

EXHIBIT

A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-12425
Non-Argument Calendar

D.C. Docket No. 1:14-cv-22767-MGC

EDWARD S. LOCASCIO,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

(May 3, 2017)

Before WILSON, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Long, we considered whether *Clisby* applied in a case where the district court dismissed a § 2255 motion as untimely, but failed to address the defendant's equitable tolling claim. *See Long v. United States*, 626 F.3d 1167, 1168–69 (11th Cir. 2010) (per curiam). We held that the district court violated *Clisby* when it failed to address the defendant's claim for statutory tolling. *See id.* at 1170. We noted that “the district court must create a record that will facilitate meaningful appellate review of the correctness of the procedural ruling” *Id.*

In this case, the district sufficiently examined Locascio's equitable tolling claim to comply with *Clisby*. While Locascio did not raise a claim of equitable tolling until after the report and recommendation, the magistrate judge did address a possible claim of equitable tolling. The magistrate judge, in reviewing Locascio's motion to amend the Fla. R. Crim. P. 3.850 motion, found that Locascio filed the motion only to comply with time limitations, as Locascio did not attach a proposed amended motion or discuss the issues he wanted to raise. The magistrate judge noted that Locascio waited over a year-and-a-half to file his amended motion. Thus the magistrate judge found that Locascio failed to exercise due diligence in pursuing collateral relief. Although Locascio later argued that extraordinary circumstances prevented him from filing a timely motion to amend, the magistrate judge's finding that Locascio failed to exercise due diligence, and the district court's later adoption of that finding, was dispositive as to Locascio's

claim of equitable tolling. *See Steed*, 219 F.3d at 1300. The district court's finding regarding due diligence was sufficient to develop meaningful appellate review and to comply with *Clisby*. *See Long*, 626 F.3d at 1170.

AFFIRMED.

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

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

David J. Smith
Clerk of Court

For rules and forms visit
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August 18, 2017

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-12425-EE

Case Style: Edward Locascio v. Florida Department of Correcti, et al

District Court Docket No: 1:14-cv-22767-MGC

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Elora Jackson, EE/lt

Phone #: (404) 335-6173

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-12425-EE

EDWARD S. LOCASCIO,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, JORDAN and ROSENBAUM, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-42

**UNITED STATES COURT OF APPEALS
For the Eleventh Circuit**

No. 15-12425

District Court Docket No.
1:14-cv-22767-MGC

EDWARD S. LOCASCIO,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 03, 2017
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

EXHIBIT

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-22767-Civ-COOKE
MAGISTRATE JUDGE P.A. WHITE

EDWARD S. LOCASCIO,

:

Petitioner,

:

v.

:

REPORT OF
MAGISTRATE JUDGE

MICHAEL D. CREWS,

:

Respondent.

:

Introduction

Edward S. Locascio, a state prisoner currently confined at Union Correctional Institution, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, challenging the constitutionality of his convictions and sentences, entered following a jury trial in Miami-Dade County Circuit Court, case number F01-034564B.

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

The undersigned has reviewed the habeas petition (DE#1), respondent's response and appendix of exhibits (DEs#15,18), the on-line dockets for the Miami-Dade County Circuit Court, the Third District Court of Appeal, and the Florida Supreme Court.¹

Procedural History

¹The court takes judicial notice of those records which can be found on-line at <http://www.miami-dadeclerk.com/>, www.3dca.flcourts.org, and <http://www.floridasupremecourt.org/>, respectively. See Fed.R.Evid. 201.

Petitioner was charged with and convicted of first degree murder (Count 1), armed burglary with an assault (Count 2), armed robbery with a deadly weapon (Count 3), and conspiracy to commit first degree murder (Count 4). (DE#18, Exs.A,B). He was adjudicated guilty and sentenced to life in prison as to Counts 1 through 3 and 30 years in prison as to Count 4, all to run consecutive to one another. (Id., Ex.C).

Petitioner appealed his conviction and sentence to the Third District Court of Appeal, case no. 3D07-1272, wherein he raised the following claims:

1. The trial court erred in denying the motions for judgment of acquittal where the circumstantial evidence did not exclude every reasonable hypothesis of innocence and did not meet the burden of proof for aider and abettor.
2. Prosecutorial misconduct in closing argument, including a comment on silence, and the interjection of inadmissible evidence and blistering character attacks, denied the defendant his right to a fair trial.
3. The defendant did not receive a fair trial because the state bolstered its weak case with prejudicial evidence of extrinsic crimes or wrongs.
4. The trial court erred by not disclosing to the defense material described by the prosecution as 'Brady Information.'

(DE#18, Ex.D). Following briefing by both parties, the district court, on March 24, 2010, per curiam affirmed petitioner's convictions and sentences without a written opinion. (DE#18, Exs.D-G); see also Locascio v. State, 34 So.3d 70 (Fla. 3d DCA 2010). Petitioner's subsequent motion for rehearing was denied on May 25, 2010. (Id., Ex.G); see also Locascio, 34 So.3d 70.

In the instant case, petitioner's conviction and sentence became final on **August 23, 2010**, which is the ninety days within which petitioner could have sought certiorari review in the United States Supreme Court following the district court's denial of his motion for rehearing on appeal. See Gonzalez, 132 S.Ct. at 653-54; see also Stallworth v. Moore, 827 So. 2d 974 (Fla. 2002) (no jurisdiction to review *per curiam* denials of relief issued without opinion or explanation on petitions for extraordinary relief or post-conviction relief). Accordingly, petitioner could have sought review in the United States Supreme Court without first petitioning the Florida Supreme Court for review and his conviction and sentence therefore became final when the ninety-day limit for seeking such review expired.

Petitioner therefore had until **August 23, 2011**, to file a timely federal petition unless he availed himself of state post-conviction motions which would toll the time period. See 28 U.S.C. §2244(d)(2) (tolling the limitation period for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending"); Wall v. Kholi, ___ U.S. ___, 131 S.Ct. 1278 (2011).² The AEDPA clock resumes running when the state's highest court issues its mandate disposing of the motion for post-conviction relief. Lawrence v. Florida, 549 U.S. 327, 331-32, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007).

The federal limitations ran unchecked for **165 days**, from the

²A properly-filed application is defined as one whose "delivery and acceptance are in compliance with the applicable laws and rules governing filings," which generally govern such matters as the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. Artuz v. Bennett, 531 U.S. 4 (2000) (overruling Weekley v. Moore, 204 F.3d 1083 (11th Cir. 2000)).

time his conviction became final on August 23, 2010, until February 4, 2011, when petitioner filed a pro se petition for writ of habeas corpus alleging ineffective assistance of appellate counsel with the Third District Court of Appeal, assigned case number 3D11-318. (DE#18, Ex.H). Therein, petitioner raised the following claims:

1. Appellate counsel was ineffective for failing to argue as a fundamental error that the trial court abused its discretion by only allowing photos of a bag (the prosecutor referred to as a fanny pack) and a[n] asp holder into evidence instead of the actual physical items.

2. Appellate counsel was ineffective for failing to argue that the trial court abused its discretion and fundamentally erred by excluding the testimony of defense witness Dr. Merry Haber at trial.

3. Appellate counsel was ineffective for failing to argue as a fundamental error that the trial judge departed from role of neutral arbiter and became advocate for the prosecutor.

4. Appellate counsel was ineffective for failing to argue as a fundamental error that the trial judge abused its discretion by not granting the defense motion to exclude the prosecution from seeking the death penalty and a death penalty jury.

(Id.). Without requiring a response from the state, the district court denied the motion on February 18, 2011, followed by the denial of petitioner's motion for rehearing on March 23, 2011.

(Id., Ex.I).

The federal limitations period once again ran unchecked for **86 days** from the time the district court denied petitioner's motion for rehearing on March 23, 2011, until June 17, 2011, when petitioner returned to the state trial court filing a pro se motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. (DE#18, Ex.J). Therein, petitioner raised the following claims:

1. Counsel was ineffective for failing to impeach Cati for inconsistent statements.
2. Counsel was ineffective for failing to present evidence that Jessica Cati embezzled money from Mr. Cati's business.
3. Counsel was ineffective for failing to call Ana Maria Cati as a witness at trial.
4. Counsel was ineffective for failing to present evidence through direct-examination of Pedro Cati.
5. Counsel was ineffective for failing to present evidence through direct-examination of Anita Bardell.
6. Counsel was ineffective for failing to adequately direct-examine Mario Martin Ortiz.
7. Counsel was ineffective by failing to object to prosecutorial misconduct during closing arguments.

(Id., Ex.J). On June 29, 2011, the trial court denied the motion as insufficient to support the relief prayed. (Id., Ex.K). The foregoing order was rendered on July 26, 2011, with a copy of it mailed to petitioner on July 27, 2011. (Id.); see also Miami-Dade Court Docket.

During the interim, on June 30, 2011, petitioner filed a pro se motion for leave to amend his Rule 3.850 motion, which was docketed with the court on August 15, 2011. (DE#18, Ex.L:1). Therein, petitioner alleged an inmate law clerk researched and prepared his initial Rule 3.850, that was at the time pending before the state trial court. (Id.:1-2). According to petitioner, he signed and mailed the motion without an opportunity for prior review. (Id.). However, after having subsequently reviewed the motion, petitioner realized that "its content was disjointed and was a hybrid of his case and other inmates cases rendering the motion unintelligible and legally and facially insufficient."

(Id.). Based upon the foregoing, petitioner sought leave to amend his initial Rule 3.850 motion pursuant to Spera v. State, 971 So.2d. 754, 761 (Fla. 2007). (Id.:2-4).

Then, on August 9, 2011, petitioner filed a motion for rehearing directed at the trial court's June 29, 2011, order denying his Rule 3.850 motion, which was not mailed to him until July 27, 2011. (DE#18,Ex.M). Therein, petitioner asserted since his initial Rule 3.850 motion was denied as legally insufficient, he had the right to amend the motion. (Id.).

While the foregoing motion was still pending before the state trial court, on May 18, 2012, petitioner filed a "Motion to Rule/Notice of Invoking Rule of Nisi," wherein he noted that his motion for rehearing was still pending. (DE#18,Ex.M). He once again argued that the summary denial of his Rule 3.850 motion was in error and that state law requires the trial court to allow him to amend his motion. (Id.). According to petitioner, he had his amended Rule 3.850 motion "completed, ready and available to be filed in anticipation of this Court's authorization to do so since the date of the filing of his Motion for Rehearing." (Id.). Thereafter, on June 12, 2012, the trial court denied the motion for rehearing as insufficient to support the relief requested. (Id.,Ex.N). The order was rendered on June 25, 2012 and a copy was mailed to petitioner on June 28, 2012. (Id.).

On July 12, 2012, petitioner appealed the denial of his Rule 3.850 motion and the denial of his motion for rehearing with the Third District Court of Appeal, assigned case number 3D12-2015. (DE#18,Ex.O). On August 29, 2012, the district court, per curiam and without written opinion, affirmed the denial of his Rule 3.850 motion. (Id.,Ex.P); see also Locascio v. State, 96 So.3d 901 (Fla.

3d DCA 2012)(Table). The mandate issued on September 24, 2012, followed by the denial of petitioner's motion for rehearing on November 1, 2012. (Id.).

The federal limitations period once again ran unchecked for **82 days** from the time the petitioner's motion for rehearing was denied on appeal of his Rule 3.850 motion on November 1, 2012, until January 22, 2013, when petitioner returned to the state trial court filing his amended pro se motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. (DE#19,Ex.Q). Therein, petitioner raised the following claims:

1. Ineffective assistance of trial counsel contrary to Amendments VI, XIV, United States Constitution, and Article 1, Sections 9, 16, Florida Constitution, for failing to object to a large photo display of the victim designed to inflame the emotions of the jury which was not admitted into evidence at trial and prosecution's impermissible use of a mannequin to excessively demonstrate the State's speculative theory of the offense charged.

2. Ineffective assistance of trial counsel contrary to Amendments VI, XIV, United States Constitution, and Article 1, Sections 9, 16, Florida Constitution for failing to suppress or object to extrinsic evidence of the divorce proceedings used by the State to transform the issue of the trial from guilt or innocence into a character assassination of the Defendant.

3. Ineffective assistance of trial counsel contrary to Amendments VI, XIV, United States Constitution, and Article 1, Sections 9, 16, Florida Constitution for failing to present evidence that the items found in the so-called 'Death Bag/Kit' came from the victim's own home contrary to the State's allegation that the Defendant supplied the items to Michael LoCascio. And failing to object to, or correct false incriminating statements attributed to the Defendant.

4. Ineffective assistance of trial counsel contrary to Amendments VI, XIV, United States Constitution, and

Article 1, Sections 9, 16, Florida Constitution for failing to object to a golden rule argument by the State failing to investigate in order to impeach multiple State's witnesses, and by failing to object to State placing facts not in evidence before the jury.

(Id., Ex.Q). The state filed its response arguing that petitioner has not filed an amendment, but rather a second motion for post-conviction relief. (Id., Ex.R). The state explained that when a defendant fails to file a facially sufficient claim, the trial court has discretion to allow the defendant to file an amendment pursuant to Spera v. State, 971 So.2d 754 (Fla. 2007). (Id.). However, the successive motions must be filed by the two year deadline articulated in the rule. (Id.); citing Fla.R.Crim.P. 3.850(b); Spera, supra at 759. As such, the state concluded since petitioner's case was affirmed on May 25, 2010, he was now time barred in filing the motion since the "amended" motion was filed outside the two-year limitation period. (Id.). In fact, in Spera, the Court held that the window to amend a motion for post-conviction relief would not exceed thirty (30) days. (Id.). The state further argued that petitioner had failed to state any legitimate reason why the facts in support of his present motion were not known and could have not been known to him at the time of the filing of his first motion. (Id.).

In his reply, petitioner argued he timely sought leave to file an amended Rule 3.850 motion, prior to learning of the trial court's denial of his initial Rule 3.850 motion. (DE#18, Ex.S). Then, upon receiving the court's order denying his Rule 3.850 motion, he immediately filed a motion for rehearing. (Id.). Because his initial motion was not a "shell" motion, petitioner concluded he is entitled to the benefits afforded by Spera, supra; and therefore, his amended motion should be considered timely filed.

On June 27, 2013, the state trial court denied petitioner's amended Rule 3.850 motion for the reasons set forth in the state's response. (DE#18,Ex.T).

Petitioner pursued an appeal of the trial court's denial of his amended Rule 3.850 motion with the Third District Court of Appeal, assigned case number 3D13-1955. (DE#18,Ex.U). Therein, he argued as follows:

1. Whether the trial court erred by denying an initial postconviction motion as insufficient, then denying an amended motion as timebarred.

2. Whether the trial court erred by denying an amended postconviction motion with an ambiguous and confusing order.

(Id.,Ex.U). Without requiring a response from the state, the district court, on December 11, 2013, per curiam, affirmed the trial court's denial without written opinion. (Id.,Ex.V); see also Locascio v. State, 129 So.3d 1078 (Fla. 3d DCA 2013)(Table). Petitioner's motion for rehearing was denied on January 8, 2014, followed by the issuance of the mandate on January 24, 2014. (Id.).

However, because the state trial court denied the amended Rule 3.850 motion for the reasons set forth in the state's response; in that it was untimely filed, the amended rule 3.850 motion consequently did not serve to toll the limitations period. See Sweet v. Sec'ty, DOC, 467 F.3d 1311 (11th Cir. 2006).

In Sweet, the Supreme Court said that "[w]hen a postconviction petition is untimely under state law, that is the end of the matter for purposes of §2244(d)(2)," because, "time limits, no matter their form, are 'filing' conditions." Pace v. DiGuglielmo, 544 U.S. 408, 414-417, 125 S.Ct. 1807 (2005)(internal quotation marks and

alterations omitted) (emphasis added). The Supreme Court held that "[b]ecause the state court rejected petitioner's petition as untimely, it was not 'properly filed' and therefore, he was not entitled to statutory tolling pursuant to §2244(d)(2). Id. at 417, 125 S.Ct. 1807. Accordingly, if petitioner's amended Rule 3.850 motion failed to adhere to state laws and/or rules in that it was untimely filed, then it would not be "properly filed" under AEDPA even if the court denied relief on the merits in the alternative. Gorby v. McNeil, 530 F.3d 1363, 1368 (11th Cir. 2008); Sweet v. Sec'y, Dept. Of Corr., 467 F.3d 1311 (11th Cir. 2006); Drew v. Dep't of Corr., 297 F.3d 1278 (11th Cir. 2002) (stating that although a successive state court post-conviction motion constitutes a "properly filed" petition for purposes of tolling, however, when the petition at issue is also untimely, tolling is not afforded).

Accordingly, the federal limitations period ran unchecked for **480 days** from November 1, 2012, when petitioner's motion for rehearing was denied on appeal of his Rule 3.850, until February 24, 2014, when he filed a Petition for Writ of Habeas Corpus with the Florida Supreme Court, assigned case number SC14-411. (DE#18, Ex.W). Therein, he once again argued the trial court erred when it denied a timely filed initial motion as insufficient without allowing the petitioner at least one opportunity to amend, and then denying his amended motion as time barred. (Id.). Without requiring a response from the state, the supreme court, on May 9, 2014, denied the petition as procedurally barred. (Id., Ex.X). In doing so, the court noted that a petition for extraordinary relief is not a second appeal and cannot be used to litigate or relitigate issues that were or could have been raised on direct appeal or in prior postconviction proceedings. (Id.). Petitioner's subsequent motion for rehearing was denied on July 14, 2014. (Id.).

Despite petitioner filing the foregoing petition with the state supreme court, it nonetheless did not statutorily toll the limitations period as it was not commenced until after the one-year limitations period had already expired. It is now well-settled that a state petition filed after expiration of the federal limitations period cannot toll the period, because there is no period remaining to be tolled. See also Tinker v. Moore, 255 F.3d 1331, 1332 (11th Cir. 2001) (holding that a state petition filed after expiration of the federal limitations period cannot toll the period, because there is no period remaining to be tolled); Webster v. Moore, 199 F.3d 1256, 1258-60 (11th Cir.) (holding that even properly filed state court petitions must be pending in order to toll the limitations period), cert. denied, 531 U.S. 991 (2000). See also Hollinger v. Sec'y, Dep't of Corr', 334 Fed.Appx. 302, 304-305, 2009 WL 1833746, *2 (11th Cir. 2009), citing, Moore v. Crosby, 321 F.3d 1377, 1381 (11th Cir. 2003) (concluding that Rule 3.850 motion, "filed after expiration of the limitations period[,] does not relate back so as to toll idle periods preceding the filing of the federal [habeas] petition"); Rich v. Sec'y, Dep't of Corr's, 317 Fed.Appx. 881 (11th Cir. 2008) (table); Scarlett v. Sec'y, Dep't of Corr's, 404 Fed.Appx. 394 (11th Cir. 2010). Consequently, the filing of the motion, after the one-year federal limitations period expired, did nothing to toll the limitations period.

Consequently, the federal limitations period ran unchecked for **628 days** from November 1, 2012, when petitioner's motion for rehearing was denied on appeal of his initial Rule 3.850, until July 21, 2014, when petitioner came to this Court filing the instant petition for federal habeas corpus relief. (DE#1).

Discussion

In response to the order to show case, the respondent asserts petitioner is not entitled to review on the merits of his claim in that this petition should be dismissed as time-barred. (DE#15:8-12).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed for the first time a one-year statute of limitations on petitions for writ of habeas corpus filed by state prisoners. See Antiterrorism and Effective Death Penalty Act, Pub.L. 104-132, 110 Stat. 1214 (1996). In most cases, the limitations period begins to run when the judgment becomes final after direct appeal or the time for seeking such review has expired. 28 U.S.C. §2244(d)(1)(A).³ This period is tolled while a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending.⁴ 28 U.S.C. §2244(d)(2). Moreover, the one-year limitations period is subject to equitable tolling in "rare and

³The statute provides that the limitations period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such action;

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

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

28 U.S.C. §2244(d)(1).

⁴A properly-filed application is defined as one whose "delivery and acceptance are in compliance with the applicable laws and rules governing filings," which generally govern such matters as the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. Artuz v. Bennett, 531 U.S. 4 (2000) (overruling Weekley v. Moore, 204 F.3d 1083 (11th Cir. 2000)).

exceptional cases." See Helton v. Secretary for Dept. of Corrections, 259 F.3d 1310, 1312 (11th Cir. 2001) (stating that "[e]quitable 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."), cert. denied, 535 U.S. 1080 (2002); Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999). See also Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998), cert. denied, 526 U.S. 1074 (1999).

Regarding the underlying conviction and initial sentence, the judgment of conviction and sentence became final at the very latest on August 23, 2010. Since petitioner did not file this habeas corpus petition, in which he raises challenges to the underlying conviction and sentence, until July 21, 2014, well-beyond one year after the date on which the conviction and sentence became final, the petition is time-barred pursuant to 28 U.S.C. §2244(d)(1)(A) unless the limitations period was extended by properly filed applications for state post-conviction or other collateral review proceedings. 28 U.S.C. §2244(d)(2).

As indicated above, petitioner pursued collateral relief in the state trial court. Notwithstanding, **879 days** of untolled time expired from the time his conviction became final until he filed the instant federal habeas petition. Thus, petitioner is not entitled to statutory tolling of the federal limitations period.

Notwithstanding, both the United States Supreme Court and Eleventh Circuit Court of Appeals have held that 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.

Holland v. Florida, 560 U.S. 631, 648, 130 S.Ct. 2549, 2562 (2010) ("We have previously made clear 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.") (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)); San Martin v. McNeil,⁵ 633 F.3d 1257, 1267 (11th Cir. 2011); Chavez v. Secretary, Dept. of Corrections, 2011 WL 2990060, at *7 (11th Cir. 2011).

"The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" Holland v. Florida, 560 U.S. at 652, 130 S.Ct. at 2565 (quoting Lonchar v. Thomas, 517 U.S. 314, 326 (1996)). "As for the 'extraordinary circumstances' prong . . . a defendant [must] show a causal connection between the alleged extraordinary circumstances and the late filing of the petition." San Martin v. McNeil, 633 F.3d at 1267.

In Holland, the Supreme Court reiterated that it had previously found 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." Holland, 560 U.S. at 651, 130 S.Ct. at 2564 (citations omitted) (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)). The Holland Court noted that when facts of the case warrant it, equitable tolling can be applied in the "absence of an allegation and proof of bad faith, dishonesty, divided loyalty,

⁵In San Martin, petitioner failed to explain how a two-week delay in receiving notice of the Supreme Court's denial of his certiorari petition ultimately caused the late filing of his federal petition, or why he did not have ample time, even after the two-week delay, to have presented a timely federal habeas petition. See San Martin v. McNeil, 633 F.3d 1257, 1261-63 (11th Cir. 2011).

[or] mental impairment." Holland, 560 U.S. at 642-43, 130 S.Ct. at 2559-60. The court further explained that "professional conduct that fails to [rise to that level] could nonetheless amount to egregious behavior that warrants equitable tolling." Holland, 560 U.S. at 650-51, 130 S.Ct. at 2563-64.

In setting aside a court's finding that no diligence had been demonstrated, the Supreme Court found that Holland's counsel had not only failed to file Holland's federal petition on time, but also failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case. Holland, 560 U.S. at 651, 130 S.Ct. at 2564. The Supreme Court further found that counsel failed to communicate with his client over a period of years, despite Holland's numerous letters to counsel that repeatedly emphasizing the importance of filing the federal petition on time, identifying the applicable legal rules, pleading for information about the Florida Supreme Court's decision, and pleading with counsel to respond to the letters. Holland,⁶ 560 U.S. at 651, 130 S.Ct. at 2564.

Something more than attorney negligence may justify equitable tolling in appropriate cases. For example, in Downs v. McNeil, 520

⁶In Holland, however, the Supreme Court determined that the facts did not involve a garden variety claim of attorney negligence, but instead far more serious instances of attorney misconduct. Holland, 560 U.S. at 651, 130 S.Ct. at 2564. In Holland, the Supreme Court stressed that:

Holland not only wrote his attorney numerous letters seeking crucial information and providing direction; he also repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have Collins [Holland's attorney]--the central impediment to the pursuit of his legal remedy--removed from his case. And, the very day that Holland discovered that his AEDPA clock had expired due to Collins' failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court.

Holland, 560 U.S. at 652, 130 S.Ct. at 2565.

F.3d 1311 (11th Cir. 2009), the Eleventh Circuit drew the distinction between "mere negligence" on the one hand, and "egregious misconduct" on the other. "Egregious misconduct" is conduct in which an attorney makes misrepresentations, gives false assurances, or outright lies about the status of a case to his client. See Downs v. McNeil, 520 F.3d at 1321-22, 1323 (giving an example of egregious misconduct as one of "outright willful deceit"); see also, Roper v. Dep't of Corr's, 434 Fed.Appx. 786, 2011 WL 2693183 (11th Cir. 2011) (holding that "affirmative misrepresentation by counsel" about the status of a motion may constitute "extraordinary circumstances" justifying equitable tolling of the habeas filing deadline). No serious conduct, much less egregious misconduct of counsel he purportedly retained to file his Rule 3.850 motion has been demonstrated here.

Further, counsel's mistake "in miscalculating the limitations period does not provide a basis for equitable tolling because such an argument would essentially equitably toll limitations period for every person whose attorney missed a deadline. Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel." Lawrence v. Florida, 549 U.S. 327, 336-37 (2007). Likewise, the filing of motions for extensions of time by counsel to file a motion for post conviction relief in state court also does not serve to toll the AEDPA statute of limitations. Chavez v. Fla. Dep't of Corr's, 647 F.3d 1057 (11th Cir. 2011).

The Eleventh Circuit has also cautioned that a petitioner's efforts to learn the disposition of pre-federal habeas steps are crucial to determining whether equitable tolling is appropriate. See Knight v. Schofield, 292 F.3d 709 (11th Cir. 2002) (*per curiam*);

Drew v. Dep't of Corr's, 297 F.3d 1278, 1288 (11th Cir. 2002) ("A lengthy delay between the issuance of a necessary order and an inmate's receipt of it might provide a basis for equitable tolling *if the petitioner has diligently attempted to ascertain the status of that order and if the delay prevented the inmate from filing a timely federal habeas corpus petition.*" (emphasis supplied)). Where a petitioner alleges to have contacted the court by mail, but provides no copies of the letters and does not make any attempt to otherwise contact the court, such as by calling or seeking help from a person who could go to the court personally, no equitable tolling is warranted. Drew, 297 F.3d at 1289).

Also, petitioner's ignorance of the law does not warrant application of equitable tolling. The law is well settled that petitioner's status as an unskilled layperson does not excuse the delay.⁷ See Johnson v. United States, 544 U.S. 295, 311, 125 S.Ct. 1571, 1582 (2005) (stating that "the Court has never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness."). See also Rivers v. United States, 416 F.3d 1319, 1323 (11th Cir. 2005) (holding that while movant's lack of education may have delayed his efforts to vacate his state conviction, his procedural ignorance is not an excuse for prolonged inattention when promptness is required); Carrasco v. United States, 2011 WL 1743318, *2-3 (W.D.Tex. 2011) (finding that movant's claim that he just learned of Padilla decision did not warrant equitable tolling, although movant was incarcerated and was proceeding without

⁷It is well accepted that *pro se* filings are subject to less stringent pleading requirements, Estelle v. Gamble, 429 U.S. 97, 106 (1976), and should be liberally construed with a measure of tolerance. See Haines v. Kerner, 404 U.S. 519 (1972). See also Gomez-Diaz v. United States, 433 F.3d 788, 791 (11th Cir. 2005); Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991). However, the policy of liberal construction for *pro se* litigants' pleadings does not extend to a "liberal construction" of the one-year limitations period.

counsel, because ignorance of the law does not excuse failure to timely file §2255 motion). Here, petitioner has not demonstrated that he was unable to pursue his legal claims during the applicable one-year limitation period due to his lack of legal knowledge.

To the extent petitioner may be arguing he is entitled to equitable tolling, in that he filed a timely motion for leave to amend his Rule 3.850 motion, but was precluded from doing so, this argument fails. A review of his motion for leave to amend reveals it was simply filed to comply with the time limitations as it did not have attached to it a proposed amended Rule 3.850 nor did the motion itself list and/or discuss the issues petitioner wanted to raise. (See DE#18, Ex.L). Moreover, a review of petitioner's motion for rehearing, filed 72 days later, on June 29, 2011, shows that although petitioner requested to amend his Rule 3.850 motion, he once again failed to inform the court the amendment he sought to make. (Id., Ex.M).

Also, petitioner's "Motion to Rule/Notice of Invoking Rule of Nisi" filed almost a year later on May 18, 2012, fails to lend support to any equitable tolling argument. As previously discussed, in this motion, petitioner noted that his amended Rule 3.850 motion was "completed, ready and available to be filed in anticipation of [the trial court's] authorization to do so since the date of the filing of his Motion for Rehearing." (Id.). Notwithstanding his claim that his amended Rule 3.850 motion was ready to be filed as of June 29, 2011, petitioner nonetheless waited until January 22, 2013, over a year and a half (574 days) later, to finally do so. (Id., Ex.Q).

Moreover, even if the state trial court had granted petitioner's motion for leave to amend his Rule 3.850 motion, by

his very own words, any such amendment was not ready to be filed until June 29, 2011, 72 days after the filing of his motion for leave.

It is evident that the petitioner here falls far short of demonstrating the existence of "'extraordinary circumstances, but also circumstances that are beyond the petitioner's conduct and unavoidable with diligence,'" thereby precluding him from obtaining equitable tolling. Downs, 520 F.3d at 1323. It should be noted that there was over one year of untolled time during which no properly filed post-conviction proceedings were pending. Based on the foregoing, petitioner has failed to demonstrate that he acted with diligence in pursuing his rights during that period. The Court thus finds petitioner did not act diligently in pursuing his rights and is therefore not entitled to equitable tolling. See Holland, 130 S.Ct. at 2562; accord San Martin, 633 F.3d at 1267.

This Court is not unmindful that petitioner pursued collateral relief in the state forum. Notwithstanding, as previously noted, there was well over one year of untolled time during which no post-conviction proceedings were pending which would act to toll the federal limitations period. As a result of petitioner's failure to diligently pursue his rights, he has failed to demonstrate that he qualifies for equitable tolling of the limitations period. See Webster v. Moore, 199 F.3d 1256, 1258-60 (11th Cir.) (holding that even properly filed state court petitions must be pending in order to toll the limitations period), cert. den'd, 531 U.S. 991 (2000).

The time-bar is ultimately the result of the petitioner's failure to timely pursue state post-conviction proceedings and then this federal habeas corpus proceeding. Since this habeas corpus proceeding instituted in **July 2014** is untimely, the petitioner's

claim challenging the lawfulness of his judgment is now time-barred pursuant to 28 U.S.C. §2244(d)(1)-(2) and should not be considered on the merits. As the Northern District of Florida aptly stated with regard to statutes of limitations:

[A]lthough application of the statute of limitations might appear harsh, that is always the case with statutes of limitation. By definition, statutes of limitation preclude presentation of a plaintiff's or petitioner's claims on the merits. Harsh as they are, statutes of limitation serve important interests. And harsh as it might seem, statutes of limitation establish hard and fast deadlines, subject to tolling under various circumstances but not subject to being held inapplicable simply because a plaintiff or petitioner came close. *The law is and always has been that a statute of limitations creates a definitive deadline; a complaint or petition filed one day late (or six days late as in the case at bar) is untimely, just as if a year late.*

(emphasis added). Turner v. Singletary, 46 F.Supp.2d 1238, 1240 (N.D.Fla. 1999).

Evidentiary Hearing

To the extent petitioner requests an evidentiary hearing on this matter, the request must be denied. To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, show both extraordinary circumstances and reasonable diligence entitling a petitioner to enough equitable tolling to prevent his motion to vacate or habeas petition from being time-barred. See generally Chavez v. Secretary Florida Dept. of Corrections, 647 F.3d 1057, 1060-61 (11th Cir. 2011) (holding that an evidentiary hearing on the issue of equitable tolling of

the limitations period was not warranted in a §2254 proceeding and further finding that none of the allegations in the habeas petition about what post-conviction counsel did and failed to do came close to the serious attorney misconduct that was present in Holland, instead, were at most allegations of garden variety negligence or neglect). If so, he gets an evidentiary hearing and the chance to prove that those factual allegations are true. Id. As noted by the Eleventh Circuit, "[t]he allegations must be factual and specific, not conclusory. Conclusory allegations are simply not enough to warrant a hearing." Id. at 1061. Based upon the reasons stated above, this is not one of those cases where an evidentiary hearing is warranted on the limitations issue or otherwise.

Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts. A §2254 petitioner "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2254 Rule 11(b).

However, "[A] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a

substantial showing of the denial of a constitutional right, a §2254 petitioner must demonstrate "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." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). After review of the record in this case, the Court finds the petitioner has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997). Thus, issuance of a certificate of appealability is not warranted and should be denied. Notwithstanding, if petitioner does not agree, he may bring this argument to the attention of the district judge in objections.

Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be dismissed as time-barred; that a certificate of appealability be denied; and, the case closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 4th day of December, 2014.

A handwritten signature in black ink, appearing to be "H. P. White", written over a horizontal line.

UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 14-22767-Civ-COOKE/WHITE

EDWARD S. LOCASCIO,

Petitioner,

vs.

JULIE L. JONES, SECRETARY,

Respondent.

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

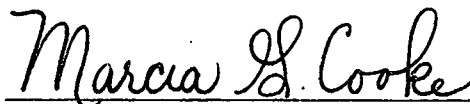
THIS MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, pursuant to 28 U.S.C. 63(6b)(1)(B) and Administrative Order 2003-19 of this Court. On December 4, 2014, Judge White issued a Report (ECF No. 20) recommending that Plaintiff's Complaint (ECF No. 1) be dismissed. Plaintiff filed his objections to Judge White's Report on February 10, 2015 (ECF No. 24).

I have considered Plaintiff's objections and have made a *de novo* review of the record. I find Judge White's Report and Recommendation clear and cogent. Accordingly, it is **ORDERED and ADJUDGED** that Judge White's Report and Recommendation (ECF No. 20) is **AFFIRMED and ADOPTED**. Plaintiff's Complaint is **DISMISSED with prejudice** as time-barred. The Clerk shall **CLOSE** this case. All pending motions are **DENIED as moot**.

It is **FURTHER ORDERED and ADJUDGED** that Petitioner has not demonstrated that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003); accord *Lott v. Attorney Gen., Fla.*, 594 F.3d 1296, 1301 (11th Cir. 2010) (explaining that a "petitioner need not show he will

ultimately succeed on appeal” in order to warrant a certificate of appealability). Accordingly, this Court **DENIES** a Certificate of Appealability in this case.

DONE and ORDERED in Chambers at Miami, Florida, this 27th day of April 2015.



MARCIA G. COOKE
United States District Judge

Copies furnished to:

Patrick A. White, U.S. Magistrate Judge

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Counsel of Record

**Additional material
from this filing is
available in the
Clerk's Office.**