A P P E N D I X

APPENDIX

A-1

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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June 13, 2022

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 21-13780-E
Case Style: Alfonso Ponton v. Secretary, Florida Department of Corrections
District Court Docket No: 1:16-cv-20059-KMW

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gloria M. Powell, E
Phone #: (404) 335-6184

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13780-E

ALFONSO PONTON,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

To merit a certificate of appealability, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Because Alfonso Ponton has failed to make the requisite showing, his motion for a certificate of appealability is DENIED.

/s/ Robert J. Luck
UNITED STATES CIRCUIT JUDGE

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 16-20059-CV-WILLIAMS

ALFONSO PONTON,

Petitioner,

vs.

SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER DISMISSING PETITION

THIS MATTER is before the Court following the Eleventh Circuit Court of Appeals' ("Eleventh Circuit") Order vacating the dismissal of Petitioner Alfonso Ponton's *pro se* 28 U.S.C. § 2254 petition for writ of habeas corpus ("§ 2254 Petition") as an unauthorized second or successive petition.[1] *See Ponton v. Sec'y, Fla. Dep't of Corr.,* 891 F.3d 950 (11th Cir. 2008); (DE 15). Following the Eleventh Circuit's remand, a *Castro*[2] Order was entered warning Petitioner that his initial pleading in this matter would be recharacterized

[1] The Eleventh Circuit found Petitioner was never warned that his fifth federal habeas pleading, filed in 1988, would be construed as a § 2254 Petition attacking the constitutionality of his Florida state court convictions following jury verdicts in Miami-Dade County Circuit Court Case Nos. F81-25758, F81-28089, and F81-27294. *Ponton,* 891 F.3d at 951−52; (DE 15). Thus, the Eleventh Circuit held that "a pre-*Castro* pleading that is recharacterized as a § 2254 petition without the required notice and warning does not count as a first petition for second or successive purposes." *Ponton,* 891 F.3d at 954 (citing *United States v. Blackstock,* 513 F.3d 128, 133, 135 (4th Cir. 2008) (finding a pre-*Castro* motion did not count as a first § 2255 motion because the movant was not given the required notice and warning)); (DE 15).

[2] In *Castro,* the United States Supreme Court held that when a district court recharacterizes a movant's pleading as a first § 2255 motion, the court must (1) advise the movant "that it intends to recharacterize the pleading," (2) "warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on 'second or successive' motions;" and, (3) give movant "an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has." *Castro v. United States,* 540 U.S. 375, 383 (2003).

as a first § 2254 Petition. (DE 17). Pursuant to *Castro*, the Court advised Petitioner that he could withdraw the filing or file an amended petition. (*Id.*). In response, Petitioner—with the help of counsel—filed an Amended Petition challenging the constitutionality of his Florida state court convictions following jury verdicts in Miami-Dade County Circuit Court Case Nos. F81-25758, F81-28089, and F81-27294. (DE 36). Respondent, the Secretary of the Florida Department of Corrections, filed a limited response (DE 46) with supporting appendices[3] (DE 47–48) arguing that the Amended Petition should be dismissed as time barred. Petitioner has filed a Reply, conceding that the Amended Petition was filed more than one-year after the federal limitations period under 28 U.S.C. § 2244(d) expired. (DE 55 at 1). Petitioner, however, contends he is entitled to equitable tolling. (*Id.* at 7–9). Upon review of the Amended Petition, the State's Response, and Petitioner's Reply, the Court dismisses the amended Petition as time barred.

I. BACKGROUND

In Miami-Dade Case No. 81-25758, Petitioner was found guilty following a jury verdict of two counts of robbery with a weapon (Counts 1 and 2) and one count of aggravated assault with a firearm (Count 9). (DE 47-1 at 165–70).[4] He was sentenced to three consecutive terms of thirty years of imprisonment. (*Id. at* 171–76). On July 19, 1983, the appellate court *per curiam* affirmed the convictions in a decision without written

[3] The Court takes judicial notice of the state court records and transcripts filed separately as appendices to the State's response. *See* Fed. R. Evid. 201; *Nguyen v. United States*, 556 F.3d 1244, 1259 n.7 (11th Cir. 2009) (quoting *United States v. Glover*, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999) ("A court may take judicial notice of its own records and the records of inferior courts.") (citation omitted)).

[4] Unless otherwise noted, the exhibit and page numbers referenced in this Order following reference to state court records provided by Respondent corresponds with the pagination provided by the court's electronic filing system: CM/ECF.

opinion. (*Id.* at 211); *see Ponton v. State*, No. 82-1017, 436 So. 2d 117 (Fla. 3rd DCA Jul. 27, 1983) (unpublished table decision).

In Miami-Dade Case No. 81-27294, Petitioner was found guilty following a jury verdict of five counts of armed robbery with a firearm (Counts 1 through 5) and two counts of aggravated battery with a firearm (Counts 6 and 7). (DE 47-2 at 111–34). He was sentenced to a total term of 134 years of imprisonment. (*Id.*). On July 19, 1983, the appellate court *per curiam* affirmed the convictions, but modified the "legally excessive sentences" for the aggravated battery convictions to consecutive terms of fifteen years of imprisonment as to each offense in an unpublished opinion. (*Id.* at 161–63); *see Ponton v. State*, No. 82-1021, 434 So. 2d 347 (Fla. 3rd DCA Jul. 19, 1983) (per curiam). Following issuance of the appellate court's mandate, on November 25, 1986 the trial court entered a Corrected Sentence *nunc pro tunc* to April 16, 1982 modifying the term of imprisonment as to the two aggravated battery convictions to consecutive fifteen years of imprisonment. (*Id.* at 166–67). The corrected sentence did not constitute a new judgment for purposes of the federal one-year limitations period.[5]

In Miami-Dade Case No. 81-28089, Petitioner was found guilty following a jury verdict of three counts of armed robbery (Counts 1 through 3). (DE 47-3 at 54–57). He was sentenced to three consecutive terms of 134 years of imprisonment. (*Id.* at 62–67).

[5] The Eleventh Circuit has made clear that when a Florida trial court issues a new legal order or judgment *nunc pro tunc*, the amended sentence relates "back to the date of the initial judgment" and is "not a 'new judgment' for purposes of § 2244." *See Osbourne v. Fla. Dep't of Corr.*, 968 F.3d 1261, 1266−67 (11th Cir. 2020) (citing *Colon v. State*, 909 So. 2d 484, 487 (Fla. 5th DCA 2005); *Patterson v. Sec'y, Fla. Dep't of Corr.*, 849 F.3d 1321, 1327 (11th Cir. 2017) (en banc) ("noting that Florida Rule 3.800(a) encompasses some errors that may relate back to the original sentencing, and '[a]n order that relates back to an original sentence merely amends the original order and may not entitle the defendant to vacatur of the original judgment and entry of a new one.'")).

On August 4, 1983, the appellate court *per curiam* affirmed the convictions in a decision without a written opinion. (*Id.* at 98); *see Ponton v. State*, No. 3D82-1018, 436 So. 2d 364 (Fla. 3rd DCA Aug. 4, 1983) (per curiam).

The three state court convictions referenced above became final prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act of 1996, as amended ("AEDPA"). *See* 28 U.S.C. § 2244(d). Where, as here, a conviction became final prior to AEDPA's enactment, the petitioner had until April 23, 1997—one year from AEDPA's date of enactment—to file a petition. *See Moore v. Campbell,* 344 F.3d 1313, 1319 (11th Cir. 2003) (per curiam) (citing *Wilcox v. Fla. Dep't of Corr.*, 158 F.3d 1209, 1211 (11th Cir. 1998) (per curiam)); *see also Goodman v. United States*, 151 F.3d 1335, 1337 (11th Cir. 1998) (per curiam) (applying one-year grace period to § 2255 motions). Thus, Petitioner had until April 23, 1997 to timely file his § 2254 petition. *See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008). The one-year limitations period is statutorily tolled during times when a "properly filed" application for post-conviction relief is pending in the state forum.[6] *See* 28 U.S.C. § 2244(d)(2).

Before his convictions became final, between 1985 and April 11, 1997, as summarized in detail by Respondent, Petitioner filed no less than sixteen collateral post-conviction motions regarding the three state court cases under attack here.[7] *See* (DE 46 at 6–33). Of those, the last post-conviction proceeding was a state habeas corpus petition received by the appellate court on April 11, 1997. (DE 47-9 at 62). On April 25, 1997,

[6] An application is properly filed if its delivery and acceptance comply with applicable laws and rules governing such filings. *Artuz v. Bennett*, 531 U.S. 4, 8 (2000).

[7] "After those convictions became final, Ponton launched a barrage of *pro se* post-conviction pleadings in state and federal court. He has filed at least 40 postconviction motions and petitions in state court alone." *Ponton v. State,* 891 F.3d 950, 951 (11th Cir. 2018); (DE 15 at 4).

the state appellate court denied the petition. (*Id.* at 64); *see Ponton v. Singletary,* No. 3D97-1070, 694 So. 2d 753 (Fla. 3rd DCA Apr. 11, 1997) (unpublished table decision). Rehearing was denied on May 15, 1997, and the proceedings concluded without issuance of a mandate. (DE 47-9 at 65−66).

More than two years elapsed from the conclusion of the above state appellate court proceeding on May 15, 1997 until Petitioner filed a state habeas corpus petition with the trial court on October 12, 1999.[8] (DE 47-9 at 67, 94).

Date(s)	**Action**	**Tolling**
April 24, 1996	Enactment of AEDPA	
April 24, 1996 - April 23, 1997	One-year AEDPA grace period established	
April 11, 1997 - May 15, 1997 (DE 47 at 1263−67)[9]	State habeas corpus petition filed. Trial court's denial affirmed on appeal. Rehearing denied on May 15, 1997	Limitations period tolled
Over 24-Month Gap[10]		
October 12, 1999 - September 27, 2000 (*Id.* at 1268−1317)	Petitioner filed a state habeas corpus petition denied by the trial court on October 25, 1999. Appeal dismissed on September 27, 2000	Limitations period tolled.

An order denying the habeas corpus petition and supplement was entered on October 25, 1999. (*Id.* at 115). Petitioner appealed, but on September 27, 2000, the appeal was dismissed for failure to comply with the appellate court's order. (*Id.* at 115); *Ponton v.*

[8] Absent evidence to the contrary, in accordance with the prison mailbox rule, a *pro se* prisoner's filing is deemed filed on the date it is delivered to prison authorities for mailing. *Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001) (per curiam) (citing *Adams v. United States*, 173 F.3d 1339, 1340−41 (11th Cir. 1999) (per curiam)); Fed. R. App. P. 4(c)(1).

[9] The page numbers reference in the Appendix correspond to the Respondent's Bates Stamp located on the bottom of its Appendix. *See* (DE 47).

[10] This period (and the foregoing gap periods) represents the amount of time during which no post-conviction proceedings were pending, which would serve to stop the federal limitations period from expiring.

State, 769 So. 2d 383 (Fla. 3rd DCA 2000) (unpublished table decision). The appeal concluded without issuance of a mandate. (DE 47-9 at 116).

The filing of the October 1999 state habeas corpus petition did not statutorily toll the federal limitations period because it was filed after expiration of the one-year period, when there was no time remaining to be tolled. *See Cooke v. Sec'y, Dep't of Corr.*, No. 19-10440-A, 2019 WL 3562640, at *1 (11th Cir. Jun. 21, 2019) (citing *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (per curiam) ("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.")). Additionally, as the state court ruled that the Rule 3.850 Motion was untimely under state law, the motion was not "properly filed" and thus could not toll the one-year statute of limitations. *See Jones v. Sec'y, Fla. Dep't of Corr.*, 906 F.3d 1339, 1350 (11th Cir. 2018) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 414, 417 (2005)). Therefore, the filing of that state habeas corpus petition did not stop the federal limitations clock from expiring.[11]

II. LEGAL STANDARD

AEDPA implemented a one-year statute of limitations on petitions for writ of habeas corpus filed by state prisoners. *See* 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus . . ."). Specifically, AEDPA provides that the limitations period shall run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is

[11] Furthermore, the attached Appendix reflects additional significant gaps, well in excess of one year, during which no properly filed post-conviction motions were pending.

> removed, if the applicant was prevented from filing by such action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

See 28 U.S.C. § 2244(d)(1)(A)−(D). AEDPA also placed new restrictions on "second or successive" § 2254 habeas corpus petitions. *See* 28 U.S.C. § 2244(b). Unless a court of appeals has issued an order authorizing the district court to consider the merits of a "second or successive" § 2254 habeas petition, a district court lacks jurisdiction to do so. *See Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004) (per curiam).

Under 28 U.S.C. § 2254(a), a habeas petition may challenge only the state-court judgment pursuant to which a petitioner is being held in custody. *See Patterson v. Sec'y, Fla. Dep't of Corr.*, 849 F.3d 1321, 1325 (11th Cir. 2017) (en banc) (citing 28 U.S.C. § 2244(b)). The only "judgment that matters for purposes of § 2244 is 'the judgment authorizing the prisoner's confinement.'" *Id.* at 1325 (quoting *Magwood v. Patterson*, 561 U.S. 320, 332 (2010)). Thus, "AEDPA's statute of limitations begins to run when the judgment pursuant to which the petitioner is in custody, which is based on both the conviction and the sentence the petitioner is serving, is final." *Vaughan v. Sec'y, Fla. Dep't of Corr.*, 770 F. App'x 554, 555 (11th Cir. 2019) (per curiam) (quoting *Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286, 1293 (11th Cir. 2007)).

III. DISCUSSION

Petitioner raises numerous claims regarding his three trials.[12] Nevertheless, Respondent contends that this petition should be dismissed as time barred because Petitioner is not entitled to either statutory or equitable tolling. (DE 46 at 35–51). In his reply, Petitioner concedes that his Amended Petition is statutorily time-barred. (DE 55 at 1–2). Notwithstanding, Petitioner asserts that he is entitled to equitable tolling of the limitations period because (1) he relied to his detriment on the district court's incorrect dismissal of his prior § 2254 petitions as successive; (2) he suffers from physical and mental health difficulties; and, (3) he exercised due diligence, but was barred in October 16, 2002 and again on September 24, 2007 from filing any further *pro se* pleadings, appeals, motions, and petition with the state trial and appellate courts. (DE 55 at 8, 9).

The Court agrees with Respondent that this petition is time-barred under 28 U.S.C. § 2244(d)(1)−(4). Specifically, during the period between May 1997 and October 1999, no post-conviction proceedings were pending, which would have served to stop the federal limitations period from expiring. Moreover, over the ensuing years, there were

[12] They include: (1) his right to a fair trial was violated when the trial court supplied the jury with verdict forms that did not contain an option for "not guilty;" (2) counsel failed to object when the court provided the jury with verdict forms that did not contain an option for "not guilty," and then failed to raise the trial court's fundamental error on appeal; (3) Petitioner was tried and convicted while mentally incompetent; (4) the trial court should have held another competency hearing before Petitioner's third trial where Petitioner's behavior raised doubt as to his competency; (5) the trial court erred during Petitioner's third trial by failing to strike the jury venire after they witnessed Petitioner's irrational behavior, saw Petitioner gagged, and viewed Petitioner in handcuffs and shackles; (6) counsel was ineffective during Petitioner's third trial by advising the jury venire that Petitioner was in handcuffs and shackled when those restraints were not otherwise visible; (7) the trial court erred in failing to exclude testimony of state witnesses when those witnesses, during cross-examination, refused to answer critical questions, invoking their Fifth Amendment privilege against self-incrimination; (8) the eyewitness identification of Petitioner during his second trial was tainted by the suggestive photographic identification; (9) counsel failed to file a motion to suppress the tainted eyewitness identification at Petitioner's second trial; and, (10) his right to a fair trial was violated by the perjured testimony of co-perpetrators Calvin Brown, Paul Lewis, and Jeffrey Redding. (DE 36 at 2–77).

additional gaps well in excess of one-year between post-conviction filings, during which no collateral proceedings were pending. *See* attached Appendix. Thus, absent equitable tolling, this federal petition is time-barred.

A. Applicable Law Regarding Equitable Tolling

It is well settled that the federal one-year limitations period is subject to equitable tolling. *See Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1218 (11th Cir. 2017) (citations omitted) (finding AEDPA's one-year limitations period is subject to equitable tolling). "[E]quitable tolling is an extraordinary remedy [that] is limited to rare and exceptional circumstances and typically applied sparingly." *Lanier v. United States*, 769 F. App'x 847, 850 (11th Cir. 2019) (per curiam) (quoting *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009) (per curiam)). To be entitled to equitable tolling, Petitioner must demonstrate that (1) "he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lanier*, 769 F. App'x at 850 (quoting *Holland v. Florida,* 560 U.S. 631, 649 (2010)). The diligence required for equitable tolling is "reasonable diligence not maximum feasible diligence." *Id*. (quotation omitted). As to extraordinary circumstances, it must be beyond a petitioner's control and a causal connection must exist between the alleged extraordinary circumstances and the late filing of the petition. *See Hunter*, 587 F.3d at 1308; *San Martin v. McNeil*, 633 F.3d 1257, 1267 (11th Cir. 2011). Importantly, Petitioner bears the burden of establishing entitlement to equitable tolling. *See Lanier*, 769 F. App'x at 850 (citing *Outler v. United States*, 485 F.3d 1273, 1280 (11th Cir. 2007) (per curiam)). As set forth below, Petitioner has not demonstrated that he is entitled to equitable tolling.

B. Discussion

1. Petitioner's Reliance on Incorrect Dismissals of Prior § 2254 Petitions

Petitioner maintains that he is entitled to equitable tolling because he relied to his detriment on the district court's incorrect dismissals of his prior § 2254 petitions. (DE 55 at 2). In support, Petitioner relies upon non-binding decisions from other federal appellate courts that have granted equitable tolling where the district court's unilateral action of recharacterizing a pleading prevented a petitioner from presenting claims in a timely manner. (*Id.* at 4).

Petitioner acknowledges, however, that those decisions are not controlling here. In fact, he concedes that the arguments raised have been rejected by the Eleventh Circuit in *Outler*, 485 F.3d 1273. Nonetheless, Petitioner maintains that *Outler* was wrongly decided. (*Id.* at 5). In *Outler,* the Eleventh Circuit found that the recharacterization of a defendant's criminal pleading, filed pursuant to Fed. R. Crim. P. 33 ("Rule 33 Motion"), was "not the type of impediment contemplated by § 2255 ¶ 6(2)." *See Outler*, 485 F.3d at 1279. In so ruling, the Eleventh Circuit found that the district court's recharacterization "was, at worst, a misguided attempt to assist an unschooled *pro se* litigant." *Id.* at 1280.

The Eleventh Circuit also rejected Outler's argument that the change of law effected by *Castro* warranted equitable tolling because the court mischaracterized his Rule 33 Motion. *Id.* at 1281. The petitioner in *Outler* did not alert the district or appellate court at any time prior to the expiration of the statute of limitations that he had other claims he intended to raise in a § 2255 motion and did not identify any such additional claims. *Id*. Here, too, it is undisputed that Petitioner made no effort to contest the 1988 recharacterization until the objections to a report filed in this case in 2016 and the appeal before the Eleventh Circuit, Case no. 16-10683. But concerns arising from

recharacterization of a pleading to a § 2254 motion existed pre-AEDPA. *See Porter v. Singletary,* 49 F.3d 1483, 1485 (11th Cir. 1995) (per curiam) (affirming in part denial of successive petition under "successive writ/abuse of the writ doctrine"); *Burger v. Zant,* 984 F.2d 1129, 1135 (11th Cir. 1993) (per curiam) (accord). Petitioner could have presented his claims in any of the numerous filings recounted by this Court and the circuit court and did not do so. In fact, both parties do not dispute that, in 1992, Petitioner filed three habeas corpus petitions attacking each of the state court convictions here (case nos. 92-1693, 92-1694, and 92-1695), all of which were dismissed as unauthorized successive filings because of the 1988 prior adjudication on the merits of Petitioner's federal habeas corpus petition. (DE 15); *Ponton v. Morphonious,* 891 F.3d 950, 951-52 (11th Cir. 2018). Petitioner could have challenged, but didn't, the recharacterization of his 1988 proceeding during any of the 1992 filings; pre-*Castro* decisions afforded Petitioner the opportunity to do so. *See Porter,* 49 F.3d at 1485. Like the petitioner in *Outler,* any attempt to justify equitable tolling because of the court's recharacterization in 1988 and the habeas cases that followed—affirmed by the Eleventh Circuit—does not warrant tolling of the limitations period. *See Outler,* 485 F.3d at 1284.

2. Physical and Mental Health Difficulties

Respondent contends that Petitioner has not demonstrated that he was suffering from mental health issues during any of the lengthy gaps of untolled time during which no post-conviction proceedings were pending in the state courts post-*Castro*. Further, he has failed to establish a causal connected between his mental conditions and his inability to timely file this federal habeas petition. (DE 46 at 45–51). In response, Petitioner maintains "physical and mental health difficulties" justify equitable tolling of the limitations period. (*Id.* at 6).

Petitioner provides no particular information regarding what physical infirmities justify equitable tolling. For example, the Eleventh Circuit has made clear that hospitalizations, confinement to a wheelchair, limited access to a law library, and transfer are not extraordinary circumstances unless there is a causal connection between the incapacity and the delay in filing. *Echemendia v. United States,* 710 F. App'x 823, 827 (11th Cir. 2017) (per curiam) (finding Plaintiff had not met his burden of showing extraordinary circumstances to warrant equitable tolling where he was not confined to the hospital or a wheelchair for the entire time claimed warranted tolling, finding the impediments occurred at the beginning of the limitations period). Here, Petitioner has not provided any information regarding what physical infirmities would justify equitable tolling during any of the large gaps of time during which no state court proceedings were pending.

Next, Petitioner alleges equitable tolling is warranted because of his mental health, as he was undergoing psychiatric treatment and taking anti-psychotic medication while in Florida Department of Corrections ("FDOC") custody.[13] (DE 55 at 7). Petitioner has attached to his reply a few documents he maintains are relevant to his mental illness. (DE 55). Specifically, in a February 1996 Inmate Request, Petitioner inquired why he was prescribed medications which he asserted were "to[o] much" for him. (DE 55-1 at 1). Petitioner also requested a medical evaluation because he was hearing voices. (*Id.*). On February 24, 1996, Petitioner was informed that he was placed on "stronger medications" because he had attempted suicide twice and was hearing voices. (*Id.*). Petitioner asserts

[13] Petitioner maintains that, in July 2020 counsel requested, but had not received, Petitioner's mental health records from FDOC. (DE 55 at 6). As of the filing of this Order, Petitioner has not provided the Court with sufficient mental health records to support his allegations.

that the antipsychotic medications "were indeed 'too much,' and he was mentally unable to litigate his case until nearly a year later, when, on April 11, 1997, he filed a *pro se* petition for writ of habeas corpus in the Third District Court of Appeal." (DE 55 at 8). Petitioner maintains that notwithstanding "moments of clarity," his mental illness continued "unabated." (*Id.*). But Petitioner does not explain when or for how long these "moments of clarity" lasted following the April 1997 filing of his habeas petition. His allegations that his medical illness continued "unabated," especially during the critical two-year gap from May 1997 to October 1999, is insufficient to warrant equitable tolling.

Petitioner points to the fact that he was transferred on September 18, 2002 from Everglades CI to South Florida Reception Center because of his mental health issues, at which time he was prescribed "Thorazine for schizophrenia, Dalmane and Restoril because he was hearing voices, and Mellaril for hallucinations." (*Id.*). He was returned to FDOC custody on February 16, 2003. (*Id.*). On June 23, 2005, Petitioner made an Inmate Request where he again inquired as to the medications he was being given and when he would be discharged. (*Id.*; DE 55-3 at 1). B. Blocker ("Blocker") responded on June 28, 2005 that Dr. Bhat, the "CSU Psychiatrist," would determine when Petitioner could be discharged because it was a mental health issue. (DE 55-3 at 1). Blocker further stated that upon discharge, the Central Office in Tallahassee would be notified so that Petitioner could be transferred. (*Id.*).

"[M]ental impairment is not *per se* a reason to toll a statute of limitations." *Hunter v. Ferrell,* 587 F.3d 1304, 1308 (11th Cir. 2009) (per curiam). To warrant tolling on that basis, the alleged mental impairment must have affected a petitioner's ability to file a timely habeas petition. *Id.*; *Lawrence v. Fla.,* 421 F.3d 1221, 1226−27 (11th Cir. 2005), *aff'd,* 549 U.S. 327 (2007). In *Lawrence,* the United States Supreme Court concluded

that a petitioner's allegations that his full-scale IQ was 81 and that he had "suffered from mental impairments his entire life" alone were insufficient to justify equitable tolling because they did not establish a "causal connection between his alleged mental incapacity and his ability to file a timely petition." *Lawrence*, 421 F.3d at 1226−27.

In this case, although Petitioner suggests that his mental health issues prevented him from timely filing this federal habeas petition, he has not "establish[ed] a causal connection between" the alleged mental health infirmities "and his ability to file a timely petition." *Id.* at 1227; *see also Spears v. Warden*, 605 F. App'x 900, 905 (11th Cir. 2015) (per curiam) ("[T]he record indicates that Spears has some history of mental-health issues and medication, but, as in *Lawrence*, Spears has not explained how his mental-health issues or medication, apart from the drug-induced prison transfers, affected his ability to file a timely petition."); *Bilbrey v. Douglas*, 124 F. App'x 971, 973 (6th Cir. 2005) (per curiam) (equitable tolling not applicable because petitioner "failed to establish a causal connection between her mental condition and her ability to file a timely petition"); *Green v. Hinsley*, 116 F. App'x 749, 751 (7th Cir. 2004) (equitable tolling did not apply because petitioner failed to submit evidence of how his low IQ would render him incompetent or prevent him from timely filing his petition). Indeed, Petitioner has not demonstrated that his lifetime of mental health issues prevented him from timely filing this federal proceeding and does not advance (nor allege) any evidence from June 2005 until the filing of this federal petition that would support his argument for equitable tolling on this basis. Alleging generally that he was given medication while in FDOC custody, without a causal connection to his inability to file a timely motion in this proceeding, is insufficient to establish equitable tolling. *See Lawrence,* 421 F.3d at 1227. Accordingly, the Court does not find that Petitioner has established entitlement to equitable tolling of the limitations

period, and the Court's finding that Petitioner's claims are time barred remains unchanged.

3. Exercise of Due Diligence

Further, to the extent Petitioner asserts he is entitled to equitable tolling on the basis that he was unfamiliar with the federal rules governing the filing of federal habeas corpus petitions at the time he filed this or his prior habeas petitions, the Eleventh Circuit has made clear that "a lack of a legal education and related confusion or ignorance about the law" does not justify equitable tolling of the federal limitations period. *See Perez v. Fla.*, 519 F. App'x 995, 997 (11th Cir. 2013) (per curiam) (citing *Rivers v. United States,* 416 F.3d 1319, 1323 (11th Cir. 2005) (per curiam) (stating in the context of a 28 U.S.C. § 2255 proceeding that lack of an education was not excuse for delayed efforts to vacate a state conviction)). Like any other litigant, a *pro se* litigant is "deemed to know of the one-year statute of limitations." *Id.* (quoting *Outler*, 485 F.3d at 1282 n.4.). Thus, equitable tolling on this basis is not warranted.

IV. CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his § 2254 habeas corpus petition has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability. *See Harbison v. Bell*, 556 U.S. 180, 183 (2009) (citing *Slack v. McDaniel*, 529 U.S. 473, 484−85 (2000); *Wilkinson v. Dotson*, 544 U.S. 74, 78−83 (2005)). When a district court rejects Petitioner's constitutional claims on the merits, Petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack*, 529 U.S. at 484. However, when the district court rejects a claim on procedural grounds, Petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim

of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Upon consideration of the record, the Court finds that no certificate of appealability shall issue.

V. CONCLUSION

Based upon the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Petitioner's § 2254 Amended Petition (DE 36) is **DISMISSED**.
2. Judgment in favor of the Respondent will be entered separately in accordance with Fed. R. Civ. P. 58(a);
3. A Certificate of Appealability is **DENIED;** and,
4. All pending motions are **DENIED AS MOOT**.
5. This case is **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of September, 2021.

cc:
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APPENDIX - TIMELINE OF STATE FILINGS

Date(s)	Action	Tolling
April 24, 1996	Enactment of AEDPA	
April 24, 1996 - April 23, 1997	One-year AEDPA grace period established	
April 11, 1997 - May 15, 1997 (DE 47 at 1263−67)[14]	State habeas corpus petition filed. Trial court's denial affirmed on appeal. Rehearing denied on May 15, 1997	Limitations period tolled
Over 24-Month Gap[15]		
October 12, 1999 - September 27, 2000 (*Id.* at 1268−1317)	Petitioner filed a state habeas corpus petition denied by the trial court on October 25, 1999. Appeal dismissed on September 27, 2000	Limitations period tolled.
March 6, 2000 - September 13, 2000 (*Id.* at 1318−69)	Petitioner filed an appellate state habeas corpus petition and motion to supplement which were denied without written opinion. Rehearing was denied on September 13, 2000.	Limitations period tolled
Over 3-Month Gap		
December 21, 2000 - September 14, 2001 (*Id.* at 1370−80)	Petitioner filed motion to correct illegal sentence. Trial court denied motion, and denial affirmed on appeal. Rehearing denied and mandate issued on September 14, 2001.	Limitations period tolled
April 25, 2001 - June 18, 2001 (*Id.* at 1381−1401)	Petitioner filed habeas corpus petition with the Florida Supreme Court that was transferred to the Third District Court of Appeal. On June 18, 2001, the petition was denied.	Limitations period tolled
April 24, 2001 - February 28, 2003 (*Id.* at 1402−1668)	Petitioner filed a motion to reopen and/or petition for writ of error coram nobis with the trial court. The trial court's order denying relief was affirmed on appeal on October 16, 2002. After Petitioner's motion for rehearing and for clarification were denied, the mandate issued on February 28, 2003.	Limitations period tolled

[14] The page numbers reference in the Appendix correspond to the Respondent's Bates Stamp located on the bottom of its Appendix. *See* (DE 47).

[15] This period (and the foregoing gap periods) represents the amount of time during which no post-conviction proceedings were pending, which would serve to stop the federal limitations period from expiring.

Over 11-Month Gap		
February 23, 2004 - August 25, 2004 (*Id.* at 1669−71)	Petition for writ of Mandamus filed with the Florida Supreme Court. After its denial, rehearing was denied on August 25, 2004.	The parties do not dispute that this filing did not statutorily toll limitations period.[16]
Additional 23-Month Gap		
July 8, 2006 - September 17, 2008 (*Id.* at 1672−92)	Petitioner filed motion for DNA testing. The trial court's denial was affirmed on appeal, and the mandate issued on June 16, 2008. The Florida Supreme Court denied review on September 17, 2008	Limitations period not tolled. *See Brown*, 530 F.3d at 1337.
Over 42-Month Gap		
August 4, 2011 - October 28, 2011 (*Id.* at 1936−61)	Petitioner filed state habeas petition with the appellate court. After denial of the petition, rehearing was denied on October 18, 2011. Discretionary review was denied on October 28, 2011	Limitations period not tolled.
Over 14-Month Gap		
January 24, 2013 - May 30, 2013 (*Id.* at 1961A−1961P)	Petitioner filed motion for post-conviction relief. On April 30, 2013 trial court denied it as unauthorized, frivolous, and successive. No appeal filed. Proceeding concluded when time to appeal expired 30 days later.	Limitations period not tolled.
December 6, 2013 - June 18, 2015 (*Id.* at 1962−2036)	Petitioner filed Fla. Supreme Court mandamus petition which was transferred to Third District Court of Appeal, then denied. Discretionary review denied on June 18, 2015.	Limitations period not tolled.
Over 6-Month Gap		
December 31, 2015	Initial *pro se* § 2254 Petition filed here.	
December 12, 2019	Counsel Amendment filed	

[16] No copy of the mandamus petition could be provided. The parties do not dispute that Petitioner is not entitled to statutory tolling. Thus, if the petition did not request judicial review of Petitioner's criminal judgments, but instead requested an order from the court directing another court to perform some function, then it is not a proper application for "collateral review" within the meaning of § 2244(d)(2) and does not statutorily toll the limitations period. *See Wall v. Kholi*, 562 U.S. 545, 556 n.4 (2011) (distinguishing a motion to reduce sentence from "a motion for post-conviction discovery or a motion for appointment of counsel, which generally are not direct requests for judicial review of a judgment and do not provide a state court with authority to order relief from a judgment."); *see also Brown v. Sec'y for Dep't of Corr.*, 530 F.3d 1335, 1337 (11th Cir. 2008) (holding that a postconviction motion for DNA testing is not an application for collateral review within the meaning of § 2244(d)(2)); *Moore v. Cain*, 298 F.3d 361, 366−67 (5th Cir. 2002) (concluding that because a mandamus petition does not seek review of a criminal judgment, it does not toll time under § 2244(d)(2)).

A-3

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-10683

D.C. Docket No. 1:16-cv-20059-KMW

ALFONSO PONTON,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

(June 4, 2018)

Before ED CARNES, Chief Judge, MARCUS, Circuit Judge, and ROSS,[*] District Judge.

ED CARNES, Chief Judge:

[*] Honorable Eleanor Louise Ross, United States District Judge for the Northern District of Georgia, sitting by designation.

This case involves the effect of a Castro error in an earlier federal habeas proceeding on whether a later habeas petition is to be treated as second or successive for purposes of 28 U.S.C. § 2244(b). See Castro v. United States, 540 U.S. 375, 124 S. Ct. 786 (2003).

I. FACTS AND PROCEDURAL HISTORY

Alfonso Ponton was charged in 1982 in Florida state court in three separate criminal cases on a total of 12 counts of robbery, 3 counts of armed robbery, 1 count of aggravated assault with a firearm, and 3 counts of aggravated battery. Juries found him guilty on nearly all of those counts, and he was sentenced to 65 years imprisonment in the first case, 730 years in the second, and 402 years in the third. The state appellate court affirmed his convictions and, with one minor exception not relevant here, affirmed his sentences in all three cases. See Ponton v. State, 436 So. 2d 117 (Table) (Fla. 3d DCA 1983); Ponton v. State, 436 So. 2d 364 (Fla. 3d DCA 1983); Ponton v. State, 434 So. 2d 347 (Fla. 3d DCA 1983).

After those convictions became final, Ponton launched a barrage of pro se post-conviction pleadings in state and federal court. He has filed at least 40 post-conviction motions and petitions in state court alone. See Ponton v. State, 155 So. 3d 425, 425 (Fla. 2014). Beginning in 1984, he filed his first of over a dozen pro se pleadings in federal district court. His first four federal pleadings — a mixed

habeas corpus petition and civil rights action filed in 1984, a civil rights action filed that same year, a 28 U.S.C. § 2254 petition filed in 1986, and another civil rights action filed in 1986 — were all dismissed without prejudice.

Ponton's fifth federal pleading, which he filed in 1988, is the one that matters in this case. He alleged that the judge and other individuals involved in his trials conspired against him so that he could not assist in his own defense and that his attorneys provided ineffective assistance of counsel. The district court dismissed his complaint as a mixed § 2254 petition containing exhausted and unexhausted habeas claims.[1] Ponton appealed, and we reversed because it appeared that he may have exhausted all of his claims. Ponton v. Morphonios, No. 88-5534 (11th Cir. Mar. 24, 1989) (unpublished).

On remand the State conceded that he had exhausted his ineffective assistance claim. Ponton withdrew his other claims, asked the district court to proceed on his ineffective assistance claim, and filed an amended complaint. The docket sheet indicated his amended complaint had been classified as a petition for a writ of habeas corpus. Nothing in the record indicates that the court notified him of that recharacterization or warned him that it could limit future federal habeas filings. The court dismissed his petition on the merits, Ponton appealed, and we

[1] The Supreme Court has held that district courts "must dismiss [ ] 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." Rose v. Lundy, 455 U.S. 509, 510, 102 S. Ct. 1198, 1199 (1982).

affirmed. Ponton v. Morphonios, No. 90-5592 (11th Cir. June 28, 1991) (unpublished).

After that 1988 filing, Ponton filed three § 2254 petitions in 1992. Those petitions were dismissed as successive because his 1988 petition had been denied on the merits. After a twelve-year hiatus, he filed three more § 2254 petitions in 2004, 2009, and 2013. They were dismissed as unauthorized second or successive petitions because he did not receive permission from this Court to file them. See 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."); see also In re Bradford, 830 F.3d 1273, 1277 (11th Cir. 2016) ("[W]hen a petitioner fails to seek permission from the court of appeals to file a second or successive petition, the district court lacks jurisdiction to consider it.").

Undeterred, Ponton filed yet another § 2254 petition in 2016. Before the State filed its response, the district court — once again — dismissed that petition as an unauthorized second or successive petition because Ponton failed to obtain permission from this Court to file it. This is his appeal.[2]

[2] Ponton proceeded pro se in the district court, but we appointed counsel to represent him in this appeal.

II. STANDARD OF REVIEW

"We review de novo whether a petition for a writ of habeas corpus is second or successive." Patterson v. Sec'y, Fla. Dep't of Corr., 849 F.3d 1321, 1324 (11th Cir. 2017) (en banc).

III. DISCUSSION

Ponton contends that the district court erred in dismissing his 2016 petition as an unauthorized second or successive petition because, in light of the Supreme Court's Castro decision, his 1988 petition does not count as a first petition.

In Castro the Supreme Court addressed the "longstanding practice" in which courts "sometimes treat[ ] as a request for habeas relief under 28 U.S.C. § 2255 a [pleading] that a pro se federal prisoner has labeled differently." 540 U.S. at 377, 124 S. Ct. at 789. Although courts often recharacterize pro se pleadings to help prisoners (for example, to avoid dismissal), id. at 381, 124 S. Ct. at 791, recharacterization "can have serious consequences for the prisoner" by subjecting him to "the restrictive conditions that federal law imposes upon a 'second or successive' . . . federal habeas motion," id. at 377, 124 S. Ct. at 789.

To ensure that litigants are aware of those consequences, Castro held that when district courts recharacterize a pro se litigant's pleading as a first § 2255 motion, the court must (1) notify the litigant "that it intends to recharacterize the pleading," (2) "warn the litigant that this recharacterization means that any

subsequent § 2255 motion will be subject to the restrictions on 'second or successive' motions," and (3) give the litigant "an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has." Id. at 383, 124 S. Ct. at 792. If the district court does not give the notification and warning, "the motion cannot be considered to have become a § 2255 motion for purposes of applying to later motions the law's 'second or successive' restrictions." Id.

There is no reason to believe that the district court notified Ponton when it recharacterized his 1988 pleading as a § 2254 petition and warned him that he could face restrictions on any future federal habeas petitions.[3] According to Ponton, that failure means that his 1988 petition does not count as a first petition under Castro, which means that he should be allowed to file his 2016 petition.[4]

[3] Although the Castro decision involved only pleadings recharacterized as § 2255 motions, its premise is that recharacterization can harm litigants because any later § 2255 motion is subject to restrictive conditions on second or successive motions. 540 U.S. at 377, 124 S. Ct. at 789. That same principle applies where a litigant's pleading is recharacterized as a § 2254 petition. See 28 U.S.C. § 2244(b) (restrictions on second or successive petitions). As a result, the Castro notice-and-warning requirement applies to pleadings recharacterized as § 2254 petitions. See Martin v. Overton, 391 F.3d 710, 713 (6th Cir. 2004) (concluding that the Castro notice-and-warning requirement applies to "petitions recharacterized as § 2254 petitions"); see also Yellowbear v. Wyo. Att'y Gen., 525 F.3d 921, 924–25 (10th Cir. 2008) (same); Cook v. N.Y. State Div. of Parole, 321 F.3d 274, 277–78, 282 (2d Cir. 2003) (same).

[4] The State also argues that Ponton waived his Castro argument by failing to raise it in the district court, but that argument fails. Because Ponton proceeded pro se in the district court, we liberally construe his filings in that court. See Figuereo–Sanchez v. United States, 678 F.3d 1203, 1207 (11th Cir. 2012). Ponton argued in the district court that he should have received a warning before his pleading was recharacterized, which is enough to preserve the argument for appeal.

The State argues that the Castro notice-and-warning requirement does not apply to pleadings that were filed before that decision was issued in 2003, and as a result Ponton's 1988 petition still counts as a first petition for second or successive purposes.

The State is wrong. The Castro notice-and-warning requirement applies to pre-Castro petitions because that is what the Supreme Court did in Castro itself, and Ponton's situation is no different than Castro's. See Griffith v. Kentucky, 479 U.S. 314, 323, 107 S. Ct. 708, 713 (1987) (noting the principle that "similarly situated defendants" must be treated the same). Castro's first pleading (filed in 1994) was recharacterized without notice as a § 2255 motion and denied on the merits, his second § 2255 motion was dismissed as an unauthorized second or successive motion, and the Supreme Court held that the first pleading could not count as a first § 2255 motion for second or successive purposes. Castro, 540 U.S. at 377–79, 383–84, 124 S. Ct. at 789–90, 793.

That is the same situation Ponton is in: His 1988 pre-Castro pleading was recharacterized without warning and denied on the merits, his current 2016 petition was dismissed as an unauthorized second or successive petition based on that 1988 denial, and he argues that his 1988 pleading does not count as a first petition.[5] Just

[5] The dismissal as second or successive of the six § 2254 petitions Ponton filed between 1988 and 2016 does not change the analysis because those petitions could not render his 2016 petition second or successive. See Boyd v. United States, 754 F.3d 1298, 1302 (11th Cir. 2014)

as the Supreme Court applied the notice-and-warning requirement to Castro's 1994 pleading, we must apply the notice-and-warning requirement to Ponton's 1988 pleading. See Griffith, 479 U.S. at 323, 107 S. Ct. at 713; see also Powell v. Nevada, 511 U.S. 79, 84, 114 S. Ct. 1280, 1283 (1994) ("[S]elective application of new rules violates the principle of treating similarly situated defendants the same.") (quotation marks omitted).[6] As a result, we hold that a pre-Castro pleading that is recharacterized as a § 2254 petition without the required notice or warning does not count as a first petition for second or successive purposes.[7] See United States v. Blackstock, 513 F.3d 128, 133, 135 (4th Cir. 2008) (holding that a

("[A] motion that is dismissed as second or successive cannot render a later motion second or successive.").

[6] The Supreme Court also formulated the Castro notice-and-warning requirement under its "supervisory powers over the Federal Judiciary" and stated that its "supervisory power determinations normally apply, like other judicial decisions, retroactively . . . ." 540 U.S. at 382–83, 124 S. Ct. at 792 (quotation marks omitted). Although it limited that statement to Castro, id. at 383, 124 S. Ct. at 792, we have recognized that the "Supreme Court has the power to supervise lower federal courts through special statements that go beyond the holding of a case," Santamorena v. Ga. Military Coll., 147 F.3d 1337, 1343 n.14 (11th Cir. 1998).

[7] The State asserts that Ponton's pre-1988 petitions mean that his 1988 petition counts as a successive filing for which a Castro warning is not required. See United States v. Lloyd, 398 F.3d 978, 980 (7th Cir. 2005) ("Castro's warn-and-allow-withdrawal approach does not apply [to successive petitions]."). That argument fails because those pre-1988 petitions were dismissed without prejudice, so his 1988 petition was not a successive filing. See Dunn v. Singletary, 168 F.3d 440, 441 (11th Cir. 1999) ("When an earlier habeas corpus petition was dismissed without prejudice, a later petition is not 'second or successive' for purposes of § 2244(b)."). And the State's assertion that the recharacterization of the 1988 pleading was essentially harmless — because Ponton's pre-1988 pleadings had been recharacterized so he must have known the consequences of recharacterization — fails because there is no harmless error exception to Castro. See Figuereo–Sanchez, 678 F.3d at 1206 (stating that we have "interpreted the rule in Castro to be categorical and mandatory") (quotation marks omitted); see also Castro, 540 U.S. at 384, 124 S. Ct. at 793 (noting how the "lack of warning prevents [the litigant from] making an informed judgment" about the consequences of recharacterization) (quotation marks omitted).

pre-Castro motion did not count as a first § 2255 motion because the litigant did not receive the required notice and warning).

IV. CONCLUSION

Because Ponton's 1988 petition was recharacterized without the required notice and warning, the district court erred in dismissing his 2016 petition as an unauthorized second or successive petition.[8]

VACATED AND REMANDED.

[8] Ponton was convicted before the Antiterrorism and Effective Death Penalty Act went into effect, so he had until April 23, 1997, to file his § 2254 petition. See Wilcox v. Fla. Dep't of Corr., 158 F.3d 1209, 1211 (11th Cir. 1998). The district court never addressed the timeliness of Ponton's 2016 petition, which was dismissed before the State could file a response, and we express no opinion on that issue. See Nyland v. Moore, 216 F.3d 1264, 1266 (11th Cir. 2000) ("When reviewing the district court's denial of a habeas petition . . . [i]f there is an issue that the . . . court did not decide in the first instance, it is not properly before this Court and we remand for the district court's consideration.") (citations omitted).