



APPENDIX A

11TH CIRCUIT U.S. COURT OF APPEALS DECISION OF JULY 28, 2017.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-14908-A

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JUL 28 2017

David J. Smith
Clerk

AL PRINCE,

Petitioner-Appellant,

versus

ATTORNEY GENERAL, STATE OF FLORIDA,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

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

ORDER:

Al Prince is a Florida prisoner serving a total life sentence as a prison releasee reoffender after a jury found him guilty of two counts of sexual battery and one count of battery. On February 3, 2014, Mr. Prince filed this 28 U.S.C. § 2254 petition arguing that:

- (1) counsel was ineffective in failing to move for dismissal of his charges based on a speedy-trial violation;

(2) counsel was ineffective in misadvising him to reject a plea offer;

(3) counsel was ineffective in misadvising him regarding his right to testify on his own behalf; and

(4) the court erred in sentencing him to life imprisonment.

The District Court dismissed Mr. Prince's § 2254 petition as untimely. The court also denied him a certificate of appealability ("COA") and in forma pauperis ("IFP") status on appeal. Mr. Prince then filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), which the court denied. He now moves in this Court for a COA and IFP status.

Mr. Prince also filed a motion to supplement his motion for a COA on a new ineffective assistance of counsel claim. This motion is due to be denied because this claim has not been presented to the District Court for consideration. See Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir. 1994) (providing that "an issue not raised in the district court and raised for the first time in an appeal will not be considered by this Court"). See also Ferguson v. Sec'y for Dep't of Corr., 580 F.3d 1183, 1193 (11th Cir. 2009); ("[w]e also do not consider issues or arguments raised for the first time on appeal.")

DISCUSSION:

The state court entered judgment against Mr. Prince and sentenced him on March 15, 2007. The court initially sentenced him as a habitual violent felony

offender and a prison releasee reoffender. On October 15, 2008, the First District Court of Appeals in Florida affirmed Mr. Prince's convictions and sentences, but vacated the portion of the judgment designating Prince as a habitual violent felony offender and remanded to the trial court with instructions to enter an amended judgment.

Then, on November 6, 2008, the trial court entered an order correcting Mr. Prince's sentence by striking the designation of Mr. Prince as a habitual violent felony offender. The trial court stated that all other provisions of the judgment and sentence it previously entered should remain in full force and effect and directed the clerk of court to file a corrected judgment and sentence. The clerk recorded the amended judgment and sentence on November 14, 2008. Prince did not appeal from the amended judgment and sentence.

On October 30, 2009, Prince filed pro se motion for postconviction relief under Fla. R. Crim. P. 3.850 in the state trial court. He later filed a motion for leave to file an amended Rule 3.850 motion, which the state court denied. The state court denied his motion on January 6, 2011, but on November 16, 2011, the First District Court of Appeals reversed and remanded with directions to allow Mr. Prince to amend his first claim and to consider the three claims he had raised in his proposed amended Rule 3.850 motion.

On remand, the trial court struck Mr. Prince's original Rule 3.850 motion and provided him leave to file an amended motion. Mr. Prince filed an amended Rule 3.850 motion on April 2, 2012, but the court denied it on May 16, 2012. The order denying his amended Rule 3.850 motion references the Office of the State Attorney and Mr. Prince under "copies to," but the deputy clerk's "Certificate of Service" section is blank. Mr. Prince filed this 28 U.S.C. § 2254 petition on February 3, 2014.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court has denied a § 2254 petition on procedural grounds, the movant must show that reasonable jurists would find debatable whether (1) the District Court was correct in its procedural ruling; and (2) the § 2254 petition states a valid claim of the denial of a constitutional right. Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000).

This Court review de novo the District Court's dismissal of a § 2254 petition as untimely. Pugh v. Smith, 465 F.3d 1295, 1298 (11th Cir. 2006). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations for filing a § 2254 petition. 28 U.S.C. § 2244(d)(1). This one-year limitations period begins to run from, as relevant here, the date on which the judgment became final by either the conclusion of direct review or the

expiration of the time for seeking such review. Id. The AEDPA further says the “time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward” the limitations period. Id. § 2244(d)(2). Beyond that, the statute of limitations may be equitably tolled if the petitioner shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” Holland v. Florida, 560 U.S. 631, 649, 130 S. Ct. 2549, 2562 (2010) (quotation omitted).

Mr. Prince’s § 2254 petition was untimely under § 2244(d)(1)(A). He did not file a direct appeal from his November 14, 2008 amended judgment, so his convictions became final for AEDPA purposes on December 15, 2008,¹ which started his one-year AEDPA limitations period. See 28 U.S.C. § 2244(d)(1)(A); Mederos v. United States, 218 F.3d 1252, 1253 (11th Cir. 2000) (explaining that where a criminal defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a notice of appeal expires); Fla. R. App. P. 9.140(b)(3) (stating that a defendant must file a notice of appeal within 30 days following rendition of a written order imposing sentence).

Mr. Prince’s AEDPA limitations period began to run on December 16, 2008, and ran for 318 days until Prince filed his initial Rule 3.850 motion on October 30,

¹ The 30th day fell on Sunday, December 14, 2008, so Mr. Prince had until Monday, December 15, 2008, to appeal.

2009. This motion tolled the limitations period until the trial court struck the motion on remand on March 15, 2012, which provided Mr. Prince leave to file an amended Rule 3.850 motion. The District Court concluded that once the trial court struck Mr. Prince's initial Rule 3.850 motion, there was nothing pending in the state court system. Thus, his limitations period began to run again on March 16, 2012 until he filed his amended Rule 3.850 motion 17 days later on April 2, 2012.² This motion tolled Mr. Prince's AEDPA limitations period until the trial court denied the motion on May 16, 2012, and Mr. Prince failed to timely appeal that denial within 30 days. See Fla. R. App. P. 9.140(b)(3). As a result, his AEDPA time began running again on June 16, 2012 (30 days after the trial court denied his amended Rule 3.850 motion), and expired 30 days later on July 16, 2012. Thus, because Mr. Prince filed his § 2254 petition on February 3, 2014, that petition was untimely by more than a year and a half.

Although Mr. Prince filed a petition for belated appeal of the denial of his amended Rule 3.850 motion, this petition did not toll his AEDPA time. See Espinosa v. Sec'y, Dep't of Corr., 804 F.3d 1137, 1141 (11th Cir. 2015) (explaining that filing a petition for belated appeal of an order denying state collateral relief does not toll the federal limitations period for a petition for a writ of habeas corpus). This is true even though the state court granted Mr. Prince a

² Although Prince did not challenge the calculation with regard to this untolled period, even giving Prince the benefit of those 17 days, his petition was still untimely.

belated appeal. See Moore v. Crosby, 321 F.3d 1377, 1380 (11th Cir. 2003) (explaining an out-of-time appeal “does not revive the time during which no state collateral petition was pending before the state court”). Beyond that, Mr. Prince’s February 15, 2011 Rule 3.853 motion for DNA testing did not toll the AEDPA limitations period because it was not a challenge to the conviction. Instead, it merely sought material that might help develop such a challenge. See Brown v. Sec’y for Dep’t of Corr., 530 F.3d 1335, 1337–38 (11th Cir. 2008) (concluding a Rule 3.853 proceeding was not a challenge to the conviction and therefore did not toll AEDPA’s limitations period). The remainder of Mr. Prince’s postconviction filings did not toll his AEDPA limitations period because he did not file them within the one-year limitations period. See Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000) (explaining a state-court petition filed after the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled).

Construing Mr. Prince’s reply liberally, he argued he was entitled to equitable tolling because he was prevented from filing a timely appeal of the denial of his amended Rule 3.850 motion. He says this was because he was not provided a copy of the trial court’s May 16, 2012 order denying that motion. He appeared to argue he was entitled to equitable tolling of the time that elapsed between the

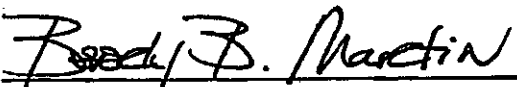
denial of his amended Rule 3.850 motion and the completion of his belated appeal on December 3, 2013.

The District Court concluded Mr. Prince did not show he was entitled to equitable tolling. The court determined he did not diligently attempt to ascertain the status of his postconviction case because he waited until January 9, 2013, more than nine months after he filed his amended Rule 3.850 motion, to file a notice of inquiry with the clerk of court about his case. In any event, the court correctly noted that even giving Mr. Prince the benefit of equitable tolling, his § 2254 petition was untimely. That's because after the December 3, 2013 mandate affirming the denial of his amended Rule 3.850 motion, Mr. Prince waited 62 days to file his § 2254 petition, which would still make it more than 30 days late.

The court also properly denied Prince's Rule 59(e) motion. The only grounds for granting a Rule 59(e) motion are newly discovered evidence and manifest errors of law or fact. Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1344 (11th Cir. 2010). A litigant cannot use a Rule 59(e) motion to relitigate old matters, raise argument, or present evidence that could have been raised prior to the entry of judgment. Id. In his Rule 59(e) motion, Mr. Prince appeared to argue that (1) counsel was ineffective in failing to inform him he could appeal from his amended judgment; and (2) the District Court failed to consider a 90-day period during which he could have sought certiorari in the United States Supreme Court

following the First District Court of Appeals' affirmance of the denial of his amended Rule 3.850 motion. However, Mr. Prince could have raised these arguments before judgment was entered against him, so he could not raise them in a Rule 59(e) motion. See id.

Because Mr. Prince did not show that reasonable jurists would find debatable the District Court's dismissal of his petition, his motion for a COA and motion to supplement his motion for a COA are DENIED. His motion for IFP status is DENIED AS MOOT.


UNITED STATES CIRCUIT JUDGE

APPENDIX B

11TH CIRCUIT U.S. COURT OF APPEALS DENIAL OF RECONSIDERATION.

APPENDIX B "

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-14908-A

AL PRINCE,

Petitioner-Appellant,

versus

ATTORNEY GENERAL, STATE OF FLORIDA,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

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

Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Al Prince has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's July 27, 2017, order denying him a certificate of appealability and leave to proceed *in forma pauperis* to appeal the denial of his underlying petition for habeas corpus relief, 28 U.S.C. § 2254. Upon review, Prince's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX C

U.S. MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION HABEAS DISMISSAL

APPEDIX C

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

2016 MAR 16 PM 12:53

CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DISTRICT

AL PRINCE,

Petitioner,

vs.

Case No. 3:14-cv-307-J-20MCR

SECRETARY, DOC, et al.,

Respondents.

ORDER

Petitioner initiated this action by filing a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Petition) (Doc. 1) and a Memorandum of Law (Doc. 2) on February 3, 2014.¹ He challenges his 2007 Duval County conviction for two counts of sexual battery and one of battery. Petition at 1.

Pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA), there is a one-year period of limitations:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant

¹ The Petition was filed with the Clerk on February 7, 2014; however, giving Petitioner the benefit of the mailbox rule, this Court finds that the Petition was filed on the date Petitioner provided his Petition to prison authorities for mailing to this Court (February 3, 2014). See Houston v. Lack, 487 U.S. 266, 276 (1988); Rule 3(d), Rules Governing Section 2254 Cases in the United States District Courts. The Court will also give Petitioner the benefit of the mailbox rule with respect to his inmate pro se state court filings when calculating the one-year limitations period under 28 U.S.C. § 2244(d).

to the judgment of a State court. The limitation 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 State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) 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 this subsection.

28 U.S.C. § 2244(d).

Respondents, in their Motion to Dismiss Petition for Writ of Habeas Corpus as Untimely (Response) (Doc. 15), contend that Petitioner has failed to comply with the limitations period. They

provided exhibits in support of their contentions. (Doc. 15).² Petitioner was given admonitions and a time frame to respond to the request to dismiss the Petition contained within the Response. See Court's Order (Doc. 10). Petitioner filed a Reply Brief (Reply) (Doc. 16).

The Court will provide a brief procedural history with respect to the claim of untimeliness. Petitioner was charged by second amended information with two counts of sexual battery, one count of armed burglary with assault or battery, aggravated battery, and grand theft auto. Ex. C at 26-27. A jury returned a verdict of not guilty as to counts three and five, guilty as to counts one and two (with findings of the use of actual physical force likely to cause serious personal injury), and guilty as to count four, the lesser included offense of battery. Id. at 75-84. On March 15, 2007, the court adjudicated Petitioner guilty as to counts one, two and four, entered judgment, and sentenced Petitioner to concurrent life terms on counts one and two, as an habitual violent felony offender and a prison releasee reoffender, and one-year in prison on count four. Id. at 125-29.

² The Court refers to the Respondents' exhibits as (Ex.). Where provided, the page numbers referenced in this opinion are the Bates stamp numbers at the bottom of each page. Otherwise, the Court will reference the page number on the particular document. The Court will reference the page numbers assigned by the electronic docketing system where applicable.

Petitioner appealed, id. at 135, Ex. F, Ex. G, and on October 15, 2008, the First District Court of Appeal affirmed per curiam the conviction and sentences, but vacated the portion of the judgment designating Petitioner as an habitual violent felony offender, and remanding to the trial court with instructions to enter an amended judgment. Ex. H. The mandate issued on October 31, 2008. Ex. I.

The trial court, on November 6, 2008, entered an Order Correcting Sentence, striking the designation of Petitioner as an habitual violent felony offender, and directing the clerk of the court to file a corrected judgment and sentence. Ex. J. The clerk recorded the amended judgment and sentence on November 14, 2008. Ex. K. Petitioner did not take a direct appeal from the amended judgment and sentence. His conviction and sentence became final upon the expiration of the time to appeal that judgment and sentence, Monday, December 15, 2008.³ Green v. Tucker, No. 3:10cv418/MCR/MD, 2011 WL 6942895, at *3 (N.D. Fla. Nov. 17, 2011) (Not Reported in F.Supp.2d) ("It is well established that when a Florida defendant does not directly appeal his conviction, his conviction becomes final thirty (30) days after rendition of the order of judgment of conviction and sentence."), report and recommendation adopted by 2012 WL 13552 (N.D. Fla. Jan. 4, 2012).

³ The thirtieth day fell on Sunday, December 14, 2008; therefore, Petitioner had until Monday, December 15, 2008 to appeal.

The statute of limitations period began to run on December 16, 2008, and ran for 318 days, until Petitioner filed a pro se Rule 3.850 post conviction motion in the circuit court on October 30, 2009. Ex. R at 1-11. This post conviction motion tolled the limitations period, through its initial appeal, until, on remand, the trial court, on March 15, 2012, struck the motion, providing Petitioner leave to file an amended Rule 3.850 motion. Ex. R; Ex. S; Ex. T; Ex. V; Ex. EE at 70-99.

Once the trial court struck the Rule 3.850 motion, there was nothing pending in the state court system and the limitations period began to run again on March 16, 2012. Green v. Tucker, 2011 WL 6942895, at *3 (finding a Rule 3.850 motion is not pending to toll the limitations period if struck by the court as insufficient). See Response at 6.⁴ It ran untolled for a period of seventeen days, until Petitioner filed his Amended Motion for Postconviction Relief on April 2, 2012. Ex. EE at 100-108. The circuit court denied the amended Rule 3.850 motion in an order filed on May 16, 2012.⁵ Id. at 109-13. Petitioner failed to file an appeal within thirty days, with the time to appeal expiring on

⁴ Although Petitioner does not challenge Respondents' calculation with regard to this asserted untolled period, see Reply at 4, the Court will later address whether the federal Petition was timely filed giving Petitioner the benefit of these seventeen days.

⁵ The order references, under "copies to", the Office of the State Attorney and Petitioner, but the deputy clerk's certificate of service is blank. Ex. EE at 113.

June 15, 2012. Thus, the one-year limitations period was tolled until June 15, 2012. At this point, there were thirty days remaining in the one-year limitations period. The limitations period began to run again on June 16, 2012, and expired thirty days later on Monday, July 16, 2012. Based on the foregoing, the Petition is untimely and due to be dismissed unless Petitioner can establish that equitable tolling of the statute of limitations is warranted.

Petitioner, in his Reply, does not contest Respondents' calculation of the passing of the one-year limitations period. Reply at 4. He does, however, contend that he is entitled to equitable tolling because he claims he was prevented from filing a timely appeal of the denial of his amended Rule 3.850 motion because he was not provided with a copy of the trial court's order filed on May 16, 2012. Id. at 6. He asserts there were extraordinary circumstances both beyond his control and unavoidable even with diligence. Id.

Before addressing the question of whether equitable tolling is warranted under the circumstances presented, there are a few matters that merit brief discussion. Petitioner's petition for belated appeal was not filed before the limitations period expired; therefore, it did not retroactively toll the time between the expiration of the time to appeal the denial of the amended Rule 3.850 motion and the permission granted to file an out-of-time post

conviction appeal. See Patrick v. McDonough, No. 4:06cv543-SPM/WCS, 2007 WL 3231740, at *9 (N.D. Fla. Oct. 29, 2007) (Not Reported in F.Supp.2d) (recognizing that if a motion for a belated appeal is filed when a petitioner still has time left on his one-year clock, it is a properly filed application pursuant to 28 U.S.C. 2244(d)(2) and tolls the limitations period while it is pending). Petitioner is "not entitled to statutory tolling for the . . . period between the date the state trial court's denial of his 3.850 motion became final and the date he filed his petition for a belated appeal of that 3.850 denial." McMillian v. Sec'y for the Dep't of Corr., 257 F. App'x 249, 253 (11th Cir. 2007) (per curiam). The Eleventh Circuit has rejected the notion that a post conviction motion is pending after the expiration of the time to file an appeal "merely because a state provides a procedure for seeking an out-of-time appeal in special circumstances or because a state court ultimately grants a petition for an out-of-time appeal." Id. Ultimately, the motion for an out-of-time appeal was granted; however, the granting of an out-of-time appeal "does not revive the time during which no state collateral petition was pending before the state court." Moore v. Crosby, 321 F.3d 1377, 1380 (11th Cir. 2003).

Also of note, Petitioner's February 15, 2011 Rule 3.853 Motion for DNA testing did not toll the AEDPA limitations period. Ex. JJ. The motion does not constitute a challenge to the underlying

conviction. Instead, it seeks material that might help in developing a challenge. See Brown v. Sec'y for the Dep't of Corr., 530 F.3d 1335, 1338 (11th Cir. 2008) (finding a Rule 3.853 proceeding involves an application for discovery, not a challenge to the conviction, and does not toll AEDPA's limitations period during its pendency); Leath v. McNeil, No. 3:07-cv-145-J-34HTS, 2008 WL 5427781, at *3 (M.D. Fla. Dec. 30, 2008) (Not Reported in F.Supp.2d) (holding a motion for DNA testing is not an application for post conviction or other collateral review for purposes of tolling under AEDPA).

Finally, the remainder of Petitioner's post conviction filings did not operate to toll the limitations period as they were filed following the expiration of the limitations period. See Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir.) (per curiam), cert. denied, 531 U.S. 991 (2000) ("Under § 2244(d)(2), even 'properly filed' state-court petitions must be 'pending' in order to toll the limitations period. A state-court petition like [Petitioner]'s that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled.").

Petitioner urges this Court to find that his untimely filing of his federal Petition should be contributed to circumstances beyond his control. Specifically, he blames his untimely filing on state court clerk error. Apparently, he is contending that he is

entitled to equitable tolling of the time that elapsed between the denial of his post conviction motion and the completion of his belated appeal. Reply at 5.

The Eleventh Circuit has concluded that: "[t]he limitations period is subject to equitable tolling." Cadet v. Fla. Dep't of Corr., 742 F.3d 473, 474 (11th Cir. 2014) (citing Holland v. Florida, 560 U.S. 631, 130 S.Ct. 2549, 2560 (2010)). In the two-pronged test for equitable tolling, a petitioner must demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing." Holland, 560 U.S. at 649 (quotation marks omitted); see Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008) (stating that equitable tolling "is a remedy that must be used sparingly"); see also Brown v. Barrow, 512 F.3d 1304, 1307 (11th Cir. 2008) (per curiam) (noting that the Eleventh Circuit "has held that an inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence") (citation omitted).

Petitioner bears the burden to show extraordinary circumstances that are both beyond his control and unavoidable with diligence, and this high hurdle is not easily surmounted. Howell v. Crosby, 415 F.3d 1250 (11th Cir. 2005), cert. denied, 546 U.S. 1108 (2006); Wade v. Battle, 379 F.3d 1254, 1265 (11th Cir. 2004)

(per curiam) (citations omitted). In this case, Petitioner has not met the burden of showing that equitable tolling is warranted.

With regard to Petitioner's contention that he is entitled to equitable tolling of the time that elapsed between the denial of his post conviction motion and the completion of his belated appeal, the Court looks to the period between May 16, 2012, the date of the denial of the Rule 3.850 motion, and December 3, 2013, the date the First District Court of Appeal issued the mandate after addressing the belated appeal of the denial of the Rule 3.850 motion. Thirty days of this period are considered to be tolled, allowing for an appeal of the denial of the Rule 3.850 motion. As such, the one-year limitations period was tolled until Monday, July 16, 2012. That leaves the period from July 17, 2012 until mandate issued on the affirmance of the denial of the amended Rule 3.850 motion on December 3, 2013 at issue.⁶ Ex. HH, Ex. II.

Upon review, the circuit court did not appoint counsel for Petitioner for his Rule 3.850 proceeding. Therefore, Petitioner was proceeding pro se at the time of his post conviction proceeding and at the conclusion of his post conviction case. Also of significance, the state court Special Master, Commissioner to the First District Court of Appeal, found the following: "[a] review of

⁶ Of import, there were only thirty days remaining in the one-year limitations period, as 335 days of the limitations had already run.

the record reveals that the May 15, 2012 Order contains an unsigned and undated certificate of service, (Ex. E), and that Petitioner was not legally represented by counsel at the time. Accordingly, the undersigned recommends the instant Petition be granted"

Ex. AA. Thereafter, the First District Court of Appeal granted a belated appeal, Ex. BB, and the mandate issued on May 30, 2013. Ex. CC.

The remaining question is whether Petitioner exercised due diligence in attempting to ascertain the status of his Rule 3.850 motion. After the First District Court of Appeal granted a belated appeal, the circuit court, in its March 15, 2012 Order Vacating Prior Order Denying Motion for Postconviction Relief, Striking Defendant's November 4, 2009 Motion, and Granting Leave to Amend, said it "will not address" Petitioner's October 18, 2010 amended motion for post conviction relief, **"until such time as Defendant timely files his amendment, or until the thirty (30) days in which to do so expires."** Ex. EE at 71 (emphasis added). In the decretal, the court vacated its order denying Petitioner's motion for post conviction relief; struck the November 4, 2009 motion; and gave Petitioner thirty days to "amend the claim in his November 4, 2009 motion for post conviction relief." Id. at 72. The deputy clerk, on March 15, 2012, completed the certificate of service, certifying that the clerk furnished a copy of the order to Petitioner.

As such, Petitioner knew that the court announced it would address either the amended motion, if timely filed, or allow thirty days to expire prior to issuing its ruling. Petitioner timely filed an Amended Motion for Postconviction Relief on April 2, 2012, pursuant to the mailbox rule (file-stamped with the clerk on April 6, 2012), Ex. EE at 100-108, and true to its word, the court promptly issued its ruling the following month on May 15, 2012. Id. at 109-13.

Petitioner failed to make any inquiries to the clerk of the court to ascertain the status of his motion until the next year, on January 9, 2013, pursuant to the mailbox rule.⁷ Ex. XX at 8a. This does not constitute an exercise of reasonable diligence. Indeed, Petitioner waited until January 9, 2013 to file a notice of inquiry with the clerk of the court. Ex. X at 8a-10a. Apparently, the clerk responded to his inquiry on January 24, 2013. Ex. 11a.

In sum, the Court is not persuaded that Petitioner diligently attempted to ascertain the status of his post conviction case. Cf. Knight v. Schofield, 292 F.3d 709, 711 (11th Cir. 2012) ("Knight was assured that the court would contact him, then demonstrated diligence in pursuing information when it did not do so.").

⁷ It is Petitioner's burden to show that he has been pursuing his rights diligently, and Petitioner has not provided any evidence that he contacted the clerk of the state circuit court to ascertain the status of his post conviction motion until nine months had passed after the filing of his April 2, 2012 amended post conviction motion.

Indeed, the Court is of the opinion that Petitioner has not shown that he is entitled to extraordinary relief. Equitable tolling is a remedy that should be used sparingly, and under these circumstances, the Court finds that Petitioner has failed to show that he exercised due diligence in attempting to ascertain the status of his amended Rule 3.850 motion.

In the alternative, even if the Court gives Petitioner the benefit of equitable tolling, the Court finds the Petition is untimely filed. After the December 3, 2013 mandate affirming the denial of his Rule 3.580 motion, Ex. II, Petitioner waited sixty-two days, until February 3, 2014, to file his federal Petition. Again, there were only thirty days remaining in the limitations period after the period of 335 days ran, as previously noted; therefore, even assuming equitable tolling of the limitations period at issue (from July 17, 2012, until mandate issued on December 3, 2013), the federal Petition would still be untimely filed. Indeed, assuming tolling, the limitations would have begun to run anew on December 4, 2013, until the thirty-day period expired on January 3, 2014, a month before the original federal Petition was filed on February 3, 2014. See Response at 11 n. 4. As a result, the Petition is untimely filed and is due to be dismissed pursuant to 28 U.S.C. § 2244(d).⁸

⁸ Assuming the seventeen days between the trial court's March 15, 2012 order striking the Rule 3.850 motion on remand and the April 2, 2012 filing of the amended Rule 3.850 motion were tolled,

Based on the record, Petitioner has not presented any justifiable reason why the dictates of the one-year limitations period should not be imposed upon him. Petitioner had ample time to exhaust state remedies and prepare and file a federal petition. Petitioner fails to demonstrate he is entitled to equitable tolling or, in the alternative, assuming equitable tolling, that he timely filed his federal Petition.⁹ Therefore, this Court will dismiss the case with prejudice pursuant to 28 U.S.C. § 2244(d).

Therefore, it is now

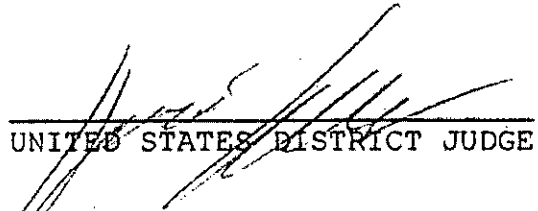
the federal Petition is still untimely filed as the one-year period would have expired in forty-seven days after the mandate issued on December 3, 2013, on Tuesday, January 21, 2014, as Monday, July 20, 2014 was a federal holiday. See Barry v. Crews, No. 5:14-cv-20-RS-EMT, 2014 WL 6909410, at *5 (N.D. Fla. Dec. 9, 2014) (holding that the petitioner's Rule 3.850 remained pending for purposes of statutory tolling even though the circuit court struck the original and amended motions, because the order striking the motions is an interim order and the court must enter a final order disposing of the post conviction motion if the petitioner does not avail himself of the opportunity to amend). Again, Petitioner did not file his federal Petition until February 3, 2014, an untimely filing giving Petitioner every benefit of a liberal analysis of tolling principles.

⁹ Petitioner summarily claims actual innocence, Reply at 1, 6, he completely fails to demonstrate that he has new evidence establishing actual innocence. In fact, Petitioner's Exhibit I attached to the Petition, the Order Denying Defendant's Motion for DNA Testing, states that "the semen collected through a vaginal swab of the victim was an exact match for Defendant." Petitioner's Exhibit I at 43e (Doc. 1-1 at 54). The order further states that the presence of Petitioner's DNA in the van is irrelevant to proving or disproving the identity of the victim's assailant in her home. Id. Petitioner's convictions are related to the attack of the victim in the home (two counts of sexual battery and battery). Ex. K. The jury found Petitioner not guilty of the remaining counts, Ex. C at 79-80, 83; therefore, those counts are no longer at issue.

ORDERED AND ADJUDGED:

1. The Petition and the case are **DISMISSED with prejudice**.
2. The **Clerk** shall enter judgment dismissing the Petition with prejudice and dismissing the case with prejudice.
3. The **Clerk** shall close the case.
4. If Petitioner appeals the dismissal of the Petition, the Court denies a certificate of appealability.¹⁰ Because this Court has determined that a certificate of appealability is not warranted, the **Clerk** shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

DONE AND ORDERED at Jacksonville, Florida, this 16th day of March, 2016.


UNITED STATES DISTRICT JUDGE

¹⁰ This Court should issue a certificate of appealability only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this substantial showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Upon due consideration, this Court will deny a certificate of appealability.

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c:
Al Prince
Counsel of Record