Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11540-H

BOBBY RAY JONES,

Petitioner-Appellant,

versus

WARDEN,
ATTORNEY GENERAL STATE OF ALABAMA,

Respondents-Appellees.

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

ORDER:

In September 2018, Bobby Ray Jones, an Alabama prisoner serving a life sentence for murder, filed the instant *pro se* 28 U.S.C. § 2254 petition. After the state responded and Mr. Jones replied, a magistrate judge issued a report and recommendation ("R&R"), recommending that the district court dismiss Mr. Jones's petition as untimely. Over Mr. Jones's objections, the district court adopted the R&R, dismissed Mr. Jones's petition, and denied him a certificate of appealability ("COA"). Mr. Jones now seeks a COA from this Court.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court dismissed a habeas petition on procedural grounds, the movant must show that reasonable jurists would debate (1) whether the motion 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).

Here, the district court did not err by dismissing Mr. Jones's petition as untimely. Assuming that his resentencing, which resulted from his first Ala. R. Crim. Proc. 32 petition, constituted a new judgment for purposes of 28 U.S.C. § 2244(d)(1)(A), then his conviction became final when the time to seek certiorari review expired, rather than when the time to seek rehearing expired. *See Nix v. Sec'y for Dep't of Corr.*, 393 F.3d 1235, 1236-37 (11th Cir. 2004). Thus, contrary to the district court's finding, Mr. Jones's conviction became final on November 22, 2012, which was 90 days after the state appellate court affirmed the judgment on August 24, 2012.

Regardless, the district court properly found that neither Mr. Jones's second or third Rule 32 petitions tolled the statute of limitations, as both were dismissed as untimely, and thus, were not properly filed. *See Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005). Therefore, the statute of limitations expired one year after the judgment became final, which was on November 22, 2013, and the district court properly found that the instant petition was untimely.

Moreover, the district court did not err by finding that Mr. Jones was not entitled to equitable tolling. The untimeliness of his first Rule 32 petition, and counsel's alleged ineffectiveness for failing to bring the claims on direct appeal and causing the untimeliness, does not excuse his failure to file a § 2254 petition by November 2013. Likewise, the alleged ineffectiveness of counsel that Mr. Jones's family hired in 2015 has no bearing on the untimeliness of the instant petition, and Mr. Jones has failed to provide actual evidence of his innocence. Accordingly, Mr. Jones's motion for a COA is DENIED.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

APX. B;

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

BOBBY RAY JONES, Petitioner, v. WARDEN PHILLIP MITCHELL, et al., Respondents.	)	Case No.: 4:18-cv-01582-LSC-HNJ

MEMORANDUM OPINION

The magistrate judge entered a report on February 16, 2021, recommending the court dismiss Petitioner Bobby Ray Jones' petition for a writ of habeas corpus as untimely pursuant to 28 U.S.C. § 2244(d)(1)(A). Doc. 19. On March 4, 2021, Jones filed objections to the report and recommendation. Doc. 21.

Jones reasserts his contention that he is actually innocent of murder and entitled to equitable tolling as a result. Doc. 21 at 2. He states his incarceration has hindered his ability to obtain the affidavits of two witnesses, Terry Heflin and Billy Guffey, who have actual knowledge that he did not commit the crime. *Id.* at 1-3.

To prove actual innocence to overcome the expiration of the statute of limitations, a petitioner must show that, in light of new evidence, "'no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (quoting *Schlup v. Delo*, 513 U.S.

298, 329 (1995)). Jones does not address the magistrate judge's conclusion that even if he were able to locate a witness who would submit an affidavit on his behalf, such statement would not establish that no reasonable juror would have found him guilty of murder beyond a reasonable doubt. Doc. 19 at 14.

Specifically, the magistrate judge noted that prosecution witnesses William Richard Brassell and Keith Lydell Marks testified during Jones' trial that Jones was driving the vehicle and struck the victim. Doc. 9-7 at 42, 45, 64-70; Doc. 9-8 at 57, 60, 67-71. While proposed affidavits from Heflin and Guffey may serve to impeach the testimony of Brassell and Marks, they would be insufficient to show Jones' actual innocence since Jones does no more than question the credibility of trial witnesses, which is within the realm of the jury. *See Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004) (finding the jury chose not to believe the defendant and the court could not revisit the jury's determination); *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992) (holding "[t]his sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness's] account of petitioner's actions"). Consequently, Jones has not established actual innocence to overcome the statute of limitations, and his petition is untimely.

Having carefully reviewed and considered *de novo* all the materials in the court file, including the report and recommendation, and the objections thereto, the

court hereby **ADOPTS** the report of the magistrate judge and **ACCEPTS** his recommendation. The court finds the petition is due to be dismissed with prejudice as untimely pursuant to 28 U.S.C. § 2244(d)(1)(A).

This court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted). The court finds Jones' claims do not satisfy either standard.

The court will enter a separate Final Judgment.

DONE and **ORDERED** on April 13, 2021.

L. Scott Coogler
United States District Judge

160704

APX. B2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

BOBBY RAY JONES, Petitioner, v. WARDEN PHILLIP MITCHELL, et al., Respondents.	)	Case No.: 4:18-cv-01582-LSC-HNJ

FINAL JUDGMENT

In accordance with the accompanying Memorandum Opinion and with Rule 58 of the *Federal Rules of Civil Procedure*, the court **DISMISSES WITH PREJUDICE** Petitioner Bobby Ray Jones' petition for a writ of habeas corpus as untimely pursuant to 28 U.S.C. § 2244(d)(1)(A). The court **DENIES** a certificate of appealability.

The parties shall bear their respective costs.

DONE and **ORDERED** on April 13, 2021.

L. Scott Coogler
United States District Judge

160704

App. B 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

BOBBY RAY JONES, Petitioner, v. WARDEN PHILLIP MITCHELL, et al., Respondents.	)	Case No. 4:18-cv-01582-LSC-HNJ

ORDER REGARDING APPEAL IN HABEAS CASE

On April 13, 2021, the court dismissed this action with prejudice as untimely. (Docs. 22, 23). Petitioner Bobby Ray Jones has filed a Notice of Appeal (Doc. 24), and motion for a certificate of appealability (Doc. 25). Pursuant to 28 U.S.C. § 2253 (as amended), an appeal may not be taken in this action unless the court issues a certificate of appealability. Mr. Jones' motion for a certificate of appealability is due to be denied.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented

were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted). Mr. Jones' claims do not satisfy either standard. Consistent with that determination, the court **DENIES** Mr. Jones' motion for a certificate of appealability.

Mr. Jones is **ADVISED** that he may file a motion for a certificate of appealability directly with the Court of Appeals for the Eleventh Circuit.

DONE and **ORDERED** on June 7, 2021.

L. Scott Coogler
United States District Judge

160704

Appendix C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11540-H

BOBBY RAY JONES,

Petitioner-Appellant,

versus

WARDEN,
ATTORNEY GENERAL STATE OF ALABAMA,

Respondents-Appellees.

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

Before:

BY THE COURT:

Bobby Jones has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 1, 2021, order denying a certificate of appealability. Upon review, Jones's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appendix D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

BOBBY RAY JONES,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No.: 4:18-cv-01582-LSC-HNJ
	)	
WARDEN PHILLIP MITCHELL, et al.,	)	
	)	
	)	
Respondents.[1]	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Bobby Ray Jones ("Jones"), a person under a judgment of a court of Alabama, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. 1. Jones challenges his 2010 murder conviction in the Circuit Court of Marshall County, Alabama, and resulting sentence of life without the possibility of parole. Doc. 1 at 1, 16; Doc. 9-19 at 5. The court referred the petition to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b) for preliminary review. For the following reasons, the undersigned recommends the court dismiss the petition as untimely pursuant to 28 U.S.C. § 2244(d)(1)(A).

[1] When Petitioner Jones filed this action, Carla Jones was warden of St. Clair Correctional Facility, where Jones is incarcerated. Doc. 1 at 1. Phillip Mitchell is now the warden of that facility, and therefore Mitchell is substituted for Carla Jones as a respondent. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004); Rule 2(a), *Rules Governing Section 2254 Cases.*

I. PROCEDURAL HISTORY

On November 7, 2007, a Marshall County, Alabama, grand jury indicted Jones on one count of murder in violation of Alabama Code § 13A-6-2(a)(1) (1975) for causing the death of Tonya Rene Minson by striking her with a motor vehicle. Doc. 9-1 at 27-28. On February 26, 2010, a jury found Jones guilty of murder. Doc. 9-1 at 6; Doc. 9-2 at 84. On March 8, 2010, the trial court sentenced Jones to 111 years imprisonment. Doc. 9-1 at 6.

On March 16, 2010, the trial court clarified that Jones's prison sentence was 111 years of his life and ordered him to pay the victim's next-of-kin the sum of $200,000.00 as restitution and issued a felony sentencing order on April 1, 2010. Doc. 9-2 at 88, 91-92. Although Jones initially appealed his conviction and sentence, (doc. 9-2 at 92, 95), the Alabama Court of Criminal Appeals dismissed the appeal on August 25, 2010, on Jones's motion, and issued a certificate of judgment on the same day. Doc. 9-12; Doc. 9-18 at 2.[2]

On August 28, 2010, Jones filed a motion for post-conviction relief in the Marshall County Circuit Court pursuant to Rule 32 of the *Alabama Rules of Criminal Procedure*. Doc. 9-13 at 3-30. On April 19, 2011, the circuit court dismissed Jones's

[2] Jones alleges he did not "voluntar[ily]" dismiss his appeal. Doc. 10 at 2. Elsewhere, he alleges appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and the appellate court dismissed the appeal without an opinion. Doc. 12 at 18.

claims in the Rule 32 petition as insufficiently pleaded, precluded, time barred, and meritless. Doc. 9-13 at 77-79.[3]

On appeal, Jones presented three claims: (1) whether his statement to law enforcement was improperly admitted; (2) whether defense counsel prevented him from testifying; and (3) whether his sentence was illegal. Doc. 9-17 at 1. On October 24, 2011, the Alabama Court of Criminal Appeals found that Jones's first two claims were waived for purposes of appeal because Jones failed to cite any authority in support of the claims. *Id.* at 1. However, the appellate court found Jones was entitled to relief on his third claim regarding the legality of his sentence. *Id.* at 1-2. Specifically, the court found that Jones's sentence of 111 years imprisonment was illegal under the Habitual Felony Offender Act because he could only be sentenced to life imprisonment or life imprisonment without the possibility of parole. *Id.* at 2. Therefore, the appellate court remanded the case to the Marshall County Circuit Court with instructions that the circuit court set aside its April 1, 2010 order sentencing Jones to 111 years imprisonment and conduct a new sentencing hearing to sentence Jones in accordance with the Habitual Felony Officer Act. *Id.*

The Marshall County Circuit Court subsequently resentenced Jones to life without the possibility of parole. Doc. 9-19 at 5. On August 24, 2012, on return to remand, the Alabama Court of Criminal Appeals affirmed the circuit court's judgment.

[3] Although the circuit court stated that its order dismissed Jones's second Rule 32 petition, (doc. 9-13 at 77), this was Jones's first Rule 32 petition. Doc. 9-19 at 4-5.

Doc. 9-18 at 1-5. Jones did not file an application for rehearing or petition for writ of certiorari in the Alabama Supreme Court. On September 12, 2012, the Alabama Court of Criminal Appeals issued a certificate of judgment. Doc. 9-14.

On December 13, 2012, Jones filed a second Rule 32 petition in the Marshall County Circuit Court. Doc. 9-20 at 73-88. On April 4, 2013, the circuit court dismissed Jones's claims in his second Rule 32 petition as insufficiently pleaded, precluded, and time barred. Doc. 9-19 at 5-6.

On May 24, 2013, Jones filed a motion to amend his Rule 32 petition, which the circuit court construed as a third Rule 32 petition. Doc. 9-19 at 7-23, 48. The court summarily dismissed the claims in Jones's third Rule 32 petition as insufficiently pleaded, precluded, and time barred. *Id.* at 48-50. Thereafter, Jones appealed. Doc. 9-21 at 1-2.

On January 29, 2015, the Alabama Court of Criminal Appeals dismissed the appeal after finding Jones's third Rule 32 petition void because the circuit court did not grant Jones permission to proceed *in forma pauperis* nor did Jones pay the filing fee for the third petition and, therefore, the circuit court did not have jurisdiction to entertain the petition. *Id.* On February 24, 2015, the Court of Criminal Appeals issued a certificate of judgment. Doc. 9-22.

On November 9, 2015, Jones filed a petition for writ of habeas corpus in the St. Clair County Circuit Court in which he argued that he was imprisoned pursuant to an illegal sentence. Doc. 9-23 at 7-8. On January 8, 2016, the St. Clair County Circuit

Court converted Jones's habeas petition to his fourth Rule 32 petition and transferred it to the Marshall County Circuit Court. *Id.* at 5. After holding an evidentiary hearing, the Marshall County Circuit Court denied Jones's Rule 32 petition on September 21, 2016. *Id.* at 72-73.

On April 28, 2017, the Alabama Court of Criminal Appeals affirmed the judgment of the circuit court. Doc. 9-24. On July 7, 2017, the appellate court issued a certificate of judgment. *Id.*

Jones filed the instant habeas petition on September 23, 2018.[4] Doc. 1. As grounds for his petition, Jones argues the following:

> (1) Counsel was ineffective for failing to raise due process claims because Jones was denied an attorney during his police interrogation and he did not sign the Advice of Rights form nor was it witnessed, rendering his confession "null and void";
>
> (2) Counsel was ineffective for failing to object that a court reporter was not present during Jones's resentencing and failed to make certain objections concerning the enhancement of Jones's sentence; and
>
> (3) Jones's statement to Guntersville Police on June 1, 2007, should not have been introduced to the jury.[5]

Id. at 5-19.

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[4] A *pro se* inmate's petition is deemed filed the date it is delivered to prison officials for mailing. *See Houston v. Lack*, 487 U.S. 266, 275-76 (1988); *Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999); *Garvey v. Vaughn*, 993 F.2d 776, 780-82 (11th Cir. 1993).

[5] Jones lists as Ground Four of his petition that counsel was ineffective for failing to raise due process claims because Jones did not sign the Advice of Rights form during his police interrogation and it was not witnessed. Doc. 1 at 10. Thus, this ground for relief appears to be the same as Ground One.

In response to the court's Order to Show Cause, Respondents filed an Answer supported by exhibits on November 1, 2018. Doc. 9. The court notified the parties that the petition would be considered for summary disposition and advised Jones of the provisions and consequences of this procedure under Rule 8 of the *Rules Governing Section 2254 Cases.* Doc. 11. Jones filed responses on November 9, 2018, and on December 4, 2018. Docs. 10, 12.

II. ANALYSIS

Respondents argue that Jones's federal habeas petition is untimely. Doc. 9. For the following reasons, the undersigned finds the statute of limitations has expired and Jones's petition warrants dismissal pursuant to 28 U.S.C. § 2244(d)(1)(A).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides a one-year limitation period for filing a habeas action under 28 U.S.C. § 2254. 28 U.S.C. § 2244(d)(1). The limitation period runs from the latest of the following 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.

Id. Jones does not allege any facts that would suggest § 2244(d)(1)(B), (C), or (D) triggered the limitation period. Rather, § 2244(d)(1)(A) triggered that period. That is, the limitation period began to run from the date Jones's conviction became final by the conclusion of direct review or the expiration of time for seeking that review. *See* § 2244(d)(1)(A).

Although Jones initially appealed his conviction and sentence, (doc. 9-2 at 92, 95), the Alabama Court of Criminal Appeals dismissed the appeal on August 25, 2010, on Jones's motion, and issued a certificate of judgment on the same day. Doc. 9-12; Doc. 9-18 at 2. Thus, Jones's conviction became final for purposes of § 2244(d)(1)(A), and his limitation period for filing a § 2254 petition commenced on, August 26, 2010. *See San Martin v. McNeil*, 633 F.3d 1257, 1266 (11th Cir. 2011) (holding day after event marking finality was first day of AEDPA's one-year limitation period because Rule 6(a)(1) of the *Federal Rules of Civil Procedure* requires the day of the event that triggers a time period to be excluded from its computation). It expired one year later on August 26, 2011. *See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (noting "limitations period expires on the anniversary of the date it began to run"). As noted herein, Jones did not file the present federal petition until September 23, 2018. Doc. 1 at 15.

Under § 2244(d)(2), the time period during which "a properly filed application for State post-conviction or other collateral review" of the underlying judgment or claim

is pending does not count toward any period of limitation. 28 U.S.C. § 2244(d)(2); *Cramer v. Sec'y, Dep't of Corr.*, 461 F.3d 1380, 1383 (11th Cir. 2006).

Only two days of Jones's one-year limitation period ran before he filed his first Rule 32 petition in the Marshall County Circuit Court on August 28, 2010. Doc. 9-13 at 3-30. On April 19, 2011, the circuit court dismissed Jones's Rule 32 petition on grounds that his claims were insufficiently pleaded, precluded, time-barred and meritless. Doc. 9-13 at 78-79.

On appeal, the Alabama Court of Criminal Appeals concluded Jones was not entitled to relief, except for his claim regarding his sentence. Doc. 9-17 at 1-2. Specifically, the appellate court found that Jones's sentence of 111 years imprisonment was illegal because under the Habitual Felony Offender Act, he could only be sentenced to life imprisonment or life imprisonment without the possibility of parole. *Id.* The appellate court remanded the case to the Marshall County Circuit Court with instructions that the circuit court conduct a new sentencing hearing in accordance with the Habitual Felony Officer Act. *Id.* at 2.

The Marshall County Circuit Court resentenced Jones to life without the possibility of parole. Doc. 9-19 at 5. On August 24, 2012, on return to remand, the Alabama Court of Criminal Appeals affirmed the circuit court's judgement. Doc. 9-18 at 1-5. Jones did not file an application for rehearing or petition for writ of certiorari in the Alabama Supreme Court. On September 12, 2012, the Alabama Court of Criminal Appeals issued a certificate of judgment. Doc. 9-14.

The undersigned assumes without deciding that Jones's "resentencing result[ed] in a new judgment that restart[ed] the statute of limitations." *Insignares v. Sec., Fla. Dep't of Corr.*, 755 F.3d 1273, 1281 (11th Cir. 2014). After the appellate court affirmed the circuit court's judgment on August 24, 2012, Jones's conviction and sentence became final for purposes of § 2244(d)(1)(A) upon the expiration of 14 days – the period in which he could have filed a timely application for rehearing in the criminal appellate court. *See* ALA. R. APP. P. 40(c) (providing application for rehearing must be filed within 14 days after issuance of decision challenged). Thus, Jones's new one-year limitation period began running on September 8, 2012.

Jones filed a second Rule 32 petition on December 13, 2012. Doc. 9-20 at 73-88. On April 4, 2013, the circuit court dismissed the claims in Jones's second Rule 32 petition as insufficiently pleaded, precluded, and time barred. Doc. 9-19 at 5-6. An untimely Rule 32 petition is not "properly filed" for tolling purposes. *See Jones v. Sec'y, Fla. Dep't of Corr.*, 906 F.3d 1339, 1353 (11th Cir. 2018) (holding that when a state court finds a post-conviction motion untimely, the motion cannot be considered a tolling motion). Thus, Jones's second Rule 32 petition did not toll the limitation period.

On May 24, 2013, Jones filed a motion to amend his Rule 32 petition, which the circuit court construed as a third Rule 32 petition. Doc. 9-19 at 7-23, 48. The court summarily dismissed the claims in Jones's third Rule 32 petition as insufficiently pleaded, precluded, and time barred. *Id.* at 48-50. Thereafter, Jones appealed. Doc. 9-21 at 1-2. On January 29, 2015, the Alabama Court of Criminal Appeals dismissed the

appeal after finding Jones's third Rule 32 petition void because the circuit court did not grant Jones permission to proceed *in forma pauperis* nor did Jones pay the filing fee and, therefore, the circuit court did not have jurisdiction to consider the petition. *Id.*

Because the circuit court did not have jurisdiction to entertain Jones's third Rule 32 petition -- because Jones had not paid the filing fee for the third petition and the court had not granted Jones permission to proceed *in forma pauperis* – Jones had not "properly filed" the petition pursuant to § 2244(d)(2) for tolling purposes. *See Smith v. Commissioner, Ala. Dep't. of Corrs.*, 703 F.3d 1266, 1270-71 (11th Cir. 2012) (holding that Rule 32 petition filed without a filing fee or motion to proceed *in forma pauperis* not "properly filed"). Because Jones's second and third Rule 32 petitions did not toll the limitation period, Jones's statute of limitation expired on September 9, 2013.[6]

Although Jones filed a petition for writ of habeas corpus on November 9, 2015, which was subsequently construed as his fourth Rule 32 petition, (doc. 9-23 at 5, 7-8), the federal limitation period had already expired by that time and the petition did not entitle him to statutory tolling under § 2244(d)(2). *See Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004) ("A state court filing after the federal habeas filing deadline does not revive it."); *see also Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (where a state court application for post-conviction relief is filed after the one-year statute of limitations has expired, it does not toll the statute because no time remains to be tolled).

[6] September 8, 2013 fell on a Sunday; therefore, the period extended to Monday, September 9, 2013. *See* Fed. R. Civ. P. 6(a)(1)(C).

The AEDPA limitation may be equitably tolled, but 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." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quotations and citation omitted). Jones complains first that Stephen Smith, who served as his trial and appellate counsel, failed to set forth adequate grounds on Jones's behalf on direct appeal and denied him the "tolling of time." Doc. 12 at 3-4. However, the clock on Jones's one-year federal limitation restarted on September 8, 2012, 14 days after the Alabama Court of Criminal Appeals affirmed his resentencing on his first Rule 32 petition on August 24, 2012. Doc. 9-18. Thus, whether Jones's appellate counsel failed to set forth meritorious claims on his behalf on direct appeal in 2010 does not explain Jones's failure to file a timely habeas petition in this court by September 2013.

Next, Jones states his family hired attorney Thomas Drake, who filed a habeas petition on Jones's behalf in the St. Clair County Circuit Court on November 9, 2015. Doc. 9-23 at 7-8; Doc. 12 at 4-5. The St. Clair County Circuit Court converted the habeas petition to Jones's fourth Rule 32 petition and transferred the petition to Marshall County Circuit Court. Doc. 9-23 at 25. After the circuit court denied the Rule 32 petition on September 21, 2016, and the Court of Criminal Appeals affirmed the circuit court's judgment on April 28, 2017, Drake informed Jones's family that for additional money, he could "get [Jones] out of prison." Doc. 9-23 at 72-73; Doc. 9-24; Doc. 12 at 19-20. Jones states his family did not have any more money and Drake

refused to provide Jones with his records. Doc. 12 at 20. Jones claims he was forced to file a complaint against Drake with the Alabama State Bar in 2018 to obtain his records. *Id.*

Jones reasons that Drake's actions somehow interfered with his "tolling of time." Doc. 12 at 5. However, Drake did not start representing Jones until 2015 – well after Jones's federal limitation period expired in 2013. Because the federal limitation period had already expired in 2013, Jones's claims concerning Drake withholding records from him after dismissal of his fourth habeas petition has no bearing on why Jones failed to timely file his federal habeas petition.[7]

Jones fails to demonstrate excusable neglect or present any arguments in favor of equitable tolling such as due diligence, coupled with extraordinary circumstances. *See Dodd v. United States*, 365 F.3d 1273, 1283 (11th Cir. 2004) (holding that the prisoner failed to show he acted with reasonable diligence where he did not present any evidence showing what efforts he undertook to attempt to timely seek federal habeas relief). Indeed, Jones does not show how attorneys Smith's and Drake's alleged actions

[7] Jones asserts that once Drake provided him with his records in 2018, he discovered the Advice of Rights which he claims he did not sign, and no one witnessed. Doc. 1 at 19; Doc. 12 at 20-21. Thereafter, Jones, with the assistance of inmate law clerks, filed the instant federal habeas petition. Doc. 12 at 21. Jones appears to argue that this document is newly discovered evidence in support of his claim that his statement to law enforcement should have been suppressed and entitles him to a later start date of the limitation period under 28 U.S.C. § 2244(d)(1)(D) (providing a one year period of limitation from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of diligence"). However, the Advice of Rights is not newly discovered evidence since it was part of Jones's trial record and could have been discovered through the exercise of due diligence. Doc. 9-1 at 8. Thus, Jones is not entitled to a later start date on this claim.

contributed to his failure to file a timely federal habeas petition. Accordingly, Jones is not entitled to equitable tolling on these grounds.

The United States Supreme Court has held that actual innocence, if proved, serves as a gateway allowing a habeas petitioner to overcome an impediment due to a procedural bar or expiration of the statute of limitations. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). Nevertheless, "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*, 569 U.S. at 386 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995) (alteration adopted)). "[This] standard is demanding and permits review only in the 'extraordinary' case." *House v. Bell*, 547 U.S. 518, 538 (2006) (citation omitted). "In the usual case the presumed guilt of a prisoner convicted in state court counsels against federal review of [untimely] claims." *Id.* at 537.

Moreover, "[t]o meet the threshold showing of innocence in order to justify a review of the merits of the constitutional claims, the new evidence must raise sufficient doubt about the petitioner's guilt to undermine confidence in the result of the trial. Actual innocence means factual innocence, not mere legal insufficiency." *Ray v. Mitchem*, 272 Fed. App'x 807, 810 (11th Cir. 2008) (citations and quotations omitted) (some alterations adopted). The Supreme Court observed in *Schlup*:

> [A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare . . . . To be credible, such a 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. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

513 U.S. at 324.

Jones alleges that while he was being held in the Marshall County Jail awaiting resentencing, an inmate named Billy Guffey informed him that he saw William Richard Brassell[8] driving the vehicle when it struck the victim and that Guffey saw Brassell leave the scene. Doc. 12 at 6, 18. However, Jones has not come forward with "new reliable evidence" of his actual innocence. Jones admits that he "cannot find [Guffey] for affidavits or statement[s]," and requests that the court subpoena him. Doc. 12 at 18-19. Thus, Jones asserts no more than his own self-serving, conclusory allegation that he is actually innocent.

Even if Jones could locate Guffey and obtain an affidavit from him, such statement would not establish that no reasonable juror would have found Jones guilty beyond a reasonable doubt. Prosecution witnesses William Richard Brassell and Keith Lydell Marks testified during Jones's trial that Jones was driving the vehicle and struck the victim. Doc. 9-7 at 42, 45, 64-70; Doc. 9-8 at 57, 60, 67-71. While Guffey's statement may have served to impeach the testimony of Brassell and Marks, it does not suffice to show Jones's actual innocence as Jones does no more than question the veracity of trial witnesses. But assessing the credibility of witnesses is within the realm

[8] Brassell is incorrectly identified in Jones's response as Richard Bazelton. Doc. 12 at 6, 18.

of the jury. *See Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004) (finding the jury chose not to believe the defendant and the court could not revisit the jury's determination); *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992) (holding "[t]his sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness's] account of petitioner's actions"). Accordingly, Jones has not made a credible showing of actual innocence to warrant equitable tolling of the statute of limitations and his petition is untimely.

III. RECOMMENDATION

For the foregoing reasons, the undersigned **RECOMMENDS** the court **DISMISS WITH PREJUDICE** the petition for a writ of habeas corpus as untimely pursuant to 28 U.S.C. § 2244(d)(1)(A).

IV. NOTICE OF RIGHT TO OBJECT

Any party may file specific written objections to this report and recommendation. A party must file any objections with the Clerk of Court within fourteen (14) calendar days from the date the report and recommendation is entered. Objections should specifically identify all findings of fact and recommendations to which objection is made and the specific basis for objecting. Objections also should specifically identify all claims contained in the complaint that the report and recommendation fails to address. Objections should not contain new allegations,

present additional evidence, or repeat legal arguments. An objecting party must serve a copy of its objections on each other party to this action.

Failing to object to factual and legal conclusions contained in the magistrate judge's findings or recommendations waives the right to challenge on appeal those same conclusions adopted in the district court's order. In the absence of a proper objection, however, the court may review on appeal for plain error the unobjected to factual and legal conclusions if necessary in the interests of justice. 11th Cir. R. 3-1.

On receipt of objections, a United States District Judge will review *de novo* those portions of the report and recommendation to which specific objection is made and may accept, reject, or modify in whole or in part, the undersigned's findings of fact and recommendations. The district judge must conduct a hearing if required by law. Otherwise, the district judge may exercise discretion to conduct a hearing or otherwise receive additional evidence. Alternately, the district judge may consider the record developed before the magistrate judge, making an independent determination on the basis of that record. The district judge also may refer this action back to the undersigned with instructions for further proceedings.

A party may not appeal the magistrate judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. A party may only appeal from a final judgment entered by a district judge.

DONE this 16th day of February, 2021.

H. Johnson, Jr.

HERMAN N. JOHNSON, JR.
UNITED STATES MAGISTRATE JUDGE