# A P P E N D I X

## APPENDIX

# A-1

[DO NOT PUBLISH]

In the

# United States Court of Appeals

## For the Eleventh Circuit

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No. 19-10913

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JAMES MICHAEL FORNEY,

Petitioner-Appellant,

*versus*

WARDEN,

Respondent-Appellee.

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Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:18-cv-62794-WPD

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Before JORDAN, JILL PRYOR, and MARCUS, Circuit Judges.

PER CURIAM:

The question in this appeal is whether the district court correctly dismissed James Forney's federal habeas corpus petition as untimely. The parties disagree on whether the district court's taking judicial notice of state court dockets is governed by *Paez v. Secretary, Florida Department of Corrections*, 947 F.3d 649 (11th Cir. 2020), or by *Bryant v. Ford*, 967 F.3d 1272 (11th Cir. 2020). As explained below, however, we need not resolve the parties' debate about *Paez* and *Bryant.* The state has argued, *see* Appellee's Br. at 18–21, that any error in taking judicial notice was harmless because Mr. Forney's habeas corpus petition is untimely based on the dates listed in the habeas corpus petition and its appendix. At the end of the day, we agree with the state and affirm.[1]

I

It is undisputed that Mr. Forney's murder conviction became final on October 3, 2011, when the Supreme Court denied *certiorari* on direct appeal. *See Forney v. Florida*, 565 U.S. 848 (2011). The one-year statute of limitations for filing a federal habeas corpus petition began running that day under 28 U.S.C. § 2244(d)(1)(A). Because Mr. Forney filed his federal habeas corpus petition on November 2, 2018, it was untimely under

[1] Because we write for the parties, we presume their familiarity with the record and set out only what is necessary to explain our decision.

§ 2244(d)(1)(A) by just over six years unless there was statutory or equitable tolling. We now address all the filings that, according to Mr. Forney, tolled the limitations period for Claims 2–23 for purposes of § 2244(d)(1)(A).[2]

First, Mr. Forney filed a hybrid civil rights/habeas action in federal court on February 26, 2010, before his conviction had become final. That case, which was dismissed without prejudice on June 8, 2011, did not toll the limitations period under § 2244(d)(2). *See Duncan v. Walker*, 533 U.S. 167, 181 (2001) ("[A]n application for federal habeas corpus review is not 'an application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2).").

Second, on March 11, 2011—again before his conviction became final—Mr. Forney filed a state collateral proceeding attacking his life sentence as cruel and unusual punishment. That proceeding ended on January 28, 2014. *See* Pet., D.E. 6-2, at 48. Assuming that this proceeding was a tolling petition under § 2244(d)(2), *see Wall v. Kholi*, 562 U.S. 545, 551–60 (2011), the limitations period was tolled until January 28, 2014.

Third, Mr. Forney filed another state collateral proceeding alleging cruel and unusual punishment on February 10, 2014. By then 13 days of untolled time had elapsed. This proceeding ended

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[2] We address Mr. Forney's reliance on 28 U.S.C. §§ 2244(d)(1)(B) and 2244(d)(1)(D) as different triggering events for Claim 1 separately in Part II of the opinion.

on April 28, 2015. *See* App., D.E. 6-3, at 98; Appellant's Br. at 6. Again, assuming that this proceeding tolled the limitations period under § 2244(d)(2), the limitations period began to run on April 28, 2015.

Fourth, Mr. Forney filed his first post-conviction motion under Fla. R. Crim. P. 3.850 on October 9, 2014. *See* Pet. at 46–47. According to an appendix filed with Mr. Forney's habeas corpus petition, this Rule 3.850 motion was denied as time-barred, and the proceedings were completed on June 10, 2016. See App. at Ex. G, Ex. AG. Because it was untimely, the first Rule 3.850 motion did not toll the limitations period. *See Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005). So, by the time that the first post-conviction motion was denied on June 10, 2016, the one-year habeas limitations period—which had begun to run on April 28, 2015—had expired.

Fifth, on September 6, 2016, Mr. Forney filed a second Rule 3.850 motion. This motion was dismissed as time-barred and successive, and the proceedings ended on May 5, 2017. *See* Appellant's Br. at 7; App. at 98. The fact that a Rule 3.850 is dismissed as successive does not prevent it from tolling the limitations period under § 2244(d)(2). *See, e.g., Drew v. Dep't of Corr.*, 297 F.3d 1278, 1284 (11th Cir. 2002), *overruled on other grounds as recognized by Jones v. Sec'y, Fla. Dep't of Corr.,* 906 F.3d 1339, 1351 (11th Cir. 2018).

The problem for Mr. Forney is that he filed the second post-conviction motion after the one-year limitations period had expired. Putting aside the 13 days mentioned above, the period began running on April 28, 2015, and ended at the latest on April 28,

2016. Thus, by the time the second post-conviction motion was filed on September 6, 2016, there was no remaining time to toll under § 2244(d)(2). *See Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) ("A state-court petition . . . that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled."). The district court, then, did not err in ruling that Claims 2–23 in Mr. Forney's federal habeas corpus petition were time-barred.

Finally, we address Mr. Forney's contention that the state trial/post-conviction court, due to its "felonious" actions and improper/erroneous consideration of his post-conviction motions, constituted an "impediment" that "prevented" him from filing a federal habeas corpus petition and therefore tolled "all" of the time for the one-year limitations period for Claims 2–23 under 28 U.S.C. § 2244(d)(1)(B). *See* Pet. at 49; Appellant's Br. at 10. "The question . . . is whether [Mr. Forney] was 'prevented' from filing a federal habeas corpus petition by reason of some unconstitutional state action." *Wood v. Spencer*, 487 F.3d 1, 7 (1st Cir. 2007). *See also Earl v. Fabian*, 556 F.3d 717, 727 (8th Cir. 2009) ("The focus of § 2244(d)(1)(B) is on the state's responsibility for creating an impediment to timely filings[.]"). Mr. Forney, despite his claim of a state impediment, has not explained (much less shown) how the state trial/post-conviction court prevented him from learning the bases of Claims 2–23. And without that, he cannot rely on § 2244(d)(1)(B) for the tolling of "all" the time that elapsed after his conviction became final.

## II

This leaves Claim 1, in which Mr. Forney alleged newly discovered evidence that the state trial court tampered with the jury and altered the record on appeal by changing the jury instructions for inclusion in the record in the direct appeal. We analyze the timeliness of Claim 1 separately, as it is based on possible different triggering dates, i.e., 28 U.S.C. §§ 2244(d)(1)(B) (the date on which a state-created impediment is removed) and 2244(d)(1)(D) (the date on which the factual predicate for a claim could have been discovered through the exercise of due diligence). *See generally Zack v. Tucker*, 704 F.3d 917, 926 (11th Cir. 2013) (en banc) ("[T]he statute of limitations in AEDPA applies on a claim-by-claim basis in a multiple trigger date case.").

In his habeas petition, Mr. Forney stated that he learned about the basis for Claim 1 sometime between September 18 and October 8 of 2014. *See* Pet. at 46. He also stated that he was separated from his legal files for 44 days (a state-created impediment) from July 26 to September 18 of 2018. *See id.* at 47.

According to Mr. Forney, he filed his Rule 3.850 motion related to Claim 1 on September 6, 2016, and the post-conviction court denied it two weeks later on September 20, 2016. *See id.* at 6; App. at Ex. D. This proceeding ended on May 5, 2017. *See* Pet. at 6; Appellant's Br. at 7.

As a general matter, under § 2244(d)(1)(D) the one-year period is statutorily tolled while the petitioner exhausts his newly

discovered evidence claim in state court. *See Munchinski v. Wilson*, 694 F.3d 308, 327 (3d Cir. 2012); *Redd v. McGrath*, 343 F.3d 1077, 1083 (9th Cir. 2003). Using the dates set out by Mr. Forney in his petition, the one-year limitations period for Claim 1 ended on May 5, 2017. The habeas corpus petition, filed on November 2, 2018, was untimely even taking into account the tolling for the exhaustion of state remedies. Mr. Forney's lack of access to his legal files from July to September of 2018 does not make a difference because by then the one-year period had already expired.

We note that Mr. Forney tried to reinstate the arguments related to Claim 1 with yet another Rule 3.850 motion (his third) on July 28, 2017. *See* Pet. at 4; Appellant's Br. at 8. The state post-conviction court denied this motion on September 19, 2017. *See* Pet. at 4; App. at Ex. F. It ruled that the motion was successive. It also concluded that the alleged "newly discovered" evidence consisted of documents that were "Bates" stamped with the same page numbers as for the original direct appeal, and that as a result they were not newly discovered. See App. at Ex. F. The Fourth District Court of Appeal affirmed the denial of this motion on February 28, 2018. *See Forney v. State*, 238 So. 3d 839 (Fla. 4th DCA 2018). The Florida Supreme Court denied review on June 26, 2018. *See Forney v. State*, No.: SC18-750, 2018 WL 3154773 (Fla. June 26, 2018); Pet. at 98.

As to this Rule 3.850 motion, Mr. Forney does not challenge the state post-conviction court's determination that the evidence he presented was not newly discovered. That determination, then,

means that Mr. Forney did not present newly discovered evidence. As a result, the third Rule 3.850 motion did not toll the one-year limitations period under § 2244(d)(1)(D). *See Sistrunk v. Rozum*, 674 F.3d 181, 188–89 (3d Cir. 2012) (deferring to state court's finding that evidence was not newly discovered in applying § 2244(d)(1)(D)).

## III

We affirm the district court's ruling that Mr. Forney's habeas corpus petition is untimely.

AFFIRMED.

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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March 29, 2022

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-10913-DD
Case Style: James Forney v. Warden
District Court Docket No: 0:18-cv-62794-WPD

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Bradly Wallace Holland, DD at 404-335-6181.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

# A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JAMES MICHAEL FORNEY, CASE NO. 18-62794-CIV-DIMITROULEAS

Petitioner,

vs.

JULIE JONES,

Respondent.
_____/

**ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT**

THIS CAUSE is before the Court on Petitioner Forney's February 4, 2019 twenty-seven (27) page Motion for Relief from Judgment [DE-21] with seventy (70) page Appendix [DE-21-1]. The Court has considered Petitioner Forney's November 2, 2018, forty- nine (49) page Petition for Writ of Habeas Corpus [DE-6-2], Forney's ninety-nine (99) page Appendix [DE-6-3], Judge White's December 4, 2018 Report [DE-13], Forney's December 21, 2018 eighteen (18) page Objections [DE-16], and the Court files, and finds as follows:

1. Forney was indicted and charged with First Degree Murder in January 2004.

2. Forney decided to represent himself, but stand-by counsel took over mid-trial; Forney was found guilty on June 25, 2008. He was sentenced to life in prison.

3. On February 26, 2010, Forney filed a twenty-two (22) page Section 1983 case in this district. [10-60302CV]. On September 2, 2010, he filed a fifty-five (55) page amended complaint, adding that his complaint included a habeas corpus petition under 28 U.S.C. Section 2254. [DE-20 in 10-60302CV]. On May 6, 2011, Forney filed an eighty-nine (89) page Second Amended Complaint, again alleging 28 U.S.C. Section 2254 as one of his bases for relief. [DE-43 in 10-60302CV]. On June 8, 2011, Judge Adalberto Jordan dismissed the complaint, without prejudice to Forney's filing a third amended complaint by July 8, 2011. [DE-45 in 10-60302CV]. On June 20, 2011, Forney requested a Certificate of Appealability on

the habeas aspect of his complaint. [DE-46 in 10-60302CV]. On July 19, 2011, Judge Jordan denied a request for an interlocutory appeal and the certificate of appealability, indicating that Forney could file a separate habeas petition. [DE-49 in 10-60302CV]. On August 15, 2011, instead of filing a third amended complaint, Forney filed a Notice of Appeal and requested a certificate of appealability. [DE-50 in 10-60302CV]. The Eleventh Circuit denied a certificate of appealabilty on June 7, 2012 on the habeas portion of the complaint, and, as unnecessary, on the Section 1983 and 1985 claims. [DE-58 in 10-60302CV]. The United States Supreme Court denied certiorari on April 1, 2013. *Forney v. Broward Sheriff's Office,* 569 U.S. 908 (2013). Rehearing was denied on May 28, 2013. *Forney v. Broward Sheriff's Office,* 569 U.S. 1014 (2013). Normally, this Court might consider this current petition to be barred, without prior appellate court approval, as a successive habeas petition.[1] Here, however, no *Castro v. U.S.,* 540 U.S. 375 (2003) warnings were given. Moreover, Judge Jordan indicated that Forney could file a separate habeas petition, albeit not seven years later. [DE-49 in 10-60302CV]. So, the Court will not view the current petition as successive. Nevertheless, the time a previous federal habeas petition is pending does not toll the AEDPA statute of limitations. *Duncan v. Walker,* 533 U.S. 167, 181-182 (2001); *Day v. Hall,* 528 F. 3d 1315, 1318 (11th Cir.) *reh'g denied,* 285 Fed. Appx 744 (11th Cir. 2008); *King v. Ryan,* 564 F. 3d 1133, 1140 (9th Cir.) *cert. denied,* 558 U.S. 887 (2009).

4. On October 6, 2010, the Fourth District Court of Appeal affirmed. *Forney v. State,* 46 So. 3d 60 (Fla. 4th DCA 2010). Mandate issued on November 5, 2010. On November 22, 2010, the Florida Supreme Court denied review. *Forney v. State,* 49 So. 3d 1266 (Fla. 2010). On October 3, 2011, the U.S. Supreme Court denied certiorari. *Forney v. Florida,* 565 U.S. 848 (2011). Therefore, Forney's conviction became final on October 3, 2011. Rehearing was denied on January 23, 2012. *Forney v. Florida,* 565 U.S. 1185 (2012). The pending motion for rehearing did not toll the one year AEDPA statute of limitations.

[1] Forney concedes that he refused to drop the habeas relief because "freedom is more important than money". [DE-6-2, p. 16].

*Drury v. U.S.,* 507 F. 3d 1295, 1297 (11th Cir. 2007) *cert. denied,* 555 U.S. 825 (2008); *Giesberg v. Cockrell,* 288 F. 3d 268, 271 (5th Cir.) *cert. denied,* 537 U.S. 1072 (2002). Meanwhile, Forney filed a petition for belated appeal in the Fourth District Court of Appeal on October 18, 2011. [4D11-3939]. It was denied on November 22, 2011. Clarification was denied on January 24, 2012. On March 6, 2012, Forney sought review in the Florida Supreme Court. [SC12-432]. On March 12, 2012, the Florida Supreme Court denied review. *Forney v. State,* 86 So. 3d 1113 (Fla. 2012). On October 1, 2012, the United States Supreme Court denied a motion to proceed as a veteran. *Forney v. Florida,* 568 U.S. 808 (2012). The United States Supreme Court denied certiorari on January 14, 2013. *Forney v. Florida,* 568 U.S. 1127 (2013). However, because a petition for belated appeal does not involve collateral review of a conviction, it did not toll the AEDPA statute of limitations. *Espinosa v. Sec'y, D.O.C.,* 804 F. 3d 1137, 1141 (11th Cir. 2015); *Danny v. Sec'y, D.O.C.,* 811 F. 3d 1301, 1304 (11th Cir. 2016).

5. On September 21, 2012, Forney filed a Motion to Enlarge Time to File Post Conviction Relief and a Motion to Compel Clerk to provide a docket. He attached a February 2, 2012 Request for Clerk's Ministerial Assistance. [DE-12-1, pp. 2-12]. A Notice of Inquiry was filed on February 19, 2013. [DE-21-1, pp. 13-14]. The motions were denied on October 31, 2013. [DE-21-1, pp. 16-17]. The Fourth District Court of Appeal affirmed on June 26, 2014. *Forney v. State,* 147 So. 3d 1008 (Fla. 4th DCA 2014). Rehearing was denied on August 19, 2014. [DE-21-1, p. 24]. Mandate issued on September 5, 2014. These "discovery" motions did not give the court authority to order relief from the conviction and did not toll the AEDPA statute of limitations. *Wall v. Kholi,* 562 U.S. 545, 556, n.4 (2011); *see also, Brown v. Sec'y, D.O.C.,* 530 F. 3d 1335, 1337 (11th Cir. 2008).

6. After 1011[2] days of non-tolled time had elapsed, on October 9, 2014, Forney filed a hundred twenty-one (121) page Motion for Post Conviction Relief. It was denied as time-barred on August 11,

[2] Judge White gave Forney the benefit of the doubt and computed 990 days of non-tolled time based on a finality date of January 23, 2012.

2015. Forney filed a forty-eight (48) page motion for rehearing. Rehearing was denied on December 8, 2015. On March 17, 2016, the Fourth District Court of Appeal affirmed. *Forney v. State,* 190 So. 3d 83 (Fla. 4th DCA 2016). Rehearing was denied on May 19, 2016. Mandate issued on June 10, 2016. The Florida Supreme Court dismissed an appeal on June 23, 2016. *Forney v. State,* 2016 WL 3450582 (Fla. 2016). The United States Supreme Court denied certiorari on January 9, 2017. *Forney v. Florida,* 137 S. Ct. 645 (2017). Because this state petition was not properly filed, Forney is not entitled to statutory tolling. *Pace v. DiGuglieimo*, 544 U.S. 408, 417 (2005); *Murphy v. Sec'y, D.O.C.,* 279 Fed. Appx. 877, 878 (11th Cir. 2008). Nevertheless, the statute of limitations had already run.

7. On August 25, 2016, Forney filed a Second Motion for Post Conviction Relief; it contained twenty-one (21) pages. It was denied as untimely on September 20, 2016. The Fourth District Court of Appeal affirmed on February 23, 2017. *Forney v. State,* 230 So. 3d 467 (Fla. DCA 2017). Rehearing was denied on April 18, 2017. The Florida Supreme Court denied review on May 22, 2017. *Forney v. State,* 2017 WL 2243128 (Fla. 2017). Again, this petition was not properly filed, and the statute of limitations had already run.

8. On July 28, 2017, Forney filed another Second Post Conviction Relief Motion; it contained fifty (50) pages. It was denied on September 19, 2017. Forney filed a fifty-nine (59) page motion for rehearing. It was denied on November 5, 2017. The Fourth District Court of Appeal denied relief on February 28, 2018. *Forney v. State*, 238 So. 3d 839 (Fla. 4th DCA 2018). Rehearing was denied on April 10, 2018. Mandate issued on April 27, 2018. The Florida Supreme Court denied review on June 26, 2018. *Forney v State*, 2018 WL 3154773 (Fla. 2018). Rehearing was stricken on August 15, 2018. *Forney v. State*, 2018 WL 4050500 (Fla. 2018). Because the AEDPA statute of limitations had already expired on October 2, 2012, this post-conviction motion would not have tolled the one year limit. *Tinker v. Moore*, 255 F. 3d 1331, 1333 (11th Cir. 2001).

9. On September 13, 2017, Forney filed a thirteen (13) page Motion For Disqualification of Judge. Another Motion to Re-assign Judge was filed on November 8, 2017. On November 17, 2017, Forney filed a Status Inquiry. It is unclear whether there ever was a ruling on Forney's request. It would seem to be a moot issue at this point, particularly since Judge Holmes is now retired.

10. On September 20, 2017, Forney filed a Writ of Prohibition with the Fourth District Court of Appeal. It was denied on October 16, 2017.

11. On November 9, 2017, Forney filed a Writ of Prohibition with the Fourth District Court of Appeal. It was denied on November 30, 2017.

12. In his untimely collateral attack, Forney raised twenty-three (23) claims:

A. First, the Judge tampered with the jury and altered the record on appeal (allegedly newly discovered in 2014)

B. Second, Ineffective Assistance of Counsel: Failed to Seek a Jury determination on his revoking an invitation relative to self-defense (castle doctrine) and failed to question Detective McCully about prior victim misconduct.

C. Third, Ineffective Assistance of Counsel: Failed to Seek a Jury Determination on whether he was armed and the initial aggressor.

D. Fourth, Ineffective Assistance of Counsel: failed to request a Lesser Included Offense of Manslaughter based on mutual combat.

E. Fifth, Ineffective Assistance of Counsel: no *mens rea* instruction.

F. Sixth, Ineffective Assistance of Counsel: Failed to un-confuse the jury about felonies committed by victim.

G. Seventh, Ineffective Assistance of Counsel: Failed to request a competency hearing.

H. Eighth, Ineffective Assistance of Counsel: Failed to Request Disqualification

because of the judge's comments about believing jail nurse testimony.

I. Ninth, Ineffective Assistance of Counsel: Failed to confer when counsel took over the case. New grounds for a motion to suppress were not argued. Counsel failed to impeach O'Neal. Counsel failed to examine Nurse McMahon properly.

Counsel failed to impeach Detective McCully.

J. Tenth, Ineffective Assistance of Counsel: Failed to confer about Statement of Particulars to argue Judgment of Acquittal regarding the date and place of the crime.

K. Eleventh, Ineffective Assistance of Counsel: Failed to Object to Prosecutorial Comments.

(1) Manipulative

(2) Testifying for deceased

L. Twelfth, Ineffective Assistance of Counsel: Providing Incomplete Record on Appeal omitted "in camera" proceedings and suppression transcript.

M. Thirteenth, Ineffective Assistance of Counsel: Failed to Investigate

(1) Brutality

(2) Cause of Arrest

(3) Perjured Affidavit

(4) Forced to represent himself

N. Fourteenth, Collusion, Counsel Haas allowed the state to proceed first on the suppression motion, asked incorrect questions, allowed hearsay, failed to impeach, failed to present witnesses, and misadvised Forney as stand-by counsel.

O. Fifteenth, Prosecutorial Misconduct, Brady, withheld evidence requiring witnesses Head and Bowlin

P. Sixteenth, Prosecutorial Misconduct, Tampering with tapes

Q. Seventeenth, Jail Brutality resulted in Forney's being criminally charged

R. Eighteenth, False Testimony from witness Bowlin

S. Nineteenth, Duplicitous Indictment.

T. Twentieth, Prosecutor – Judge relationship in another case

when same prosecutor participated in a pre-trial hearing before Judge Gardiner

U. Twenty-First, denied compulsory process

V. Twenty-Second, unfair ruling by Judge Gardiner

W. Twenty-Third, new law on search incident to an arrest.

Forney raised these objections in the Middle District of Florida. The petition was properly transferred to this district. On December 4, 2018, Judge White recommended that this petition be dismissed as time-barred. [DE-13]. The Court did not address these 23 complaints, even though they are largely conclusory and insufficient upon which to base any relief, because the petition is time-barred.

13. On December 7, 2018, this Court overruled Forney's Objection to transfer. [DE-15]. On December 13, 2018, Judge Howard of the Middle District denied Forney's Motion for Reconsideration. [MDFL-DE-10 in 18-1164].

14. The Court considered Forney's numerous objections to the Report and Recommendation and overruled the objections on January 8, 2019. [DE-18]. On that date, this Court dismissed the petition as time-barred. [DE-18].

15. Rule 60 is not a vehicle for re-litigating prior issues. The Court has considered Forney's most recent filing. This petition is time-barred. Any complaint about Forney's not having access to his legal files, has been mooted by this court's consideration of this Motion for Relief from Judgment. No basis for equitable tolling has been shown. Equitable tolling is to be applied when extraordinary

circumstances have prevented an otherwise diligent[3] petitioner from timely filing his petition. *Helton v. Sec'y, D.O.C.,* 259 F. 3d 1310, 1312 (11th Cir. 2001) *cert denied,* 535 U.S. 1080 (2002).

16. Forney's conviction became final on October 3, 2011. His request for clerk's ministerial assistance did not toll the AEDPA one year statute of limitations. It ran on October 2, 2012. Forney's request for a belated appeal did not toll the statute of limitations. Even if Forney's September 21, 2012 Motion to Enlarge time would somehow be viewed as tolling the statute of limitations, only eleven (11) days of non-tolled time would have been left. The clock would have again started to run on October 31, 2013 when the trial court denied the motions. Instead of filing his collateral attack, Forney pursued appeals. Those appeals were completely exhausted by August 19, 2014. [4D14-1001]. Even if the mandate date of September 5, 2014 is considered, over eleven (11) days of non-tolled time elapsed before Forney filed his, later determined to be time-barred, and not properly filed, post conviction motion on October 9, 2014. Here, no extraordinary circumstances have prevented Forney's timely filing his petition. Forney confuses the filing of frivolous, meritless motions with diligence. It took Forney over seven (7) years to file his federal petition. He was not diligent in pursuing relief; he was diligent in filing irrelevant complaints, sometimes encompassing wild claims of official fraud and criminal actions.

Wherefore, Forney's Motion for Relief [DE-21] is Denied.

The Court again denies a certificate of a appealability.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 8th day of February, 2019.

WILLIAM P. DIMITROULEAS
United States District Judge

[3] Diligent does not mean pursuing irrelevant matters, like making a public records request of the Governor to ascertain when Judge Holmes retired in 2018.

Copies furnished to:

James Michael Forney, #125989
c/o Columbia Annex. C.I.
216 SE Corrections Way
Lake City, FL 32025

Honorable Lisette M. Reid, US Magistrate Judge

Myra Fried, AAG

# A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JAMES MICHAEL FORNEY, CASE NO. 18-62794-CIV-DIMITROULEAS

Plaintiff,

vs.

JULIE JONES,

Respondent.
_____/

**FINAL JUDGMENT AND ORDER DISMISSING HABEAS PETITION, WITHDRAWING REFERENCE**

THIS CAUSE is before the Court on Magistrate Judge Patrick A. White's December 4, 2018 Report of Magistrate Judge [DE-13]. The Court has considered Petitioner Forney's November 2, 2018 forty-nine (49) page Petition for Writ of Habeas Corpus [DE-6-2], Forney's ninety-nine (99) page Appendix [DE-6-3], Forney's December 21, 2018 eighteen (18) page Objections [DE-16], and the Court files, and having conducted a *de novo* review, finds as follows:

1. Forney was indicted and charged with First Degree Murder in January, 2004.

2. Forney decided to represent himself, and stand-by counsel took over mid-trial; Forney was found guilty on June 25, 2008. He was sentenced to life in prison.

3. On February 26, 2010, Forney filed a twenty-two (22) page Section 1983 case in this district. [10-60302CV]. On September 2, 2010, he filed a fifty-five (55) page amended complaint, adding that his complaint included a habeas corpus petition under 28 U.S.C. Section 2254. [DE-20 in 10-60302CV]. On May 6, 2011, Forney filed an eighty-nine (89) page Second Amended Complaint, again alleging 28 U.S.C. Section 2254 as one of his bases for relief. [DE-43 in 10-60302CV]. On June 8, 2011, Judge Adalberto Jordan dismissed the complaint, without prejudice to Forney's filing a third amended complaint by July 8, 2011. [DE-45 in 10-60302CV]. On June 20, 2011, Forney requested a Certificate of Appealability on the habeas aspect of his complaint. [DE-46 in 10-60302CV]. On July 19, 2011, Judge Jordan denied a

request for an interlocutory appeal and the certificate of appealability, indicating that Forney could file a separate habeas petition. [DE-49 in 10-60302CV]. On August 15, 2011, instead of filing a third amended complaint, Forney filed a Notice of Appeal and requested a certificate of appealability. [DE-50 in 10-60302CV]. The Eleventh Circuit denied a certificate of appealabilty on June 7, 2012 on the habeas portion of the complaint, and, as unnecessary, on the Section 1983 and 1985 claims. [DE-58 in 10-60302CV]. The United States Supreme Court denied certiorari on April 1, 2013. *Forney v. Broward Sheriff's Office,* 569 U.S. 908 (2013). Rehearing was denied on May 28, 2013. *Forney v. Broward Sheriff's Office,* 569 U.S. 1014 (2013). Normally, this Court might consider this current petition to be barred, without prior appellate court approval, as a successive habeas petition.[1] Here, however, no *Castro v. U.S.,* 540 U.S. 375 (2003) warnings were given. Moreover, Judge Jordan indicated that Forney could file a separate habeas petition, albeit not seven years later. [DE-49 in 10-60302CV]. So, the Court will not view the current petition as successive. Nevertheless, the time a previous federal habeas petition is pending does not toll the AEDPA statute of limitations. *Duncan v. Walker,* 533 U.S. 167, 181-182 (2001); *Day v. Hall,* 528 F. 3d 1315, 1318 (11th Cir.) *reh'g denied,* 285 Fed. Appx 744 (11th Cir. 2008); *King v. Ryan,* 564 F. 3d 1133, 1140 (9th Cir.) *cert. denied,* 558 U.S. 887 (2009).

4. On October 6, 2010, the Fourth District Court of Appeal affirmed. *Forney v. State,* 46 So. 3d 60 (Fla. 4th DCA 2010). Mandate issued on November 5, 2010. On November 22, 2010, the Florida Supreme Court denied review. *Forney v. State,* 49 So. 3d 1266 (Fla. 2010). On October 3, 2011, the U.S. Supreme Court denied certiorari. *Forney v. Florida,* 565 U.S. 848 (2011). Therefore, Forney's conviction became final on October 31, 2011. Rehearing was denied on January 23, 2012. *Forney v. Florida,* 565 U.S. 1185 (2012). The pending motion for rehearing did not toll the one year AEDPA statute of limitations. *Drury v. U.S.,* 507 F. 3d 1295, 1297 (11th Cir. 2007) *cert. denied,* 555 U.S. 825 (2008); *Giesberg v. Cockrell,* 288 F. 3d 268, 271 (5th Cir.) *cert. denied,* 537 U.S. 1072 (2002). Meanwhile, Forney

[1] Forney concedes that he refused to drop the habeas relief because "freedom is more important than money". [DE-6-2, p. 16].

filed a petition for belated appeal in the Fourth District Court of Appeal on October 18, 2011. [4D11-3939]. It was denied on November 22, 2011. Clarification was denied on January 24, 2012. On March 6, 2012, Forney sought review in the Florida Supreme Court. [SC12-432]. On March 12, 2012, the Florida Supreme Court denied review. *Forney v. State,* 86 So. 3d 1113 (Fla. 2012). On October 1, 2012, the United States Supreme Court denied a motion to proceed as a veteran. *Forney v. Florida,* 568 U.S. 808 (2012). The United States Supreme Court denied certiorari on January 14, 2013. *Forney v. Florida,* 568 U.S. 1127 (2013). However, because a petition for belated appeal does not involve collateral review of a conviction, it did not toll the AEDPA statute of limitations. *Espinosa v. Sec'y, D.O.C.,* 804 F. 3d 1137, 1141 (11th Cir. 2015); *Danny v. Sec'y, D.O.C.,* 811 F. 3d 1301, 1304 (11th Cir. 2016).

5. On September 21, 2012, Forney filed a Motion to Enlarge Time to File Post Conviction Relief and a Motion to Compel Clerk to provide a docket. He attached a February 2, 2012 Request for Clerk's Ministerial Assistance. The motions were denied on October 31, 2013. The Fourth District Court of Appeal affirmed on June 26, 2014. *Forney v. State,* 147 So. 3d 1008 (Fla. 4th DCA 2014). Rehearing was denied on August 19, 2014. Mandate issued on September 5, 2014. These "discovery" motions did not give the court authority to order relief from the conviction and did not toll the AEDPA statute of limitations. *Wall v. Kholi,* 562 U.S. 545, 556, n.4 (2011); *see also, Brown v. Sec'y, D.O.C.,* 530 F. 3d 1335, 1337 (11th Cir. 2008).

6. After 1011[2] days of non-tolled time had elapsed, on October 9, 2014, Forney filed a hundred twenty-one (121) page Motion for Post Conviction Relief. It was denied as time-barred on August 11, 2015. Forney filed a forty-eight (48) page motion for rehearing. Rehearing was denied on December 8, 2015. On March 17, 2016, the Fourth District Court of Appeal affirmed. *Forney v. State,* 190 So. 3d 83 (Fla. 4th DCA 2016). Rehearing was denied on May 19, 2016. Mandate issued on June 10, 2016. The Florida Supreme Court dismissed an appeal on June 23, 2016. *Forney v. State,* 2016 WL 3450582 (Fla.

[2] Judge White gave Forney the benefit of the doubt and computed 990 days of non-tolled time based on a finality date of January 23, 2012.

2016). The United States Supreme Court denied certiorari on January 9, 2017. *Forney v. Florida,* 137 S. Ct. 645 (2017). Because this state petition was not properly filed, Forney is not entitled to statutory tolling. *Pace v. DiGuglieimo*, 544 U.S. 408, 417 (2005); *Murphy v. Sec'y, D.O.C.,* 279 Fed. Appx. 877, 878 (11th Cir. 2008). Nevertheless, the statute of limitations had already run.

7. On August 25, 2016, Forney filed a Second Motion for Post Conviction Relief; it contained twenty-one (21) pages. It was denied as untimely on September 20, 2016. The Fourth District Court of Appeal affirmed on February 23, 2017. *Forney v. State,* 230 So. 3d 467 (Fla. DCA 2017). Rehearing was denied on April 18, 2017. The Florida Supreme Court denied review on May 22, 2017. *Forney v. State,* 2017 WL 2243128 (Fla. 2017). Again, this petition was not properly filed, and the statute of limitations had already run.

8. On July 28, 2017, Forney filed another Second Post Conviction Relief Motion; it contained fifty (50) pages. It was denied on September 19, 2017. Forney filed a fifty-nine (59) page motion for rehearing. It was denied on November 5, 2017. The Fourth District Court of Appeal denied relief on February 28, 2018. *Forney v. State*, 238 So. 3d 839 (Fla. 4th DCA 2018). Rehearing was denied on April 10, 2018. Mandate issued on April 27, 2018. The Florida Supreme Court denied review on June 26, 2018. *Forney v State*, 2018 WL 3154773 (Fla. 2018). Rehearing was stricken on August 15, 2018. *Forney v. State*, 2018 WL 4050500 (Fla. 2018). Because the AEDPA statute of limitations had already expired on October 2, 2012, this post-conviction motion would not have tolled the one year limit. *Tinker v. Moore*, 255 F. 3d 1331, 1333 (11th Cir. 2001).

9. On September 13, 2017, Forney filed a thirteen (13) page Motion For Disqualification of Judge. Another Motion to Re-assign Judge was filed on November 8, 2017. On November 17, 2017, Forney filed a Status Inquiry. It is unclear whether there ever was a ruling on Forney's request. It would seem to be a moot issue at this point, particularly since Judge Holmes is now retired.

10. On September 20, 2017, Forney filed a Writ of Prohibition with the Fourth District Court of Appeal. It was denied on October 16, 2017.

11. On November 9, 2017, Forney filed a Writ of Prohibition with the Fourth District Court of Appeal. It was denied on November 30, 2017.

12. In this untimely collateral attack, Forney raises twenty-three (23) claims:

A. First, the Judge tampered with the jury and altered the record on appeal (allegedly newly discovered in 2014)

B. Second, Ineffective Assistance of Counsel: Failed to Seek a Jury determination on his revoking an invitation relative to self-defense (castle doctrine) and failed to question Detective McCully about prior victim misconduct.

C. Third, Ineffective Assistance of Counsel: Failed to Seek a Jury Determination on whether he was armed and the initial aggressor.

D. Fourth, Ineffective Assistance of Counsel: failed to request a Lesser Included Offense of Manslaughter based on mutual combat.

E. Fifth, Inefffective Assistance of Counsel: no mens rea instruction.

F. Sixth, Ineffective Assistance of Counsel: Failed to unconfuse the jury about felonies committed by victim.

G. Seventh, Ineffective Assistance of Counsel: Failed to request a competency hearing.

H. Eighth, Ineffective Assistance of Counsel: Failed to Request Disqualification because of the judge's comments about believing jail nurse testimony.

I. Ninth, Ineffective Assistance of Counsel: Failed to confer when counsel took over the case. New grounds for a motion to suppress were not argued. Counsel failed to impeach O'Neal. Counsel failed to examine Nurse McMahon properly.

Counsel failed to impeach Detective McCully.

J. Tenth, Ineffective Assistance of Counsel: Failed to confer about Statement of Particulars to argue Judgment of Acquitttal regarding the date and place of the crime.

K. Eleventh, Ineffective Assistance of Counsel: Failed to Object to Prosecutorial Comments.

(1) Manipulative

(2) Testifying for deceased

L. Twelvth, Ineffective Assistance of Counsel: Providing Incomplete Record on Appeal omitted "in camera" proceedings and suppression transcript.

M. Thirteenth, Ineffective Assistance of Counsel: Failed to Investigate

(1) Brutality

(2) Cause of Arrest

(3) Perjured Affidavit

(4) Forced to represent himself

N. Fourteenth, Collusion, Counsel Haas allowed the state to proceed first on the suppression motion, asked incorrect questions, allowed hearsay, failed to impeach, failed to present witnesses, and misadvised Forney as stand-by counsel.

O. Fifteenth, Prosecutorial Misconduct, Brady, withheld evidence requiring witnesses Head and Bowlin

P. Sixteenth, Prosecutorial Misconduct, Tampering with tapes

Q. Seventeenth, Jail Brutality resulted in Forney's being criminally charged

R. Eighteenth, False Testimony from witness Bowlin

S. Nineteenth, Duplicitous Indictment.

T. Twentieth, Prosecutor – Judge relationship in another case

when same prosecutor participated in a pre-trial hearing before Judge Gardiner

U. Twenty-First, denied compulsory process

V. Twenty-Second, unfair ruling by Judge Gardiner

W. Twenty-Third, new law on search incident to an arrest.

Forney raised these objections in the Middle District of Florida. The petition was properly transferred to this district. The Court will not address these 23 complaints, even though they are largely conclusory and insufficient upon which to base any relief, because the petition is time-barred.

13. On December 7, 2018, this Court overruled Forney's Objection to transfer. [DE-15]. On December 13, 2018, Judge Howard of the Middle District denied Forney's Motion for Reconsideration. [MDFL-DE-10 in 18-1164].

14. The Court has considered Forney's numerous objections to the Report and Recommendation. Even though the statute of limitations is an affirmative defense, a district court has the discretion to raise *sua sponte* the timeliness issue. *Jackson v. Sec'y D.O.C.*, 292 F. 3d 1347 (11th Cir. 2002). Judge White and this Court are permitted, but not obligated, to consider *sua sponte*, the timeliness of a state prisoner's habeas petition. *Day v. McDonough*, 547 U.S. 198, 209 (2006). Here, Forney demonstrates no due process violation where this court has considered his objections to what he terms affirmative defenses. Forney contends that the AEDPA one-year statute of limitations began on January 23, 2012 [DE-16, p. 16] when the U.S. Supreme Court denied rehearing. It actually began on October 3, 2011 when the U.S. Supreme Court denied certiorari. Therefore, the AEDPA statute of limitations ran on October 2, 2012. No properly filed activity tolled the statute. The September 21, 2012 Motion to Enlarge Time did not toll the AEDPA statute of limitations. *See Howell v. Crosby*, 415 F. 3d 1250, 1251-52 (11th Cir. 2005) *cert. denied*, 546 U.S. 1108 (2006). Discovery requests did not toll the statute of limitations. Limitation issues are decided on a claim by claim basis. *Zack v. Turner,* 704 F. 3d

917 (11th Cir.) *cert. denied,* 571 U.S. 863 (2013). Only one of Forney's 23 issues are possibly newly discovered.

15. Forney's claim that Judge Holmes fabricated evidence would not be properly viewed as newly discovered to re-start a statute of limitations. Any perception that parts of the jury instructions were typed differently would have been known, if true, before October 2, 2012. Moreover, Forney's conclusory allegation of judicial misconduct does not merit any relief. He seems to assume that judges prepare transcripts and/or court records. Court reporters prepare transcripts and forward them to the clerk who forwards them, plus court documents, to the appellate court. This allegation, even if newly discovered, does not warrant any relief.

16. Forney's conclusory complaints about the Southern District of Florida being biased because Judge Holmes was previously an Assistant U.S. Attorney, over twenty (20) years ago, is also meritless.

17. Forney's conclusory complaints that the clerk and judge's delay in responding to his requests somehow excuses his untimely federal petition is also meritless

18. Forney does not explain what was in his delayed legal files that he contends that he needed, but he apparently now has.

19. Forney's conclusory complaints about felonious actions by a judge, excessive delays and deprived documents do not warrant equitable tolling. Forney decided to pursue any and all possible perceived imperfections in the state court system. For example, a review of the Florida Supreme Court online docket reveals no less than thirteen (13) petitions that have either been denied or dismissed, mostly for lack of jurisdiction: SC08-2446, SC09-354, SC10-233, SC10-648, SC10-1178, SC10-1386, SC10-2240, SC12-432, SC13-320, SC13-1600, SC16-1098, SC17-937, and SC18-750. Meanwhile, he squandered his opportunity to file what it now appears would have been similar frivolous attacks in federal court.

20. This petition is time-barred. No basis for equitable tolling has been shown. Equitable tolling is to be applied when extraordinary circumstances have prevented an otherwise diligent petitioner from

timely filing his petition. *Helton v. Sec'y, D.O.C.,* 259 F. 3d 1310, 1312 (11th Cir. 2001) *cert denied,* 535 U.S. 1080 (2002).

Wherefore, Forney's habeas petition [DE-6-2] is Dismissed, as time-barred. The Report and Recommendation [DE-13] is Approved.

The Clerk shall close this case and deny any pending motions as Moot.

The Reference to Magistrate [DE-9] is Withdrawn.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 7th day of January, 2019.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

James Michael Forney, #125989
c/o Columbia Annex. C.I.
216 SE Corrections Way
Lake City, FL 32025

Honorable Lisette M. Reid, US Magistrate Judge[3]

Myra Fried, AAG

[3] Judge White has retired, and Judge Reid now is assigned to his cases. [DE-17].

# A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-62794-CV-DIMITROULEAS
MAGISTRATE JUDGE P.A. WHITE

JAMES M. FORNEY,

Petitioner,

v.

REPORT OF
MAGISTRATE JUDGE

WARDEN ROBERT SMITH,

Respondent.
_____/

## I. INTRODUCTION

This matter is before the court on petitioner's *pro se* petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. His habeas petition attacks the constitutionality of his judgment of conviction in Case No. 04000990CF10A, Seventeenth Judicial Circuit of Florida, Broward County.

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

The undersigned has reviewed the entire record, including the operative § 2254 petition. DE#6-2. As discussed below, the petition should be DISMISSED as untimely.

## II. BACKGROUND

On June 25, 2008, following a jury trial, the state trial court adjudged movant guilty of first-degree murder and sentenced him to life in prison without the possibility of parole. DE#6-2 at 1[1]; DE#12.[2] Petitioner appealed to the Fourth District Court of Appeals ("Fourth District"). On October 6, 2010, the Fourth District affirmed without comment. Id. at 2; DE#12-1. Petitioner petitioned the Florida Supreme Court for review. On November 22, 2010, the Florida Supreme Court dismissed his petition for lack of jurisdiction. DE#6-2 at 2; DE#12-2. Petitioner then filed a cert petition in the U.S. Supreme Court. The U.S. Supreme Court denied the petition and, on January 23, 2012, denied rehearing. DE#6-2 at 2; DE#12-3.

On October 9, 2014, petitioner filed his first postconviction motion in the state trial court. DE#6-2 at 2-3; DE#12-4. On August 11, 2015, the trial court denied this motion as time-barred. DE#6-2 at 4; DE#12-5. Petitioner appealed. The Fourth District affirmed, issuing its mandate on March 7, 2016. DE#12-6. Petitioner petitioned the Florida Supreme Court for review. The Florida Supreme Court dismissed his petition, disposing of the case on July 15, 2016. DE#12-7.

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[1] Unless otherwise noted, all page citations for docket entries refer to the page stamp number located at the top, right-hand corner of the page.

[2] The court takes judicial notice of this and other judicial records referenced herein. See Fed. R. Evid. 201(b)-(c); McBride v. Sharpe, 25 F.3d 962, 970 (11th Cir. 1994) (en banc) (federal habeas court may *sua sponte* consider state court records when the petitioner was a party to the proceedings and there is no indication that the state records are "inaccurate, incomplete, or misleading").

On September 6, 2016, petitioner filed a second postconviction motion in the trial court. DE#6-2 at 4; DE#12-8. On September 20, 2016, the trial court dismissed this motion as, *inter alia*, time-barred. DE#6-2; DE#12-9. Petitioner appealed. The Fourth District affirmed, issuing its mandate on May 5, 2017. DE#12-10. Petitioner petitioned the Florida Supreme Court for review. The Florida Supreme Court dismissed the petition on May 22, 2017. DE#12-11.

On July 28, 2017, petitioner filed a third postconviction motion. DE#6-2 at 4; DE#12-12. On September 19, 2017, the trial court denied this motion as successive and on the merits. DE#12-13.

Petitioner filed the instant petition on November 2, 2018. DE#6-2 at 1. Petitioner contends that, between September 18, 2014 and October 8, 2014, he discovered "new evidence" that the trial judge altered the record of his direct criminal appeal. See id. at 5-9, 46-47. Petitioner appears to contend that the record of the jury instructions forwarded to the Fourth District contained a proper instruction for the "castle doctrine," but that the trial court gave the jury no such instruction. Id. at 5.

Evidently, petitioner raised the same claim in his third postconviction motion. As noted, the trial court denied the claim. It reasoned:

> [Petitioner's] attachments are [Bates] stamped with the same page numbers as were filed in the original appeal, thus making them copies of what the appellate court reviewed in affirming his convictions. This does not constitute newly discovered evidence.

DE#12-13.

## III. STANDARD OF REVIEW

Rule 4 of the Rules Governing § 2254 Cases provides that, "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief. . . , the judge must dismiss the petition . . . ." Consistently, the Supreme Court has stated that "[f]ederal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face[.]" McFarland v. Scott, 512 U.S. 849, 856 (1994) (citing Rule 4, Rules Governing § 2254 Cases). Likewise, the Supreme Court has "h[e]ld that district courts are permitted . . . to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." Day v. McDonough, 547 U.S. 198, 209 (2006); accord Borden v. Allen, 646 F.3d 785, 810 (11th Cir. 2011). In reviewing a petition under Rule 4, courts must construe it liberally. Enriquez v. Fla. Parole Comm'n, 227 F. App'x 836, 837 (11th Cir. 2007) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972)).

## IV. DISCUSSION

### A. 28 U.S.C. § 2244(d)(1)(A) and Statutory Tolling

AEDPA imposes a one-year statute of limitations on the filing of federal habeas petitions. 28 U.S.C. § 2244(d)(1). Pertinently, the limitation period shall run from "the date on which the judgment became final by the conclusion of direct review." 28 U.S.C. § 2244(d)(1)(A). Under this clause, "the judgment becomes final . . . when [the Supreme] Court . . . denies a petition for certiorari." Gonzalez v. Thaler, 565 U.S.

134, 150 (2012).

Here, the Supreme court denied petitioner's cert petition, then denied rehearing on January 23, 2012. Giving him the benefit of the doubt, this is the date on which his conviction became final under § 2244(d)(1)(A). Yet petitioner did not file his § 2254 motion until November 2, 2018. Therefore, if § 2244(d)(1)(A) applies, his petition is untimely absent statutory tolling.

"The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under [§ 2244(d)]." 28 U.S.C. § 2244(d)(2); see also Pace v. DiGuglielmo, 544 U.S. 408, 410 (2005). "[A]n application remains pending until it 'has achieved final resolution through the State's post-conviction procedures.'" Hernandez-Alberto v. Sec'y, Fla. Dep't of Corr., 840 F.3d 1360, 1364 (11th Cir. 2016) (per curiam) (quoting Carey v. Saffold, 536 U.S. 214, 220 (2002)). This rule includes "those intervals between one state court's judgment and the filing of an appeal with a higher state court." Matos v. Sec'y, Fla. Dep't of Corr., 603 F. App'x 763, 766 (11th Cir. 2015) (per curiam) (citing Carey, 536 U.S. at 219–20).

As recounted above, supra Part II, petitioner did not file his first postconviction motion until October 9, 2014. The trial court dismissed it as untimely and the Fourth District affirmed. Thus, this petition did not toll § 2244(d)(1)'s one-year period. Pace, 544 U.S. at 417. Furthermore, even had it, **990 days** still elapsed between January 23, 2012 (date of finality of conviction) and October 9, 2014 (date of filing of first postconviction motion). Either way, if § 2244(d)(1)(A) applies, the instant

petition is untimely.

Movant filed his second postconviction motion on September 6, 2016. However, as with the first, the trial court dismissed it as untimely and the Fourth District affirmed. Thus, this petition did not toll § 2244(d)(1).

Petitioner filed his third postconviction motion on July 28, 2017. But § 2244(d)(1)'s one-year period had expired on January 23, 2013. Thus, the third postconviction motion could not have tolled this period. Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir. 2001) (citing Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)).

Accordingly, under § 2244(d)(1)(A), the instant § 2254 petition is untimely.[3] [4]

**B. 28 U.S.C. § 2244(d)(1)(D)**

Pertinently, § 2244(d)(1) provides that its 1-year limitation period shall run from the latest of "the date on which the factual predicate of the claim or claims presented could have

[3] Petitioner contends that a § 1983 action that was dismissed in 2011 somehow counts towards tolling. DE#6-2 at 48; see also Case No. 10-60302-Civ-Jordan (S.D. Fla.). This action is not a "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim" and, therefore, does not count towards tolling. 28 U.S.C. § 2244(d)(2). In any event, his judgment of conviction did not become final until January 23, 2012.

[4] In March 2011, DE#6-2 at 48, petitioner filed a mandamus petition in Leon County, Florida alleging inadequate medical care in prison. DE#12-14. The trial court dismissed this petition in part and denied it in part. Id. The First District Court of Appeal affirmed. DE#12-16. This action is not "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim" and, therefore, does not count towards tolling. 28 U.S.C. § 2244(d)(2).

been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

Under this provision, "[t]ime begins when the prisoner knows (or through diligence could discover) the important facts, *not when the prisoner recognizes their legal significance*." Cole v. Warden, Ga. State Prison, 768 F.3d 1150, 1157 (11th Cir. 2014) (citations omitted). "[D]ue diligence is equivalent to a rule of inquiry notice[.]" Id. at 1156 (citation omitted).

Here, petitioner alleges that, between September 18, 2014 and October 8, 2014, he discovered "new evidence" that the trial judge altered the record of his direct criminal appeal. However, assuming the hodgepodge of documents he cites to support this assertion constitute "new evidence," DE#6-2 at 5, he still would have had to file his § 2254 petition by October 8, 2015 (i.e., within a year of the discovery of the new evidence), absent any statutory tolling. Yet petitioner did not file the instant petition until November 2, 2018.

Furthermore, while he alleges that he is entitled to statutory tolling, the trial court dismissed his first and second postconviction motions as untimely. And he did not file his third postconviction motion until July 28, 2017, which comes **659 days** after October 8, 2015. Hence, even if petitioner's documents constituted new evidence under § 2244(d)(1)(D), his § 2254

petition would be untimely.[5] [6]

In sum, the instant § 2254 petition is time-barred.

## V. EVIDENTIARY HEARING

"In deciding whether to grant an evidentiary hearing [under § 2254], a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Schriro v. Landrigan, 550 U.S. 465, 474 (2007). "[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Id.; see Tejada, 941 F.2d at 1559 ("A petitioner is not entitled to an evidentiary hearing . . . when his claims are . . . in the face of the record [] wholly incredible." (citation omitted)).

Consonantly, the Eleventh Circuit has held that § 2244 "does not require a hearing on the issue of time-bar or equitable tolling, so the decision as to whether to conduct an evidentiary inquiry is a matter left to the sound discretion of the district court." Drew v. Dep't of Corr., 297 F.3d 1278, 1292–93 (11th Cir. 2002) (citations omitted). "[A] petitioner seeking an evidentiary hearing must make a proffer to the district court of any evidence that he would seek to introduce at a hearing." Jones v. Sec'y,

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[5] Moreover, the undersigned does not find petitioner's argument that the trial court altered the record on appeal to be persuasive. See DE#6-2 at 5-8. Notably, the trial court rejected the same argument. DE#12-13. There is no indication in the record that the trial court's finding was unreasonable. See generally 28 U.S.C. § 2254(d).

[6] Petitioner does not request equitable tolling. Nor does he allege that he is actually innocent. Nothing in the record supports any inference that petitioner could establish either of these claims.

Fla. Dep't of Corr., 834 F.3d 1299, 1319 (11th Cir. 2016)(citing cases).

Here, petitioner has alleged no facts that would, if true, enable him to overcome § 2244's time bar. Nor is there any indication that a hearing would enable him to develop facts adequate to overcome this bar. Thus, an evidentiary hearing is not appropriate.

## VI. CERTIFICATE OF APPEALABILITY

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Cases. "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." Id. "If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." Id. "A timely notice of appeal must be filed even if the district court issues a certificate of appealability." Rule 11(b), Rules Governing § 2254 Cases.

"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). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows . . . that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it

debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Here, in view of the entire record, the undersigned denies a certificate of appealability. If petitioner disagrees, he may so argue in any objections filed with the district court. See Rule 11(a), Rules Governing § 2254 Cases ("Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue.").[7]

## VII. RECOMMENDATIONS

Based on the foregoing, it is recommended that petitioner's habeas petition (DE#6-2) be DISMISSED as untimely; that no certificate of appealability issue; that final judgment be entered; and that the case be closed.

Objections to this report may be filed with the district judge within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar petitioner from a *de novo* determination by the district judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district judge except upon grounds of plain error or manifest injustice. See 28 U.S.C.

[7] "If the district court considers the timeliness of the [habeas] petition *sua sponte*, it must give the [petitioner] 'fair notice and an opportunity to present [his] position[].'" Aureoles v. Sec'y, D.O.C., 609 F. App'x 623, 623 (11th Cir. 2015) (per curiam) (quoting Day, 547 U.S. at 210). This report and recommendation serves as fair notice. Cf. Fharmacy Records v. Nassar, 465 F. App'x 448, 458 (6th Cir. 2012) (per curiam); Ferreira-Plasencia v. Ruginski, 34 F. App'x 3, 4 (1st Cir. 2002) (per curiam). Furthermore, if he feels that his habeas petition is timely and/or that equitable tolling and/or some other exception to §2244(d)'s time bar applies, he will have an opportunity to present his position in any objections to this report. See Manzini v. The Fla. Bar, 511 F. App'x 978, 983 (11th Cir. 2013) (per curiam).

§ 636(b)(1); Thomas v. Arn, 474 U.S. 140, 148-53 (1985); RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

SIGNED this 4th day of November, 2018.

UNITED STATES MAGISTRATE JUDGE

Copies provided:

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