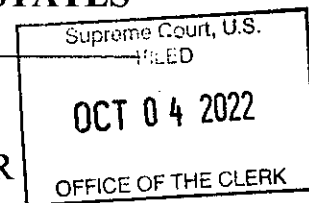


No: **22-5844**

**IN THE
SUPREME COURT OF THE UNITED STATES**

BENJEE NICOLAS - PETITIONER
(Your Name)



vs.

STATE OF FLORIDA - RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT

(Name of Court that last Ruled on Merits of Your Case)

APPENDIX

PETITION FOR WRIT OF CERTIORARI

Benjee Nicolas
(Your Name)

3420 N.E. 168th Street
(Address)

Okeechobee, FL, 34972-4824
(City, State, Zip Code)

N/A
(Phone Number)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13827-E

BENJEE NICOLAS,

Petitioner-Appellant,

versus

STATE OF FLORIDA,

Respondent-Appellee.

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

ORDER:

Benjee Nicolas's motion for a certificate of appealability is DENIED because he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Andrew L. Brasher
UNITED STATES CIRCUIT JUDGE

21-13827

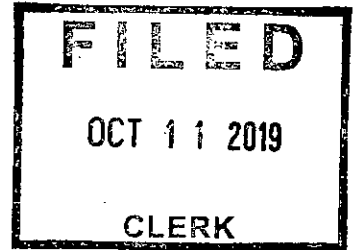
Benjee Nicolas
#M56808
Okeechobee CI - Inmate Legal Mail
3420 NE 168TH ST
OKEECHOBEE, FL 34972

APPENDIX “B”

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

STATE OF FLORIDA,
Plaintiff,
vs.

Case No. F02-6923C
Section No. F001
Judge L. SIMON



BENJEE NICOLAS,
Defendant

ORDER DENYING MOTION FOR POST CONVICTION RELIEF FILED 09/23/19

THIS CAUSE having come before this Court on the defendant's Motion for Post-Conviction Relief filed 09/23/19, and this Court having reviewed the motion, the State's response thereto, the court files and records in this case, and being otherwise fully advised in the premises therein, hereby denies the defendant's Motion on the following grounds:

Defendant has filed a motion for post-conviction relief pursuant to rule 3.850 alleging ineffective assistance of counsel. Specifically, he claims that his trial counsel was ineffective for failing to seek disqualification of the trial judge. The defendant's judgment and sentence became final in 2009. See Nicolas v. State, 2 So.3d 1123 (Fla. 3d DCA 2009). The current motion is therefore time-barred.

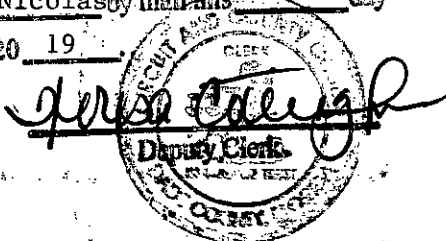
The defendant is hereby notified that he has the right to appeal this order to the District Court of Appeal of Florida, Third District within thirty (30) days of the signing and filing of this order.

DONE AND ORDERED at Miami, Miami-Dade County, Florida, this the 11
day of October 2019.

LOURDES SIMON
CIRCUIT JUDGE

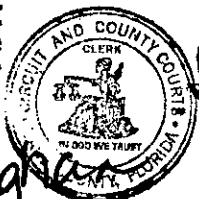
Attachments:
Defendant's Motion
State's Response

I CERTIFY that a copy of this order has been furnished to
the MOVANT, Benjee Nicolas by mail this 22nd day
of October, 20 19.



STATE OF FLORIDA, COUNTY OF DADE
I HEREBY CERTIFY that the foregoing is a true
and correct copy of the original on file in this office
OCT 22 2019

HARVEY RUVIN, CLERK of Circuit and County Courts
Deputy Clerk Harvey Ruvins



APPENDIX “C”

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:20-21087-cv-UU

BENJEE NICOLAS,

Petitioner,

v.

MARK S. INCH,

Respondent.

ORDER DISMISSING PETITION

THIS CAUSE is before the Court upon Petitioner Benjee Nicolas's *pro se* Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus. D.E. 3 ("Petition").

THE COURT has considered the Petition and is otherwise fully advised in the premises. For the reasons discussed below, the Petition is DISMISSED AS UNTIMELY.

BACKGROUND

On October 3, 2006, a jury found Petitioner guilty of first degree murder with a firearm in violation of Fla. Stat. §§ 782.04(1), 775.087, and 777.011, and of robbery with a firearm in violation of Fla. Stat. §§ 812.13(2)(a), 775.087, and 777.011. D.E. 10, App. F. As a result, the state trial court entered judgment and sentenced Petitioner to life imprisonment. D.E. 10, App. G.

Subsequently, on February 25, 2009, Petitioner's conviction was affirmed by Florida's Third District Court of Appeal ("Third DCA") in a *per curiam* decision without a written opinion. *Nicolas v. State*, 3 So. 3d 1123 (Fla. Dist. Ct. App. 2009). Petitioner then filed a petition for a writ of mandamus in the state trial court on September 2, 2009. D.E. 10, App. I. Petitioner appealed the trial court's denial of that petition and the Third DCA dismissed the appeal on August 2, 2010. *Nicolas v. State*, 42 So. 3d 243 (Fla. Dist. Ct. App. 2010). Meanwhile, Petitioner also filed a

petition for writ of habeas corpus in the state trial court on November 6, 2009. D.E. 10, App. J. The trial court denied that petition as well. *Id.* On appeal, the Third DCA affirmed the state court's decision *per curiam* and without a written opinion on April 21, 2010. *Nicolas v. State*, 36 So. 3d 679 (Fla. Dist. Ct. App. 2010).

After the Third DCA's dismissal of Petitioner's petition for a writ of mandamus on August 2, 2020, nothing pertaining to Petitioner's convictions was pending in state court for 197 days until February 15, 2011 when Petitioner filed an all writs petition in the Florida Supreme Court. *See* Case No. SC11-382. D.E. 10, App. K. On July 20, 2011, the Florida Supreme Court dismissed the all writs petition for lack of jurisdiction. *Nicolas v. State*, 67 So. 3d 1050 (Fla. 2011). On September 27, 2011, Petitioner filed a second all writs petition that the Florida Supreme Court also dismissed for lack of jurisdiction on January 23, 2012. *Nicolas v. State*, 81 So. 3d 415 (Fla. 2012).

Petitioner next sought post-conviction relief on September 17, 2019,¹ relying on Fla. R. Crim. P. 3.850 in the state trial court. D.E. 10, App. M; D.E. 12 at 7. The trial court denied the motion as time barred, *id.*, and the Third DCA affirmed the denial *per curiam* on February 5, 2020 without a written opinion. *Nicolas v. State*, 2020 WL 564162 (Fla. Dist. Ct. App. Feb. 5, 2020).

Finally, Petitioner filed both an initial and amended Petition in this Court on March 9, 2020. D.E. 1, 3.²

APPLICABLE LAW

The Antiterrorism and Effective Death Penalty Act ("AEDPA") governs petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Wilcox v. Fla. Dep't of Corr.*, 158 F.3d 1209,

¹ The state court record reflects that this petition was filed on September 23, 2019, while Petitioner asserts that it was filed on September 17, 2019. The Court will grant Petitioner a favorable inference and proceed using the date he identifies.

² 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); Fed. R. App. 4(c)(1).

1210 (11th Cir. 1998). It provides for a one-year statute of limitations on § 2254 petitions made by persons in custody pursuant to a state court judgment. 28 U.S.C. § 2244(d)(1). 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 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.

Id.

This one-year statute of limitations is tolled for “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. . . .” 28 U.S.C. § 2244(d)(2).

Equitable tolling can also apply if the statutory requirements for tolling are not met. Equitable tolling is available only when a petitioner shows both “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (internal quotation marks and citation omitted). Additionally, newly discovered evidence of “actual innocence” may permit a petitioner to overcome AEDPA’s statute of limitations. *See McQuiggin v. Perkins*, 569 U.S. 383, 388–401 (2013); *San Martin v. McNeil*, 633 F.3d 1257, 1267-68 (11th Cir. 2011).

DISCUSSION

A. Statute of Limitations Starting Point

Petitioner impermissibly permitted time to elapse on the order of years—most of it untolled—before filing the instant Petition in this Court.

As explained above, the AEDPA imposes a one-year statute of limitations on petitions by those in state custody pursuant to §2254—such as the Petition. 28 U.S.C. § 2244(d)(1). This statute of limitations runs from one of four enumerated dates. 28 U.S.C. § 2244(d)(1)(A)–(D). Petitioner does not assert, and the record does not reflect, any grounds for invoking § 2244(d)(1)(B) or § 2244(d)(1)(C)—no unconstitutional impediment or relevant new constitutional right recognized by the United States Supreme Court exists in this case.

Petitioner asserts that the statute of limitations only began running on April 22, 2019 pursuant to § 2244(d)(1)(D) because of “newly discovered evidence.” D.E. 12 at 3. This is the date that “petitioner received conformation . . . that writ of prohibition to appeal Motion to Recusal was not filed. [*sic passim.*]” *Id.* at 6. Neither this, nor anything stated in the Petition, indicates the existence of any newly discovered “vital facts” for any claim by Petitioner. *Cole v. Warden*, 768 F.3d 1150, 1155 (11th Cir. 2014); *see also Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000). Rather, the operative date for the one-year statute of limitations is under § 2244(d)(1)(A). Accordingly, the AEDPA statute of limitations began running on May 26, 2009—90 days after the Third DCA issued its decision³ affirming Petitioner’s conviction and sentence—when the period for seeking discretionary review with the United States Supreme Court expired.⁴ *See* Sup. Ct. R.

³ The Third DCA affirmed Petitioner’s conviction and sentence *per curiam* and without a written opinion on February 25, 2009. *Nicolas v. State*, 3 So. 3d 1123 (Fla. Dist. Ct. App. 2009).

⁴ Petitioner could not seek discretionary review of the Third DCA’s decision in Florida’s court of last resort because the Supreme Court of Florida does not have discretionary review jurisdiction over “a per curiam affirmance rendered without written opinion.” *Wells v. State*, 132 So. 3d 1110, 1113 (Fla. 2014).

13; *Gonzalez v. Thaler*, 565 U.S. 134 (2012). From that time, Petitioner had one year, or until May 26, 2010, to timely file a § 2254 petition. *See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008).

B. Statutory Tolling

AEDPA's statute of limitations was arguably tolled for some period after May 26, 2009 due to Petitioner's filing of a series of petitions in state court seeking post-conviction relief., but ultimately for a very small percentage of the years that passed until the filing of this Petition. Under AEDPA, the one-year statute of limitations is tolled only where post-conviction or other collateral review is pending. 28 U.S.C. § 2244(d)(2). Once the Florida Supreme Court dismissed Petitioner's second all writs petition on January 23, 2012, *Nicolas v. State*, 81 So. 3d 415 (Fla. 2012, time **ran untolled for over seven years** until Petitioner filed a motion for post-conviction relief in the state trial court on September 17, 2020, which was denied as time-barred on February 5, 2020. *Nicolas v. State*, 2020 WL 564162 (Fla. Dist. Ct. App. Feb. 5, 2020). This Petition was filed on March 9, 2020— far beyond the one-year statute of limitations.

C. Equitable Tolling and Actual Innocence

Equitable tolling does not provide any safe harbor from dismissal here, either. Petitioner does not allege, and the record does not support, that he is entitled to the rare and exceptional circumstance of equitable tolling. Petitioner has not even attempted to show that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way preventing timely filing. *Lawrence v. Florida*, 549 U.S. 327, 336 (2007); *see also Brown v. Barrow*, 512 F.3d 1304, 1307 (11th Cir. 2008) ("an inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances that are both beyond his control and unavoidable with diligence, and this high hurdle will not be easily surmounted"). Relatedly, and akin to the defect in Petitioner's assertion that § 2244(d)(1)(D) governs the starting point of AEDPA's statute of

limitations in this case, Petitioner presents no new evidence—let alone any “new reliable evidence”—to support a claim of “actual innocence.” *See Scott v. Duffy*, 372 F. App’x 61, 63-64 (11th Cir. 2010) (rejecting habeas petitioner’s actual innocence claim where no “new reliable evidence” was produced)

D. Evidentiary Hearing

Petitioner has not established the need for an evidentiary hearing. *See Chavez v. Sec’y, Fla. Dep’t of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011) (noting that the petitioner has the burden to establish the need for an evidentiary hearing). The decision to grant an evidentiary hearing “rests in the discretion of the district court.” *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007). The pertinent facts of this case are fully developed in the record before the Court. Because this Court can “adequately assess [Petitioner]’s claim without further factual development,” *Turner v. Crosby*, 339 F.3d 1247, 1275 (11th Cir. 2003), an evidentiary hearing is unnecessary.

CONCLUSION

The Petition was filed well outside AEDPA’s one-year statute of limitations, accounting for all statutory tolling. No equitable tolling is warranted, no evidence of actual innocence has been produced, and Petitioner has not established the need for an evidentiary hearing. Accordingly, it is

ORDERED AND ADJUDGED that the Petition, D.E. 3, is DISMISSED. It is further

ORDERED AND ADJUDGED that an evidentiary hearing is DENIED. It is further

ORDERED AND ADJUDGED that this case is CLOSED. No certificate of appealability shall issue. It is further

ORDERED AND ADJUDGED that Magistrate Judge Lisette M. Reid is no longer referred to this case.

DONE AND ORDERED in Chambers in Miami, Florida, this __13th__ day of August,
2020.


URSULA AGUERO
UNITED STATES DISTRICT JUDGE

cc:
U.S. Magistrate Judge Lisette M. Reid
Benjee Nicolas, *pro se*
Counsel of Record via CM/ECF

APPENDIX "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

BENJIE NICOLAS,

CASE NO. 20-21087-CIV-DIMITROULEAS

Petitioner,

vs.

MARK S. INCH, SEC'Y
FLA. DEPT. OF CORRECTIONS

Respondent.

ORDER

THIS CAUSE is before the Court on Petitioner Nicolas' *pro se* September 29, 2021 Motion for Clarification [DE-29]. The court has reviewed the court file and finds as follows:

1. On March 9, 2020, Nicolas filed a habeas petition attacking a life sentence imposed on him in state court on December 11, 2006. [DE-1-1].

– 2. On August 13, 2020, Judge Ungaro dismissed the petition as time-barred. [DE-14]. An August 26, 2020 Nicolas filed a Motion for Extension of Time to file a Motion for Reconsideration. [DE-15]. On September 2, 2020, Judge Ungaro gave Nicolas until October 1, 2020 to file his Motion for Reconsideration. [DE-16].

3. On September 9, 2020, Nicolas filed a Motion to Alter or Amend [DE-17]. On September 11, 2020, Nicolas filed an Amended Motion to Alter or Amend [DE-18]. On October 13, 2020, Judge Ungaro gave the State until November 13, 2020 to respond. Nicolas was given thirty (30) days thereafter to file a reply. [DE-19].

4. However, rather than waiting for a response and reply, on October 19, 2020, Jjudge Ungaro took judicial notice of the State's on line dockets [DE-21]. Seventy-Five (75) pages of the state docket were filed [DE-22] and mailed to Nicolas. [DE-23].

5. On October 27, 2020, Judge Ungaro denied Nicolas' Motions to Alter or Amend. [DE-24]. Although she referenced exhibits filed by the State on April 20, 2020 [DE-10], there was no mention of the State's response that had been filed on October 19, 2020. It seems clear that Judge Ungaro decided this motion without considering the State's response.

6. On November 16, 2020, Nicolas filed his reply to the state's response. [DE-25]. There is no mention in this reply of Judge Ungaro's order denying the motions to alter or amend.

7. On August 23, 2021, Nicolas filed a Notice of Consideration [DE-26]. Since Judge Ungaro had retired, the Clerk assigned the matter to the undersigned [DE-27]. On September 8, 2021, this Court entered an order denying the Notice of Consideration. [DE-28]. That order included the fact that his motions to alter or amend had been denied on October 27, 2020.

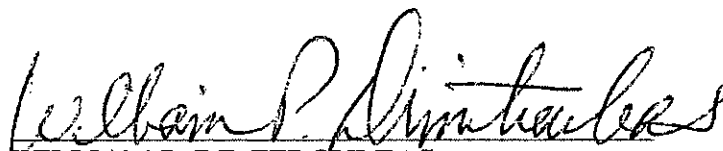
8. In the instant Motion for Clarification, Nicolas contends that he never received a copy of Judge Ungaro's order denying the motions to alter or amend. Assuming he acted with due diligence in waiting almost a year to find out that Judge Ungaro had denied his motion to alter or amend, Nicolas is still not entitled to any relief. He now claims that it took him thirteen (13) years to find out that his trial lawyer had not filed a writ of prohibition. The record conclusively refutes that allegation (Nicolas's January 27, 2010 brief) [DE-10-3, p. 40]. Now, having considered the State's response [DE-20] and Nicolas' Rely [DE-25], Judge Ungaro's prior order denying the motions to alter or amend [DE-24] is ratified. The habeas petition was time-barred. The Motions to Alter or Amend [DE-17, 18] are again Denied.

The Motion for Clarification [DE-29] is Denied, as Moot.

The court denies a Certificate of Appealability.

The Clerk shall mail a copy of this order to Mr. Nicolas.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this
6th day of October, 2021.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record

Benjie Nicolas, #M56808
Okeechobee Corr. Inst.
Inmate Mails
3420 NE 168 Street
Okeechobee FL 34972

Sandra Lipman, AAG

APPENDIX “E”

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13827-E

BENJEE NICOLAS,

Petitioner-Appellant,

versus

STATE OF FLORIDA,

Respondent-Appellee.

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

Before: JORDAN and BRASHER, Circuit Judges.

BY THE COURT:

Benjee Nicolas has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2 and 22-1(c), of this Court's April 27, 2022 order, denying a certificate of appealability. Upon review, Nicolas's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.