)(a) (See: Fla. Stat. 810.02).

There are four (4) Elements to Prove to establish the crime of 'Resisting arrest without Violence', Per Florida Statute. (See: 843.01, Fla. Stat.; See also: Standard Jury Instructions in Criminal Cases, 996 So.2d 851 (Fla. 2008).

However, the Jury was instructed to Prove [only] [two] (2) of the three (3) Elements of 'Burglary' to Establish Petitioner's Guilt. (See: T.T. 495). Likewise, the Jury was instructed to Prove

ONLY THREE (3) OF THE FOUR (4) ELEMENTS OF 'RESISTING ARREST WITHOUT VIOLENCE' TO ESTABLISH PETITIONER'S GUILT. (SEE: T.T. 498-499).

ON THE CONTRARY, "THE DUE PROCESS CLAUSE PROTECTS THE ACCUSED AGAINST CONVICTIONS EXCEPT UPON PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME IN WHICH HE IS CHARGED." (SEE: IN RE WINSHIP, 397 U.S. [432 U.S. 205] 358, 364, 90 S. CT. 1068, 1073 (1970). ALSO, "THE DUE PROCESS CLAUSE REQUIRES THE PROSECUTION TO PROVE BEYOND A REASONABLE DOUBT [ALL] OF THE ELEMENTS INCLUDED IN THE DEFINITION OF THE OFFENSE OF WHICH THE DEFENDANT IS CHARGED." (SEE: MCMILLAN V. PENNSYLVANIA, 106 S. CT. 2411 (1986); PATTERSON V. NEW YORK, 97 S. CT. 2319 (1977). FURTHERMORE, "FAILURE TO FIND THAT THE STATE HAD TO PROVE [ALL] ELEMENTS OF A CRIME BEYOND A REASONABLE DOUBT WOULD BE CONTRARY TO FEDERAL LAW." (SEE: LOCKYER V. ANDRADE, 123 S. CT. 1166 (2003); WILLIAMS V. TAYLOR, 120 S. CT. 495 (2000).

A "FEDERAL LAW", IS A "CONSTITUTIONAL LAW." THE ABOVE-SAID VIOLATION IS THAT OF THE "SIXTH" AND "FOURTEENTH" AMENDMENT OF THE U.S. CONSTITUTION, CONCERNING THE DUE PROCESS CLAUSE, AND IS THEREFORE A "CONSTITUTIONAL VIOLATION."

FURTHERMORE, IF THE JURY [HAD] BEEN INSTRUCTED THAT THEY HAD TO [ALSO] PROVE THAT THE PETITIONER [KNEW] HIS PURSUER TO HAVE BEEN AN OFFICER, (OF WHICH WAS NEVER ESTABLISHED), [AND] THAT PETITIONER DID [NOT] HAVE PERMISSION OR CONSENT OF ANYONE AUTHORIZED TO ACT AS THE OWNER OF THE STRUCTURE TO ENTER INTO THE STRUCTURE, (OF WHICH [ALSO] WAS NEVER ESTABLISHED), AND THEREFORE FALLING SHORT OF A CRIME, [THEN] IT WOULD HAVE BEEN MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE CONVICTED HIM.

THEREBY SUPRA, PETITIONER [HAS] THOROUGHLY DEMONSTRATED THAT "MANIFEST INJUSTICE" [DO] EXIST IN THIS INSTANT MATTER, THAT A "CONSTITUTIONAL VIOLATION" [HAS] OCCURRED, [AND] THAT IT RESULTED IN THE CONVICTION OF THE PETITIONER WHO [IS] "ACTUALLY "INNOCENT."

THEREFORE, PETITIONER [HAS] DEMONSTRATED THAT HE [IS] ENTITLED TO OBTAIN FEDERAL HABEAS REVIEW OF HIS

PROCEDURALLY DEFAULTED CLAIM, [WITHOUT] A SHOWING OF "CAUSE" OR "PREJUDICE." (SEE: EDWARDS V. CARPENTER, 526 U.S. 446, 451 (2000); ALSO: HENDERSON V. CAMPBELL, 353 F.3d 880, 892 (11TH CIR. 2003)).

ADDING THAT: "ACTUAL INNOCENCE IS NOT ITSELF A SUBSTANTIAL CLAIM, BUT RATHER SERVES ONLY TO LIFT THE PROCEDURAL BAR CAUSED BY APPELLANT'S FAILURE TO TIMELY FILE HIS §2255 MOTION." (SEE: UNITED STATES V. MONTANO, 398 F.3d 1276, 1284 (11TH CIR. 2000); SEE ALSO: ECF 39 AT 16).

XI. EVIDENTIARY HEARING

PETITIONER CONTENDS THAT HE HAS REPEATEDLY AND [FACTUALLY] DEMONSTRATED THAT "MANIFEST INJUSTICE" [DO] EXIST IN THE INSTANT CASE, AS DEMONSTRATED SUPRA. (SEE: P. 12-16). AND THAT, "FUNDAMENTAL MANIFEST INJUSTICE" [WILL] REMAIN TO EXIST AS A RESULT OF BARRING THE CLAIMS RAISED IN THIS HABEAS PROCEEDING, OR DENYING TO HEAR AND ADDRESS HIS ABOVE-SAID FIVE (5) CLAIMS ON ITS MERITS.

HOWEVER, CONTRARY TO PETITIONER'S FACTUAL SHOWING(S) OF MANIFEST INJUSTICE THAT IS DEMONSTRATED HEREIN, THE MAGISTRATE JUDGE'S "REPORT" [IS] [CLEARLY] [DISPUTING] THE [FACTS] THAT IS HEREBY PRESENTED, THEREBY CREATING A "[FACTUAL DISPUTE]."

WHEREFORE, "FACTUAL DISPUTE" [DOES] EXIST IN THIS MATTER AND WARRANTS A FEDERAL EVIDENTIARY HEARING. THEREFORE, PETITIONER RESPECTFULLY REQUESTS THAT AN EVIDENTIARY HEARING BE HELD IN THIS MATTER TO SETTLE THE "FACTUAL DISPUTE" OF WHETHER "IATC" EXIST; WHETHER "IAAC" EXIST; AND WHETHER "MANIFEST INJUSTICE" EXIST IN THIS INSTANT CASE.

XII. CERTIFICATE OF APPEALABILITY

PETITIONER CONTENDS THAT HE [HAS] MADE A [C]LEAR SHOWING OF CONSTITUTIONAL RIGHTS ENTITLEMENT, SUPRA. THEREFORE, IF THE COURTS FINAL ORDER BE A DENIAL OF THE ABOVE-SAID RIGHTS, THEN PETITIONER HEREBY CONTENDS, AND REQUEST, THAT THE PRESENT "OBJECTION" BE HELD CREDIBLE TO DEMONSTRATE A SHOWING THAT ANY JUROR OF REASON WOULD FIND IT DEBATABLE WHETHER THE PETITION STATES A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT AND

THAT ANY JUROR OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT WAS CORRECT IN ITS PROCEDURAL RULING. (SEE: SLACK v. MCDANIEL, 529 U.S. 473, 484 (2000)).

THEREFORE, IF THE FINAL ORDER OF THE COURT SHALL BE A DENIAL OF THE ABOVE-SAID CONSTITUTIONAL RIGHTS, THEN THE PETITIONER RESPECTFULLY REQUEST THAT A "CERTIFICATE OF APPEALABILITY" BE ISSUED IN THIS CAUSE.

XIII. REQUESTS

IT IS [CLEAR] THAT THE "RESPONDENT" AND THE "MAGISTRATE JUDGE" SHARE, BASICALLY, THE SAME ARGUMENTS. (SEE: ECF 22; ECF 39; AND RESPONDENTS 'RESPONSE'). THEREFORE, PETITIONER RESPECTFULLY REQUEST THAT HIS REPLY, (ECF 38), BE CONSIDERED IN THIS MATTER, AND THAT THE DOCUMENTS REQUESTED THEREIN BE GRANTED AND THEREFORE ORDERED TO BE INCLUDED TO RESPONDENTS "APPENDIX", (ALONG WITH PETITIONERS "MOTION TO CORRECT MANIFEST INJUSTICE" THAT WAS FILED ON MAY 19, 2017).

XIV. OBJECTION TO RECOMMENDATIONS

MAGISTRATE JUDGES 'REPORT' RECOMMENDED THAT PETITIONERS PETITION FOR HABEAS CORPUS RELIEF BE DISMISSED AS TIME-BARRED, AND THAT NO CERTIFICATE OF APPEALABILITY BE ISSUED, AND THAT THE CASE BE CLOSED. (SEE: ECF 39 AT 21).

WHEREFORE, PETITIONER "OBJECTS" TO THE ABOVE-SAID REPORT AND RECOMMENDATIONS, CONTENDING THE FACTUAL ARGUMENTS DEMONSTRATED HEREIN.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING "OBJECTION" HAS BEEN PLACED IN THE HANDS OF PRISON OFFICIALS AT FLORIDA STATE PRISON - MAIN UNIT, FOR FURTHER DELIVERY VIA U.S. MAIL TO: KAYLA HEATHER MCNAB, OFFICE OF THE ATTORNEY GENERAL, ONE SE THIRD AVENUE, SUITE 900, MIAMI, FLORIDA 33131 ON THIS 2ND DAY OF FEBRUARY, 2020.

S/ Courtney Robinson

COURTNEY ROBINSON #M19154
PETITIONER, PRO SE
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