

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12388-D

FREDERICK WROTEN,

Petitioner-Appellant,

versus

WARDEN, STATE OF ALABAMA,

Respondents-Appellees.

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

ORDER:

Frederick Wroten moves for this Court to suspend some of its procedural rules, to allow him to file pleadings without certifying that his type-written pleadings comply with the type-volume limitations of this Court. Wroten's motion is GRANTED to the extent that this Court has reviewed and considered his pending motions.

Wroten also moves for a certificate of appealability ("COA"), in order to appeal the denial of his *pro se* 28 U.S.C. § 2241 petition for habeas corpus and the denial of his subsequent Motion to Alter or Amend the Judgment under Fed. R. Civ. P. 59(e). To merit a COA, Wroten 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, 478 (2000). Because Wroten has failed to satisfy the first prong of

Slack's test, his motion for a COA is DENIED, and his motion for leave to proceed on appeal
IFP is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12388-D

FREDERICK WROTEN,

Petitioner-Appellant,

versus

WARDEN, STATE OF ALABAMA,

Respondents-Appellees.

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

Before: WILSON and MARTIN, Circuit Judges.

BY THE COURT:

Frederick Wroten has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 1, 2017, order denying a certificate of appealability and leave to proceed on appeal *in forma pauperis* in his underlying habeas corpus petition, 28 U.S.C. § 2241. Upon review, Wroten's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appendix 3 July 21 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FREDERICK WROTEN,
AIS 260584,

Petitioner,

vs.

CIVIL ACTION NO. 16-00406-CG-C

WARDEN GORDY and
THE STATE OF ALABAMA,

Respondents.

ORDER

This matter is before the Court on Petitioner's amended motion for leave to proceed on appeal *in forma pauperis* (Doc. 27). To appeal a district court's final order in a proceeding brought under 28 U.S.C. § 2254, a petitioner must first obtain a certificate of appealability. See 28 U.S.C. § 2253(c)(1); FED. R. APP. P. 22(b). Such a certificate may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

[I]n order to make a substantial showing of the denial of a federal right a petitioner who has been denied relief in a district court "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'"

Lozada v. Deeds, 498 U.S. 430, 432 (1991) (emphasis in original) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). This Court has previously denied Petitioner's motion to appeal the denial of his 2254 petition, but he now amends both his notice of appeal and his motion to appeal IFP to include the Court's denial

of his Rule 59(e) motion to vacate the order denying his 2254 petition, as well as rehashing arguments previously made.

Primarily Wroten focuses on his argument that he does not have to prove due diligence to assert a claim of actual innocence and his contention that his claim of ineffective assistance is not barred by procedural default. Although Wroten is correct that he does not necessarily have to prove diligence to assert a claim of actual innocence, to succeed on a claim of actual innocence he "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1935 (2013) (citation omitted). However, Wroten has not presented any new evidence. He only points to evidence that was presented at trial. Thus, the evidence clearly does not support a claim that no reasonable juror would have convicted him in light of the alleged new evidence. "To overcome procedural default through a showing of actual innocence, the petitioner must present 'reliable evidence ... not presented at trial.'" *Rozzelle v. Sec'y, Florida Dep't of Corr.*, 672 F.3d 1000, 1011 (11th Cir. 2012) (citation omitted).

As to Wroten's other argument, he cites *Martinez v. Ryan*, 566 U.S. 1 (2012), in which the Supreme Court allowed review of a procedurally defaulted claim where the petitioner showed excuse for the default. *Martinez* held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). "[O]nly where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse

the prisoner from the usual sanction of default. *Martinez*, 566 U.S. at 13. However, *Martinez* does not extend to defaulted claims of ineffective assistance of appellate counsel. *Davila v. Davis*, 2017 WL 2722418 (U.S. June 26, 2017); *Dansby v. Hobbs*, 766 F.3d 809, 833 (8th Cir. 2014). Moreover, Wroten's petition was not dismissed because his claim was procedurally defaulted, but because he did not file his petition within the one-year limitation period set forth in 28 U.S.C. § 2254. *Martinez* did not create an exception to the one-year limitations period. Consequently, regardless whether Petitioner can establish an excuse from any procedurally defaulted claim under *Martinez*, he must still overcome the timing limitations set forth in 28 U.S.C. § 2244(d)(1).

As previously explained, Wroten's limitations period began to run on June 3, 2010 and expired on June 3, 2011. "Equitable tolling can be applied to prevent the application of the AEDPA's statutory deadline when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition." *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1312 (11th Cir. 2001) (citation omitted). The Court notes that "[t]he 'extraordinary circumstances' standard applied in this circuit focuses on the circumstances surrounding the late filing of the habeas petition, rather than the circumstances surrounding the underlying conviction." *Id.* at 1314–15. For equitable tolling to apply, Wroten "must show both extraordinary circumstances and due diligence." *Diaz v. Secretary for the Dept. of Corrections*, 362 F.3d 698, 700-701 (11th Cir. 2004) (citation omitted). Wroten has not done so.

For the above reasons, the Court finds that Wroten has not made a substantial showing of the denial of a constitutional right. Accordingly, the Court finds that it correctly found that a certificate of appealability should not be issued and, therefore, that Wroten is not entitled to appeal *in forma pauperis*. Petitioner's motion for leave to proceed on appeal *in forma pauperis* (Doc. 27), is hereby **DENIED**.

DONE and ORDERED this 21st day of July, 2017.

/s/ Callie V. S. Granade
SENIOR UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**FREDERICK WROTEN,
AIS 260584,**

Petitioner,

vs.

**WARDEN GORDY and
THE STATE OF ALABAMA,**

Respondents.

CIVIL ACTION NO. 16-00406-CG-C

ORDER

This matter is before the Court on petitioner's Rule 59(e) motion to vacate, set aside, and hold as naught the Court's Order adopting the report and recommendation of Magistrate Judge Cassady filed by Petitioner Frederick Wroten ("Wroten"). (Doc. 19). Wroten's motion is due to be denied for the following reasons.

Wroten maintains that the Court "erred to reversal" in not addressing his claim of ineffective assistance of Attorney Scroggins and Attorney Pigott. (Doc. 19, p. 1). He contends that the actions of these attorneys during his direct appeal constitute a substantial claim of ineffective assistance, which establishes cause excusing any procedural default that bars his 28 U.S.C. § 2241 habeas corpus petition. *Id.* at 4. The Court finds this argument barred from review.

Except in two limited circumstances, Title 28, United States Code, Section 2244(b)(2) prohibits a state prisoner from filing a second or successive habeas corpus petition. 28 U.S.C. § 2244(b)(2)(A)-(B). If one of these exceptions apply, a

state prisoner must first "obtain permission from" the Eleventh Circuit Court of Appeals before filing a second or successive petition in a district court. *In re Hill*, 715 F.3d 284, 291 (11th Cir. 2013). "Specifically, § 2244(b)(3)(A) requires a state prison seeking to file a second or successive habeas petition to move the [Eleventh Circuit] 'for an order authorizing the district court to consider the application.'" *Id.* (quoting 28 U.S.C. § 2244(b)(3)(A)).

The Court has poured over Wroten's original habeas petition but cannot find that Wroten raised this argument. The Court therefor finds this new contention to be a second or successive habeas corpus petition. Wroten failed to provide the Court with an order from the Eleventh Circuit authorizing the undersigned to consider this contention. Thus, this argument is not properly before the Court.

But even if Wroten had raised this potential claim in his original habeas petition, he would still not be due relief.¹ A motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e) is available only "when a party presents evidence of an intervening change in controlling law, the availability of new evidence, or the need to correct error or manifest injustice." *Summit Med. Ctr. of Alabama, Inc. v. Riley*, 284 F. Supp. 2d 1350, 1355 (M.D.-Ala. 2003). A motion to alter or amend based upon clear error is appropriate "when the Court has patently

¹ Pro se habeas corpus petitions are liberally construed. *Williams v. Griswald*, 743 F.2d 1533, 1542 (11th Cir. 1984). Wroten does not specifically connect his ineffective assistance of counsel claims with the actions of appellate counsel he now lambasts. But he does pepper ineffective assistance contentions throughout his original petition. Further, Wroten specifically discusses appellate counsel's actions during his state appeal proceedings. See (Doc. 8-1, p. 19). Given this, the Court alternatively addresses this claim under Wroten's reconsideration request.

misunderstood a party ... or has made a mistake, not of reasoning, but of apprehension.” *Wendy’s Int’l, Inc. v. Nu-Cape Constr., Inc.*, 169 F.R.D. 680, 684 (M.D. Fla. 1996). “A motion to reconsider is not a vehicle for rehashing arguments the Court has already rejected or for attempting to refute the basis of the Court’s earlier decision.” *Lamar Advertising of Mobile, Inc. v. City of Lakeland, Fla.*, 189 F.R.D. 480, 490 (M.D. Fla. 1999). Nor does a Rule 59(e) motion provide an opportunity to simply reargue—or argue for the first time—an issue the Court has once determined. *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). Court opinions “are not intended as mere first drafts, subject to revision and reconsideration at a litigant’s please.” *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 235 (N.D. Ill. 1988). Thus, “[t]he burden is upon the movant to establish the extraordinary circumstances supporting reconsideration.” *Mannings v. Sch. Bd. of Hillsborough Cnty.*, 149 F.R.D. 235, 235 (M.D. Fla. 1993).

As the Court previously explained, Wroten’s procedural default argument based on alleged ineffective assistance of counsel is “seemingly preemptive” and nonresponsive. (Doc. 17, p. 9). The Magistrate Judge did not rely upon a procedural default by Wroten at the state level to recommend Wroten’s habeas corpus petition be dismissed. And the undersigned did not adopt the Magistrate Judge’s Report and Recommendation and dismiss Wroten’s habeas corpus petition based on a procedural default by Wroten in his state court appeal. Instead, the Court dismissed Wroten’s petition because he failed to file his § 2241 petition within the one-year statute of limitation set forth in 28 U.S.C. § 2244(d)(1)(A). *Id.* There

was no error in not addressing a claim that had no bearing on the report and recommendation. Further, because Wroten's § 2241 petition was untimely, the Court could not even reach the issue argued of whether any alleged ineffective assistance of counsel established cause excusing a procedural default. Therefore, Wroten is not due relief under Rule 59(e) on this point.

Next, Wroten has not met his burden as it relates to demonstrating clear error, manifest injustice, or any other reason that justifies relief regarding the Court's conclusion on his "actual innocence" claim and the Court's *sua sponte* conclusion on tolling of the § 2241(d)(1)(A) one-year statute of limitation. To begin, Wroten contends that the Court wrongly found that his "actual (factual) innocence" argument is one of legal innocence (sufficiency of the evidence). (Doc. 19, p. 8). The Court finds this argument unpersuasive. Although Wroten couches his argument as one of "actual innocence" and uses these terms, Wroten misapplies this concept and merely attacks the evidence presented at trial, arguing it was not enough to sustain his conviction. In order to invoke the "actual innocence" exception that would excuse his untimely filing, Wroten must have newly discovered evidence establishing his innocence. *See McQuiggin v. Perkins*, --- U.S. ---, 133 St. Ct. 1924, 1928 (2013). Wroten does not claim to have newly discovered evidence. Wroten is not due relief under Rule 59(e) on this point.

Additionally, Wroten argues the Court should have equitably tolled the one-year statute of limitation based on his appellate counsels' actions. *See* (Doc. 19, p. 5). But this is not enough. Wroten fails to articulate his own diligent attempts to

initiate a § 2241 action during the relevant time period: June 3, 2010, through June 3, 2011. Without a diligent effort by Wroten during this time, he cannot equitably toll the statute of limitations. *See Holland v. Florida*, 560 U.S. 631, 645 (2010) (reasoning that a petitioner is entitled to equitable tolling when (1) "he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way[] and prevented timely filing"). As previously explained by the Court, the only timeline regarding efforts by Wroten that makes sense starts in April 2013. (Doc. 17, p. 8). This is almost two years after the relevant time period expired. Further, Wroten did not file his post-conviction appeal in state court until March 2015 and the instant petition until May 2016, well outside the relevant time period. Thus, the Court cannot say that its earlier conclusions were a clear error or manifest injustice forming grounds for relief under Federal Rule of Civil Procedure 59(e). Here, Wroten merely attempts to rehash those arguments already addressed by the Court. The present motion is not the appropriate vehicle by which to do so. *Lamar*, 189 F.R.D. at 490..

The Court **DISMISSES** Wroten's motion (Doc. 19) as a second and successive petition for habeas corpus, and alternatively **DENIES** the motion for failure to establish a proper basis for relief under Federal Rule of Civil Procedure 59(e).

DONE and **ORDERED** this 29th day of June, 2017.

/s/ Callie V. S. Granade
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FREDERICK WROTEN,
AIS 206584

Petitioner,

vs.

CIVIL ACTION NO. 16-00406-CG-C

WARDEN GORDY and
THE STATE OF ALABAMA,

Respondents.

JUDGMENT

In accordance with the Order separately entered this date, it is hereby
ORDERED, ADJUDGED, and DECREED that Petitioner Frederick Wroten's
request for habeas corpus relief pursuant to 28 U.S.C. § 2241 is **DISMISSED**.
Petitioner is not entitled to a certificate of appealability and, therefore, he is not
entitled to appeal *in forma pauperis*.

DONE and ORDERED this 19th day of April, 2017.

/s/ Callie V. S. Granade
SENIOR UNITED STATES DISTRICT JUDGE

P/

In reviewing a magistrate judge's report and recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous,

conclusive, or general objections need not be considered by the district court.”

United States v. Schultz, 565 F.3d 1353, 1361 (11th Cir. 2009) (per curiam) (quoting *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988)). Absent objection, the district judge “may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge,” 28 U.S.C. § 636(b)(1), and “need only satisfy itself that there is no clear error on the face of the record in order to accept that recommendation,” Fed. R. Civ. P. 72, Advisory Committee Note 1983 Addition, Subdivision (b). Further, “the district court has broad discretion in reviewing a magistrate judge’s report and recommendation” —it “does not abuse its discretion by considering an argument that was not presented to the magistrate judge” and “has discretion to decline to consider a party’s argument when that argument was not first presented to the magistrate judge.” *Williams v. McNeil*, 557 F.3d 1287, 1290–92 (11th Cir. 2009).

1. Wroten’s Objections

In *McQuiggin v. Perkins*, the Supreme Court held that actual innocence, if proved, may serve as a gateway through which a petitioner may bring an untimely federal habeas petition that might otherwise be barred based on a petitioner’s failure to comply with the one-year statute of limitation contained within 28 U.S.C. § 2244(d) of the AEDPA. --- U.S. ---, 133 S. Ct. 1924, 1928 (2013). Wroten attempts to circumvent the untimeliness of his petition by way of *McQuiggin*; additionally, the Magistrate Judge relied upon *McQuiggin* in the R & R. Applying the holding from *McQuiggin*, the Magistrate Judge concluded that Wroten could not shelter

under the actual-innocence-gateway exception and, for this and other reasons, recommended Wroten's petition dismissed. Wroten raises two objections to this conclusion. First, Wroten argues the Magistrate Judge misinterpreted *McQuiggin* by finding an actual-innocence claim proper only under newly discovered evidence. (Doc. 14, pp. 2, 4, 5). Instead, Wroten continues, *McQuiggin* "clearly [] held that newly discovered evidence is not" necessary to overcome a failure to comply with the one-year statute of limitation within 28 U.S.C. § 2244(d)(1)(A). *Id.* at 4. Therefore, the Magistrate Judge's citation to *Schlup v. Delo*, 513 U.S. 298, 327 (1995), and *San Martin v. McNeil*, 633 F.3d 1257 (11th Cir. 2011), pre-*McQuiggin* cases which require new evidence, is improper. *Id.* at 4.

The Court has reviewed *McQuiggin* and finds Wroten's objection without merit. To be sure, the *McQuiggin* Court based its decision upon three affidavits that included statements not previously presented at trial. 133 S. Ct. at 1929. In other words, the *McQuiggin* Court based its decision on *new* evidence. Furthermore, in finding the new affidavits sufficient to invoke the actual-innocence-gateway exception, the *McQuiggin* Court, interestingly enough, quoted *Schlup*. See 133 S. Ct. at 1935 ("[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.") (quoting *Schlup*, 513 U.S. at 324). This begs the question as to why the *McQuiggin* Court would rely on *Schlup*, in fact use the term "new evidence" from *Schlup*, but, as Wroten insists, not really mean that a petitioner must produce new evidence to

invoke the actual-innocence-gateway exception. Quiet simply, the Supreme Court would not. To conclude otherwise would be nonsensical, and the Court will not indulge in the legal legerdemain necessary to reach this conclusion. Moreover, since *McQuiggin* was decided, the Eleventh Circuit Court of Appeals has articulated that the actual-innocence-gateway exception requires "new reliable evidence ... that was not presented at trial." *Rozzelle v. Sec'y, Fla. Dep't of Corrs.*, 672 F.3d 1000, 1011 (11th Cir. 2012). Thus, Wroten's objection that the Magistrate Judge misapplied, misinterpreted, or overlooked the law is **OVERRULED**.

Turning to Wroten's second objection to the Magistrate Judge's actual-innocence-gateway exception recommendation, Wroten asserts that the Magistrate Judge misstated the facts of this case, which renders the recommendation erroneous. (Doc. 14, p. 5). The accurate facts, he continues, establish that he indeed satisfied the actual-innocence-gateway exception. *Id.* Two "trustworthy eyewitnesses" unequivocally testified at trial that the sexual offenses in question did not occur, which is the evidence necessary to invoke this exception. *Id.* at 4, 9. Thus, his untimeliness in bringing the present federal habeas petition is excused.

The Court has compared the facts used by the Magistrate Judge with the facts within Wroten's Petition and **DECLINES TO ADOPT** the following portion of the facts within the R & R. The Magistrate Judge reasoned that Wroten supports his actual-innocence-gateway claim with "the trial testimony of the victim—his ex-wife—as well as the trial testimony of an eyewitness [to] establish that the first-degree sexual abuse offenses never happened." (Doc. 11, p. 7) (citation omitted). A

review of Wroten's Petition shows that the ex-wife was not the victim in the state court proceeding but, instead, an eyewitness to one of the underlying offenses. (Doc. 8-1, p. 15). Additionally, the victim (presumably Wroten's step-daughter) also testified in the state court proceeding. Thus, the proper factual analysis should have read as follows: Wroten "contends that the trial testimony of [an eyewitness]—his ex-wife—as well as the trial testimony of [the victim], establish that the first-degree sexual abuse offences" never occurred.

But even making the factual corrections to the relevant analysis does not invalidate the Magistrate Judge's legal conclusion under *McQuiggin*. It is undisputed that both of Wroten's self-described "trustworthy eyewitnesses"¹ testified at trial, regardless of who is and is not the victim or eyewitness. So this is not the type of credible evidence necessary to satisfy the *McQuiggin* actual-innocence-gateway exception. Instead, no matter how Wroten tries to spin it, he simply makes a sufficiency of the evidence (legal innocence) argument. A sufficiency of the evidence argument is distinctly different from an actual-innocence argument and not enough to satisfy *McQuiggin*. Thus, Wroten's objection to the *McQuiggin* actual-innocence-gateway exception analysis in the R & R is **OVERRULED.**

¹ The Court finds Wroten's repeated use of the legal buzzwords "trustworthy eyewitness" in making his actual-innocence argument ironic. These buzzwords are not something the *McQuiggin* Court used, but the *Schlup* Court did. *See Schlup*, 513 U.S. at 324 (reasoning that an actual-innocence claim "requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial).

The Magistrate Judge also concluded that Wroten could not equitably toll the one-year statute of limitation contained within 28 U.S.C. § 2244(d)(1)(A) pursuant to *Holland v. Florida*, 560 U.S. 631 (2010). The Magistrate Judge reasoned that “Wroten’s own lack of due diligence is responsible for the untimeliness of the filing of the instate petition.” (Doc. 11, p. 14). Wroten objects to this conclusion and submits that the exhibits and “record establishes that [he] was delayed by the intentional misrepresentations” of his attorney and “misled” by the same “for a period of years.” (Doc. 14, p. 7). This, he insists, prevented him from filing within the one-year limitation period, which tolled § 2244(d)(1)(A).

The Court finds no fault in the Magistrate Judge’s conclusion that Wroten is not due equitable tolling of the one-year § 2244(d)(1)(A) limitation period. If anything, the evidence Wroten points to in his objections underscores the correctness of the analysis in the R & R. For instance, Janice Watkins “attests” that she assumed responsibility for Wroten’s finances in March of 2013 and that, in such capacity, she called James Scroggins[, Wroten’s appellate attorney,] and was informed that “he no longer represented [Wroten] and was only hired to file the state appeal and he would need to hire another attorney to file the federal appeal because he didn’t do federal appeals.... We took possession of his transcript and papers regarding his trial and took them to Atty Fansler[, an Ohio attorney,] to look over.” (Doc. 14, pp. 14–15). As for Wroten’s daughter, Angela Bump, she simply penned a “To Whom it may concern” letter in which she states she retained Attorney Scroggins in August of 2008 for Wroten after being told “he would go as far

and do as much as he could for” Wroten. *Id.* at 16. Bump goes on to state that on some unknown date she “got a call from [her] Father saying that Mr. Scroggins had contacted him and that he was done with the case.” *Id.* The only “timeline” that makes sense with respect to the just-referenced call between Wroten and Bump is the general time period attested to by Watkins inasmuch as the last piece of “evidence” Wroten attaches to his objections, which is an April 11, 2013 letter penned by Scroggins and correctly addressed to Wroten, prisoner number 260584, at the Limestone Correctional Facility.² The substance of Scroggins’s letter reads in its entirety:

I am in receipt of your letter post-marked April 8, 2013. You should be aware that my representation ended with the affirmance of your conviction in the appellate courts of Alabama. I do not represent you in any matters pending in federal court although I wish you well in your efforts.

(Doc. 14, p.17). This timeline supports the Magistrate Judge’s conclusion that “there is simply no indication that Wroten diligently inquired of his attorney, particularly during the [relevant] period from June 3, 2010 to June 3, 2011, concerning the filing of a § 2254 petition and the need to file it by not later than June 3, 2011.” (Doc. 11, p. 13).

Furthermore, Wroten did not begin immediately attacking his convictions in state court or federal court even after the April 11, 2013 letter. Instead, he (or his family members listed above) hired an Ohio attorney to try and get trial transcripts.

² The contact information for Wroten listed in the attorney’s letter is the same as Wroten himself lists in the Petition (Doc. 8) and in the Objection (Doc. 14). Thus, the Court is assured of Wroten’s proper receipt of the letter.

Said attorney apparently kept the transcripts for over a year. Quiet simply, Wroten failed to exercise any alacrity whatsoever and, indeed, did not file his post-conviction petition in state court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure until March of 2015, some twenty-three months after Attorney Scroggins penned the above letter. The present Petition did not follow suit until May 6, 2016, just shy of thirty-seven months after the same letter. So even if the evidence produced or actions taken could show (and they do not) due diligence, there is no indication Wroten exercised such diligence during the relevant period of time explained by the Magistrate Judge. Thus, the Court **OVERRULES** Wroten's third objection to the R & R because, as the Magistrate Judge correctly concluded, Wroten's own lack of due diligence is responsible for the untimeliness of his current federal habeas petition.

Wroten also argues that the Magistrate Judge erred by not reviewing the "fundamental constitutional rights" Wroten contends were violated in state court. (Doc. 14, p. 10). This objection is quickly dismissed. It is foundational that the actual-innocence-gateway exception or equitable-tolling issue is a threshold matter that must be evaluated before the merits of an untimely petition may be considered. *See Schlup*, 513 U.S. at 317 (reasoning that actual innocence justifies "a review of the merits of the constitutional claims"). Given this, there is no error by the Magistrate Judge in proceeding no further than finding the Petition time-barred. Any objection otherwise is hereby **OVERRULED**.

2. Wroten's "Amended Objections"

As a last matter, Wroten filed a motion to amend his objections to the R & R. (Doc. 15). The Court finds these "amended objections" provide no basis to set the Magistrate Judge's R & R aside for two reasons. First, Wroten, for the most part, rehashes his earlier objections and adds no substance, much less amendments, to objections already raised. Thus, the "amendments" are **DENIED** as frivolous. Second, Wroten proceeds to argue, in a seemingly preemptive fashion, that the Petition should be considered because he committed no procedural default in state court. This argument is non-responsive because the R & R did not rely upon the presence of a procedural default in recommending Wroten's petition be dismissed.

3. Conclusion

Based on the foregoing, the Court hereby **ADOPTS** the Report and Recommendation of the Magistrate Judge (Doc. 11) with these additional comments and the factual **MODIFICATIONS** outlined above. It is **ORDERED** that Petitioner Frederick Wroten's Petition for Writ of Habeas Corpus (Doc. 8), filed pursuant to 28 U.S.C. § 2241 but clearly subject to the restrictions set forth in 28 U.S.C. § 2254, is **DISMISSED** as time-barred pursuant to 28 U.S.C. § 2244(d)(1)(A).

DONE and ORDERED this 19th day of April, 2017.

/s/ Callie V. S. Granade
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FREDERICK WROTEN,
AIS 260584,

Petitioner,

vs.

CA 16-0406-CG-C

WARDEN GORDY and THE STATE
OF ALABAMA,

Respondents.

REPORT AND RECOMMENDATION

Frederick Wroten, a state prisoner presently in the custody of respondent Gordy, has petitioned this Court for federal habeas corpus relief pursuant to 28 U.S.C. § 2241. (Doc. 8, at 1.) In the petition, Wroten challenges convictions for first-degree rape and two counts of first-degree sexual abuse, and the resulting sentences, entered against him in (or around) August of 2008 by the Circuit Court of Baldwin County, Alabama. (*See id.*, Attachment 1, at 2 & 14.) This matter has been referred to the undersigned for entry of a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and General Local Rule 72(a)(2)(R). It is recommended that the instant petition be dismissed as time barred under the Anti-Terrorism and Effective Death Penalty Act's one-year limitations provision contained in 28 U.S.C. § 2244(d).

PROCEDURAL BACKGROUND

In August of 2008, Wroten was convicted, following a jury trial, of one count of first-degree rape and two counts of sexual abuse; he was sentenced to a term of life imprisonment for rape and consecutive ten year sentences for each sexual abuse conviction. (Doc. 8, Attachment 1, at 2.) The Alabama Court of Criminal Appeals

affirmed Wroten's convictions and sentences on December 11, 2009 (*see id.*), *Wroten v. State*, 64 So.3d 1151 (Ala.Crim.App. Dec. 11, 2009) (table), *reh'g denied*, 75 So.3d 1225 (Ala.Crim.App. Jan. 22, 2010) (table), and the Alabama Supreme Court denied his petition for writ of certiorari—and issued the certificate of judgment—on March 5, 2010 (Doc. 8, Attachment 1, at 2), *Ex parte Wroten*, 76 So.3d 877 (Ala. Mar. 5, 2010).

Wroten retained James Scroggins, Esquire, to pursue his direct appeal and, if necessary, to prosecute a habeas corpus petition, in accordance with 28 U.S.C. § 2254, in federal court. (*See* Doc. 8, Attachment 1, at 2.) According to petitioner, following the Alabama Supreme Court's denial of his petition for writ of certiorari, Scroggins informed him and his family that he was "going to file the § 2254 habeas corpus petition." (*Id.* at 2-3.)

Over the ensuing years, Wroten and his family spoke with Scroggins on several occasions as to the status of this habeas petition[,] [o]nly to be informed that this took a long time and to be patient. However, eventually Wroten's family[,] who resided in Ohio, retained the services of the Law Firm of Steven R. Fansler of West Liberty Ohio to contact Atty. Scroggins in Alabama to discover exactly the status of this alleged habeas petition.

After a prolonged period of time[,] Fansler was able to have Scroggins admit that he had never filed the petition for writ of habeas corpus in the District Courts of Alabama as previously agreed to and paid for. Thereinafter, Atty. Fansler spent another period of time before he could actually get Atty. Scroggins to provide his firm a copy of the trial transcript which he had already been paid for by Wroten and his family. However[,] Scroggins refused to provide to Wroten any copies of the filings he had undertaken in the Alabama Appellate Courts. Yet Wroten still had to pay Atty. Scroggins[] again for the copy of the trial transcript he obtained.

[] Upon receipt of the transcript from the firm of Steven R. Fansler on January 27, 2015[] (Attachment A)[],¹ Wroten filed his first

¹ This attachment is a one line letter penned by Steven R. Fansler, Esquire, on January 27, 2015, and addressed to Wroten, as follows: "Here is a copy of all of the transcripts I have that Bob and Janice have asked I send to you." (Doc. 8, Attachment A.)

Ala.R.Crim.P. [] 32 post[-]conviction petition in the Circuit Court of Baldwin County Alabama in March of 2015.

(*Id.* at 3 (footnote added).) Wroten describes the procedural course of his Rule 32 collateral attack on his convictions and sentences, the upshot being that the trial court's summary dismissal of the petition as time-barred (*see* Doc. 8, Attachment F-2) was affirmed on appeal, the Alabama Supreme Court denying Wroten's petition for writ of certiorari on January 15, 2016 (Doc. 8, Attachment J) and the certificate of judgment of final affirmance issuing that same day (Doc. 8, Attachment H).

On May 3, 2016, Wroten filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. § 2241(c)(3). (*See* Doc. 1, at 52-53.) The Northern District of Alabama transferred Wroten's action to this Court (*see* Docs. 4-5) and, by order dated August 5, 2016, the undersigned instructed Wroten to file his petition on either this Court's form for petitions under 28 U.S.C. § 2241 or the form for petitions under 28 U.S.C. § 2254, since the petition he filed in the Northern District of Alabama was not filed on any court's form (*see* Doc. 7). In that order, Wroten was importantly advised of the following:

[I]f he again designates his petition as a § 2241 habeas corpus petition, and files his petition on the § 2241 form supplied to him, this Court will nonetheless apply the procedural requirements of § 2254 to his petition since it unquestionably attacks the constitutionality of his state convictions and sentences, and he is admittedly in custody pursuant to the judgment of an Alabama court. *Compare Johnson v. Warden, Georgia Diagnostic & Classification Prison*, 805 F.3d 1317, 1322 & 1323 (11th Cir.) ("Petitioner Johnson seeks to appeal the district court's order dismissing his § 2241 petition for lack of jurisdiction. . . . It is axiomatic that § 2254 applies where a prisoner is 'in custody pursuant to the judgment of a State court.' 28 U.S.C. § 2254(a). Johnson is in custody pursuant to the judgment of the Georgia court and, therefore, § 2254 applies to his petition. . . . A § 2241 petition filed by a state prisoner is subject to the bar on second and successive petitions contained in § 2244(b)."), *cert. denied*, ___ U.S. ___, 136 S.Ct. 532, 193 L.Ed.2d 420 (2015), *with Thomas v. Crosby*, 371 F.3d 782, 787 (11th Cir. 2004) ("A state prisoner cannot evade the procedural requirements of § 2254 by filing something purporting to be a § 2241 petition."), *cert. denied*, 543 U.S. 1063, 125 S.Ct. 888, 160 L.Ed.2d 793 (2005);

Medberry v. Crosby, 351 F.3d 1049, 1054 (11th Cir. 2003) (“[W]e . . . hold that[] although Appellant’s petition is authorized by § 2241, it also is governed by § 2254 because Appellant is ‘in custody pursuant to the judgment of a State court.’”), *cert. denied*, 541 U.S. 1032, 124 S.Ct. 2098, 158 L.Ed.2d 714 (2004); and *Robinson v. Deloach*, 2015 WL 128088, *1 (M.D. Ala. Jan. 8, 2015) (“To the extent Robinson seeks review of his claims under 28 U.S.C. § 2241, his petition is subject to 28 U.S.C. § 2254’s procedural restrictions on successive and untimely petitions.”). Stated somewhat differently, “[w]hen [, as here,] a state prisoner is ‘in custody pursuant to the judgment of a State court,’ his petition for a writ of habeas corpus is governed by both § 2241 and the restrictions set forth in § 2254.” *Morales v. Florida Dept. of Corrections*, 346 Fed.Appx. 539, 540 (11th Cir. Sept. 29, 2009) (emphasis supplied; citing *Medberry*, *supra*, 351 F.3d at 1062), *cert. denied sub nom. Morales v. McNeil*, 562 U.S. 866, 131 S.Ct. 156, 178 L.Ed.2d 94 (2010).

(*Id.* at 2-3.) Wroten completed the form § 2241 petition provided by this Court (*see* Doc. 8), and attached thereto an additional forty pages which more specifically identifies his petition as being filed pursuant to 28 U.S.C. § 2241(c)(3) and 28 U.S.C. § 2255(2) (*see* Doc. 8, Attachment 1, at 6).

DISCUSSION

As previously indicated, because Wroten attacks the constitutionality of his state convictions and sentences, and he is admittedly in custody pursuant to the judgment of an Alabama court, 28 U.S.C. § 2254 applies to his petition despite his designating it as one filed pursuant to 28 U.S.C. § 2241(c)(3) and 28 U.S.C. § 2255(2)² (*see* Doc. 7, at 2-3).³

² There is no § 2255(2); there is a § 2255(f)(2) (“A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action[.]”) and a § 2255(h)(2) (addressing successive petitions), as well as the “savings clause” in § 2255(e) (“An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section [that is, § 2255], shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”). However, given that the AEDPA contains essentially identical limitations and successive petition language pertaining to habeas corpus petitions filed by persons in State custody pursuant to a State court judgment, *see* 28 U.S.C. § 2244 (b)(2)(A) & (Continued)

While the undersigned's analysis leads inexorably to the conclusion that Wroten's habeas petition is time-barred, the first matter that must be tackled is petitioner's argument that this Court should ignore the untimeliness of the present habeas corpus petition because he is actually innocent of the two counts of sexual abuse in the first-degree of which he was convicted, along with first-degree rape, by a jury of his peers in August of 2008. (See Doc. 8, Attachment 1, at 14-15.)

A. The Actual Innocence Gateway Recognized in *McQuiggin v. Perkins*. In *McQuiggin v. Perkins*, ___ U.S. ___, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013), the Supreme Court specifically held that "actual [factual] innocence,"⁴ if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or,

(d)(1)(B), this Court has no reason to suspect that petitioner, who is admittedly confined in an Alabama state prison, intended to reference § 2255(f)(2) or § 2255(h)(2) in his habeas corpus petition. Rather, it is clear to the undersigned that Wroten means to reference § 2255(e). Section 2255(e) simply provides no avenue for relief for Wroten, however, because he is incarcerated in a state prison based on a sentence imposed by a state court and "[b]y its express terms, the 'savings clause' [§ 2255(e)] applies only to prisoners authorized to seek relief under 28 U.S.C. § 2255—prisoners incarcerated pursuant to the sentence of a federal court." *Whatley v. Davenport*, 2014 WL 1153733, *6 (M.D. Ala. Mar. 20, 2014), citing 28 U.S.C. § 2255(a) and *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1262 (11th Cir. 2013).

³ A district court has the power under Rule 4 of the Rules Governing Section 2254 Cases "to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state." *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999); see *Jackson v. Secretary for the Department of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002) ("[W]e hold that the district court possessed the discretion to raise *sua sponte* the timeliness issue."); *Hill v. Braxton*, 277 F.3d 701, 705 (4th Cir. 2002) ("Even though the limitations period is an affirmative defense, a federal habeas court has the power to raise affirmative defenses *sua sponte*, as the district court did in this case."). Rule 4 provides, in pertinent part, that "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." 28 U.S.C. foll. § 2254, Rule 4.

⁴ "It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611, 140 L.Ed.2d 828 (1998) (citation omitted).

as in this case, expiration of the statute of limitations." 133 S.Ct. at 1928 (footnote added); see *San Martin v. McNeil*, 633 F.3d 1257, 1268 (11th Cir.) ("The actual innocence exception is 'exceedingly narrow in scope,' and the petitioner must demonstrate that he is factually innocent rather than legally innocent."), *cert. denied*, ___ U.S. ___, 132 S.Ct. 158, 181 L.Ed.2d 73 (2011). However, the Supreme Court also notably cautioned that "tenable actual-innocence gateway pleas are *rare*[" *McQuiggin*, 133 S.Ct. at 1928 (emphasis supplied). "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.*, quoting *Schlup v. Delo*, 513 U.S. 298, 329, 115 S.Ct. 851, 868, 130 L.Ed.2d 808 (1995) (other citation omitted). Indeed, to be credible, a claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." *Schlup, supra*, 513 U.S. at 324, 115 S.Ct. at 865; see also *id.* at 327, 115 S.Ct. at 867 ("To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.").

Here, Wroten offers no new evidence; instead, he contends that the trial testimony of the victim—his ex-wife—as well as the trial testimony of an eyewitness, establish that the first-degree sexual abuse offenses "never happened[.]" (Doc. 8, Attachment 1, at 14.) Thus, petitioner's argument in this regard is not a *McQuiggin* gateway claim of actual innocence because he offers no new evidence (not presented at trial) establishing his actual (factual) innocence of the two counts of first-degree sexual

abuse for which he was convicted (along with one count of first-degree rape⁵) by a jury of his peers but, instead, a sufficiency of the evidence claim—relying, as it does, on the trial testimony of the victim and an unnamed eyewitness—which could (and should) have presented by Wroten on direct appeal.⁶ Because it is clear to the undersigned that petitioner cannot take advantage of the actual innocence gateway recognized in *McQuiggin*, the instant petition for federal habeas corpus relief is properly analyzed in accordance with 28 U.S.C. § 2244(d)(1)(A).

B. The One-Year Limitations Period, 28 U.S.C. § 2244. The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) was enacted on April 24, 1996 and, pertinent to this case, added a new subdivision to 28 U.S.C. § 2244 providing for a one-year period of limitations within which state prisoners must file their habeas corpus petitions pursuant to 28 U.S.C. § 2254. *Wilcox v. Florida Dept. of Corrections*, 158 F.3d 1209, 1210 (11th Cir. 1998).

(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 to the judgment of a State court. The limitation period shall run from the latest of—

⁵ The undersigned also fails to appreciate how Wroten can take advantage of the *McQuiggin* gateway in this case when he makes no argument that he is actually [factually] innocent of the first-degree rape of his ex-wife. (See Doc. 8, Attachment 1, at 39 (“That this Honorable Court will upon conclusion of it[s] review of these claims[] [o]rder[] that Wroten is entitled to have his convictions for Sexual Abuse I reversed, vacated, set aside and held for naught as he is actually innocent of these offenses[] [t]hat his substantial fundamental United States Constitutional rights were violated by the respondents[] [t]hat he is entitled to have his conviction for the offense of Rape I, reversed, remanded, set aside and held for naught[] [o]r in the alternative, that he is entitled to a new trial[] [d]ue to the entire pre-trial and trial process being tainted by the actions and deeds of the respondents to such a degree that his entire trial was not in recognition of his right to a fair trial.” (emphasis supplied).)

⁶ In other words, petitioner’s argument in this regard does not support an actual (factual) innocence claim in accordance with *McQuiggin* because it relies on the evidence presented at petitioner’s trial, not on any “new evidence.”

(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).

Subsections (B), (C), and (D) of § 2244(d)(1) clearly do not apply to petitioner's case and, therefore, the timeliness of Wroten's petition must be calculated under § 2244(d)(1)(A) based upon the date on which his first-degree rape and first-degree sexual assault convictions became final. "For prisoners whose convictions became final prior to the effective date of the AEDPA, the one-year statute of limitations instituted by the AEDPA began to run on its effective date, i.e., April 24, 1996." *Guenther v. Holt*, 173 F.3d 1328, 1331 (11th Cir. 1999) (citations omitted), *cert. denied*, 528 U.S. 1085, 120 S.Ct. 811, 145 L.Ed.2d 683 (2000). This rule from *Guenther* is obviously not applicable in this case since Wroten's convictions became final in 2010.

Section 2244(d)(1)(A) specifically provides that the one-year limitations period will run from "the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review[.]" In *Bond v. Moore*, 309 F.3d

770 (2002) and *Jackson, supra*, the Eleventh Circuit joined the majority of circuits regarding the meaning of subsection (A) and held that the statute of limitations period contained in 28 U.S.C. § 2244(d) does not begin to run "until the 90-day window during which Appellant could have petitioned the United States Supreme Court for a writ of certiorari expired." 309 F.3d at 771; *see also id.* at 774 ("Appellant was entitled to file a petition for a writ of certiorari in the United States Supreme Court within 90 days of the entry of the judgment against him by the Florida Supreme Court. Sup.Ct.R. 13.1. The statute of limitations under 28 U.S.C. § 2244(d) should not have begun to run until this 90-day window had expired. Appellant's state judgment became final on December 13, 1996, when the Florida Supreme Court denied Appellant's motion for a rehearing. The statute of limitations should have begun to run, therefore, on March 13, 1997."); *Jackson, supra*, 292 F.3d at 1348-1349 & 1349 ("While we have not directly dealt with the issue in the context of a section 2254 petition, we indicated in dicta that, under the AEDPA, a state prisoner may have the benefit of the 90-day window before his conviction is considered final. . . . In the instant case, the Fourth District Court of Appeals of Florida [] affirmed Jackson's conviction on October 17, 1997. Giving Jackson the extra 90 days in which he could have filed for certiorari to the Supreme Court, Jackson's conviction became final at the latest on January 15, 1998."); *see Pugh v. Smith*, 465 F.3d 1295, 1299 (11th Cir. 2006) (AEDPA's one-year statute of limitations "allows a prisoner the time to seek direct review in the Supreme Court of the United States."). Under the facts of this case, this Court need add the ninety days contemplated by Supreme Court Rule 13.1 since petitioner appealed his case to Alabama's court of last resort on his direct appeal as of right. The Alabama Supreme Court denied Wroten's petition for writ of certiorari on March 5, 2010. *See Ex parte Wroten, supra*. Petitioner had ninety days, or until June 3, 2010, to petition the United States Supreme Court for a writ of certiorari. When he failed

to do so, his convictions and sentences became final, which also started the clock on his one-year limitations period to file a federal habeas corpus petition. Wroten's limitations period commenced on June 3, 2010 and expired on June 3, 2011, *see Guenther, supra*, 173 F.3d at 1331, one month shy of five (5) years before he filed the instant § 2241 application.

Petitioner is unable to take advantage of the tolling provision built into § 2244(d), 28 U.S.C. § 2244(d)(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 section."); *Guenther, supra*, 173 F.3d at 1331 ("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 in [subsection (d)]."), because he did not collaterally attack his convictions and sentences in the state courts of Alabama during the relevant limitations period (that is, before June 3, 2011). *See Pace v. DiGuglielmo*, 544 U.S. 408, 413, 125 S.Ct. 1807, 1811-1812, 161 L.Ed.2d 669 (2005) ("As in *Artuz*, we are guided by the 'common usage' and 'commo[n] underst[anding]' of the phrase 'properly filed.' In common understanding, a petition filed after a time limit, and which does not fit within any exceptions to that limit, is no more 'properly filed' than a petition filed after a time limit that permits no exceptions. The purpose of AEDPA's statute of limitations confirms this commonsense reading. On petitioner's theory, a state prisoner could toll the statute of limitations at will by filing untimely state postconviction petitions. This would turn § 2244(d)(2) into a *de facto* extension mechanism, quite contrary to the purpose of AEDPA, and open the door to abusive delay."); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir.) ("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 Webster's that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled."), *cert. denied*, 531 U.S. 991, 121 S.Ct. 481, 148 L.Ed.2d 454 (2000). Accordingly, the only avenue by which this Court can consider the merits of petitioner's § 2241 petition is by finding that he is entitled to equitable tolling of AEDPA's one-year limitations period.

In *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010), the Supreme Court specifically held, for the first time, that "§ 2244(d) is subject to equitable tolling in appropriate cases[.]" *id.* at 645, 130 S.Ct. at 2560, and reiterated "that a 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* at 649, 130 S.Ct. at 2562. For its part, the Eleventh Circuit has long embraced the doctrine of equitable tolling with regard to the one-year limitations period at issue: "Equitable tolling is to be applied when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition.' . . . Thus, the petitioner must show both extraordinary circumstances and due diligence in order to be entitled to equitable tolling." *Diaz v. Secretary for the Dept. of Corrections*, 362 F.3d 698, 700-701 (11th Cir. 2004) (citation omitted). "Section 2244 is a statute of limitations, not a jurisdictional bar. Therefore, it permits equitable tolling 'when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.'" *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (citation omitted).

The Supreme Court in *Holland* indicated that "[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence[.]"

id. at 653, 130 S.Ct. at 2565, and gave the following guidance with respect to "extraordinary circumstances":

We have previously held that "a garden variety claim of excusable neglect," such as a simple "miscalculation" that leads a lawyer to miss a filing deadline, does not warrant equitable tolling. But the case before us does not involve, and we are not considering, a "garden variety claim" of attorney negligence. Rather, the facts of this case present far more serious instances of attorney misconduct. And, as we have said, although the circumstances of a case must be "extraordinary" before equitable tolling can be applied, we hold that such circumstances are not limited to those that satisfy the test that the Court of Appeals used in this case.

The record facts that we have set forth in Part I of this opinion suggest that this case may well be an "extraordinary" instance in which petitioner's attorney's conduct constituted far more than "garden variety" or "excusable neglect." To be sure, Collins failed to file Holland's petition on time and appears to have been unaware of the date on which the limitations period expired—two facts that, alone, might suggest simple negligence. But, in these circumstances, the record facts we have elucidated suggest that the failure amounted to more: Here, Collins failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters.

Id. at 651-652, 130 S.Ct. at 2564.

In truth, nowhere in his habeas corpus petition does Wroten directly argue that he is entitled to equitable tolling of the one-year statute of limitations (*see* Doc. 8, Attachment 1, at 1-40 (no mention of "equitable tolling")); however, the undersigned construes petitioner's factual allegations surrounding his "retention" of James Scroggins, Esquire, to pursue his direct appeal and, if necessary, to file a § 2254 habeas corpus petition in federal court (*see id.* at 2-3), as constituting an equitable tolling argument. Before addressing whether Wroten has established his entitlement to equitable tolling in this case, the undersigned makes clear that the period of time

relevant to the Court's equitable tolling analysis is from June 3, 2010 until June 3, 2011, "while the statute of limitations clock was still running and there was time left to be tolled." *Peterson v. Secretary, Florida Dept. of Corrections*, 631 Fed.Appx. 664, 666 (11th Cir. Nov. 5, 2015), *cert. denied*, U.S. ___, 136 S.Ct. 1472, 194 L.Ed.2d 567 (2016).

In this case, even accepting Wroten's statement that he retained Mr. Scroggins to represent him on direct appeal and, if necessary, file a § 2254 habeas corpus petition in federal court, the hiring of counsel is simply "not enough to establish reasonable diligence." *George v. Secretary Dept. of Corrections*, 438 Fed.Appx. 751, 753 (11th Cir. Jul. 27, 2011). The due diligence inquiry focuses upon the actions of the petitioner, *see id.*, and there is simply no indication that Wroten diligently inquired of his attorney, particularly during the period from June 3, 2010 to June 3, 2011, concerning the filing of a § 2254 petition and the need to file it by not later than June 3, 2011, *id.* ("In concluding that the petitioner had exercised reasonable diligence, the [Supreme] Court [in *Holland*] observed that the petitioner 'wrote his attorney numerous letters seeking crucial information and providing direction,' and 'repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have [the attorney] removed from his case.'" (citation omitted)). His vague and unsubstantiated statement that "[o]ver the ensuing *years*, [he] and his family spoke with Scroggins on several occasions as to the status of this habeas petition[,] [o]nly to be informed that this took a long time and to be patient[.]" (Doc. 8, Attachment 1, at 3 (emphasis supplied)), offers nothing in the way of specifics to establish that he exercised reasonable diligence during the relevant time period. *Cf. id.* at 753 n.4 ("George [] stated that stated that he had shown diligence 'by communicating his concerns to [his] attorney regarding preservation or timeliness of the filing of a Habeas petition.' But we cannot conclude on the basis of this one vague and unsubstantiated statement that the district court clearly erred in finding

that George failed to exercise reasonable diligence"). Thus, Wroten's own lack of due diligence is responsible for the untimeliness of the filing of the instant petition. This is not one of those rare cases in which principles of equitable tolling can save petitioner from AEDPA's one-year limitations period, and because, as aforesaid, petitioner is not actually (factually) innocent of first-degree rape and first-degree sexual assault, the dismissal of his habeas petition as time-barred is appropriate.

C. Certificate of Appealability. Pursuant to Rule 11(a) of the Rules Governing § 2254 Cases, the undersigned recommends that a certificate of appealability in this case be denied. 28 U.S.C. foll. § 2254, Rule 11(a) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). The habeas corpus statute makes clear that an applicant is entitled to appeal a district court's denial of his habeas corpus petition only where a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2243(c)(2). Where, as here, a habeas petition is being denied on procedural grounds without reaching the merits of the underlying constitutional claims, "a COA should issue [only] when the prisoner shows . . . that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000); see *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003) ("Under the controlling standard, a petitioner must 'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed

further.""). Inasmuch as a district court can raise *sua sponte* the AEDPA statute of limitations, *Jackson, supra*, 292 F.3d at 1349, within the context of Rule 4, *Johnson v. Chase*, 2006 WL 2949442, *1 (S.D. Ga. Oct. 16, 2006) ("Federal district courts are empowered pursuant to Rule 4 to raise the AEDPA's statute of limitation *sua sponte* and dismiss those actions that are time barred."), a reasonable jurist could not conclude either that this Court is in error in dismissing the instant petition or that Wroten should be allowed to proceed further, *Slack, supra*, 529 U.S. at 484, 120 S.Ct. at 1604 ("Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.").

Rule 11(a) further provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by petitioner, he may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation. *Brightwell v. Patterson*, CA 11-0165-WS-C, Doc. 14 (Eleventh Circuit order denying petitioner's motions for a COA and to appeal IFP in a case in which this Court set out the foregoing procedure); *see also Castrejon v. United States*, 2011 WL 3241817, *20 (S.D. Ala. Jun. 28, 2011) (providing for the same procedure), *report and recommendation adopted*, 2011 WL 3241580 (S.D. Ala. Jul. 29, 2011); *Griffin v. DeRosa*, 2010 WL 3943702, at *4 (N.D. Fla. Sept. 20, 2010) (providing for same procedure), *report and recommendation adopted sub nom. Griffin v. Butterworth*, 2010 WL 3943699 (N.D. Fla. Oct. 5, 2010).

CONCLUSION

The Magistrate Judge recommends that Frederick Wroten's petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2241 but clearly subject to the restrictions

set forth in 28 U.S.C. § 2254, be dismissed as time-barred pursuant to 28 U.S.C. § 2244(d)(1)(A). Petitioner is not entitled to a certificate of appealability and, therefore, he is not entitled to appeal *in forma pauperis*.

NOTICE OF RIGHT TO FILE OBJECTIONS

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. *See* 28 U.S.C. § 636(b)(1); FED.R.CIV.P. 72(b); S.D. Ala. GenLR 72(c)(1) & (2). The parties should note that under Eleventh Circuit Rule 3-1, “[a] party failing to object to a magistrate judge’s findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court’s order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice.” 11th Cir. R. 3-1. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge’s report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this the 29th day of September, 2016.

s/WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

FREDERICK WROTEN,

Petitioner,

v.

WARDEN GORDY and
THE STATE OF ALABAMA,

Respondents.

Case No.: 5:16-cv-00747-VEH-JHE

TRANSFER ORDER

Petitioner Frederick Wroten has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging his conviction in the Circuit Court of Baldwin County, Alabama. The Circuit Court of Baldwin County is located in the Southern District of Alabama. The petitioner is incarcerated at Limestone Correctional Facility, which is located in the Northern District of Alabama. Under 28 U.S.C. § 2241, the district courts for the district where the person is in custody and the district within which the sentencing court was held have concurrent jurisdiction over habeas applications "made by a person in custody under the judgment and sentence of a State court." 28 U.S.C. § 2241(d). "The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination." *Id.*

The undersigned concludes that the more appropriate forum is the Southern District of Alabama, since Wroten was convicted in Baldwin County. This is especially true if appointment of counsel and an evidentiary hearing are required. Accordingly, for the convenience of the parties and potential witnesses in this case and in the furtherance of justice, this case is hereby **TRANSFERRED**

to the United States District Court for the Southern District of Alabama, pursuant to 28 U.S.C. § 2241(d). A decision on Wroten's motion to appoint counsel, (doc. 3), is reserved for ruling by the United States District Court for the Southern District of Alabama.

DONE this 19th day of July, 2016.


VIRGINIA EMERSON HOPKINS
United States District Judge