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[DO NOT PUBLISH]

TIMOTHY D. WOULARD, Petitioner - Appellant, versus SECRETARY, DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA, Respondents - Appellees.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

707 Fed.Appx. 635; 2017 U.S. App. LEXIS 17066

No. 16-10469 Non-Argument Calendar

September 5, 2017, Decided

Editorial Information: Prior History

Appeals from the United States District Court for the Middle District of Florida. D.C. Docket No. 6:14-cv-02058-RBD-DAB. Woulard v. Sec'y, Dep't of Corr., 2016 U.S. Dist. LEXIS 2421 (M.D. Fla., Jan. 7, 2016)

Disposition: AFFIRMED.

Counsel TIMOTHY D. WOULARD, Petitioner - Appellant, Pro se, DAYTONA BEACH, FL.

For SECRETARY, DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA, Respondents - Appellees: Rebecca Rock McGuigan, Pam Bondi, Marjorie J. Vincent-Tripp, Attorney General's Office, DAYTONA BEACH, FL.

Judges: Before TJOFLAT, WILLIAM PRYOR, and JORDAN, Circuit Judges.

Opinion

PER CURIAM:

Timothy Woulard, a Florida state prisoner proceeding *pro se* and *in forma pauperis*, appeals the district court's dismissal of his 28 U.S.C. 2254 habeas corpus petition as barred by the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996. *See* 28 U.S.C. 2244(d)(1). Upon review of the record and the parties' briefs, we affirm.

I

Because we write for the parties, we set out only what is necessary to resolve this appeal.

In March of 2010, Mr. Woulard was charged in Florida state court with second-degree murder with a firearm (count 1) and possession of a firearm by a convicted felon (count 2). Mr. Woulard pled guilty to the lesser-included offense of manslaughter for count 1 and to the possession charge, and he was sentenced pursuant to a plea agreement on May 11, 2010.

In June of 2010, Mr. Woulard moved to withdraw his guilty plea. After an evidentiary hearing, he stated that he no longer wanted to take back his plea, and the state court allowed him to withdraw the motion on July 30, 2010.¹

On January 26, 2011, Mr. Woulard filed a Rule 3.850 motion for post-conviction relief in state court and asserted two grounds of ineffective assistance of counsel. The state court granted an evidentiary hearing on one issue, but subsequently entered an order denying the motion in March of 2013. The Fifth District Court of Appeal issued a per curiam opinion affirming, and the mandate issued on May 2, 2014.

Mr. Woulard filed an initial *pro se* 2254 petition in federal court on October 7, 2014, but the district court dismissed it without prejudice because he had not paid the filing fee, filed an affidavit of indigency, or tried to seek IFP status. Rather than filing a motion for reconsideration or appealing the dismissal, Mr. Woulard filed a second 2254 petition on December 10, 2014.

In January of 2016, the district court dismissed Mr. Woulard's second 2254 petition as untimely because it was due on December 4, 2014. In reaching that calculation, the district court applied Florida law and found that the one-year statute of limitations period began to run on August 30, 2010 (i.e., 30 days after Mr. Woulard's motion to withdraw his plea pleadings had ended) because he had not appealed his state convictions or sentence. The district court recognized that his properly-filed state post-conviction motion tolled the limitations period from January 26, 2011 (the date he filed the motion) through May 2, 2014 (the date the appellate mandate issued for the denial of the motion). Given that 149 days had elapsed between August 30, 2010, and the filing of the state post-conviction motion, the district court found that Mr. Woulard had 216 days from the date of the state appellate mandate to timely file a federal habeas petition.

In October of 2016, we granted a certificate of appealability on one issue: whether the district court erred in dismissing Woulard's 2254 petition as untimely. Because Mr. Woulard has abandoned the only equitable tolling argument that he made in the district court, and he has waived his remaining arguments on appeal, we now affirm.

II

We review a district court's decision to dismiss a habeas petition as untimely and its decision regarding the applicability of equitable tolling *de novo*. See *San Martin v. McNeil*, 633 F.3d 1257, 1265 (11th Cir. 2011). A district court's relevant factual findings are reviewed only for clear error, *see id.*, and we therefore must be "left with a 'definite and firm conviction that a mistake has been committed.'" *United States v. Smith*, 821 F.3d 1293, 1302 (11th Cir. 2016).

III

AEDPA imposes a strict one-year statute of limitations for filing a 2254 habeas petition and identifies four events that trigger the one-year period. See 28 U.S.C. 2244(d)(1)(A)-(D). As relevant here, the one-year period begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

2244(d)(1)(A). The statute of limitations period is tolled, however, while a properly-filed motion for state post-conviction relief is pending. *See* 2244(d)(2). In Florida, a state post-conviction motion is pending until the appropriate appellate court issues the mandate for its order affirming a state trial court's denial of the motion. *See Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000).

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." *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (citation omitted). We have held that a petitioner must "show a causal connection between the alleged extraordinary circumstances and the late filing of the petition." *San Martin*, 633 F.3d at 1267. We may also consider an untimely habeas petition if a petitioner can show that he is actually innocent, but this "exception is 'exceedingly narrow in scope,' and the petitioner must demonstrate that he is factually innocent rather than legally innocent." *Id.* at 1267-68 (citation omitted). Although we liberally construe *pro se* briefs, "issues not briefed on appeal by a *pro se* litigant are deemed abandoned." *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). Moreover, issues that are raised for the first time on appeal generally will not be addressed unless an exception applies. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331-32 (11th Cir. 2004).

Here, Mr. Woulard has abandoned his equitable tolling argument regarding his initial 2254 petition (filed on October 7, 2014, without paying the filing fee) because he did not brief the issue on appeal. *See Timson*, 518 F.3d at 874. Even if he had briefed the issue, he has not attempted to show a causal connection between an extraordinary circumstance and his inability to file the petition on time. *See San Martin*, 633 F.3d at 1267.

Instead, Mr. Woulard claims for the first time on appeal that his second 2254 petition was actually filed (through mailing) on December 1, 2010, but that a corrections officer incorrectly transposed the date as December 10, 2010. Mr. Woulard has not asserted that any of the exceptions to the waiver rule apply, and we therefore decline to address that new argument. *See Access Now*, 385 F.3d at 1331 (explaining that if we address issues "that districts court never had a chance to examine, we . . . deviate from the essential nature . . . of an appellate court"). *Cf. Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (noting that although we are required to liberally construe *pro se* pleadings, issues not raised in the district court are generally deemed waived).

In addition, Mr. Woulard argues that he is entitled to proceed because he has made a substantial showing of a deprivation of a constitutional right-ineffective assistance of counsel. But he incorrectly asserts the standard for determining whether a petitioner should be granted a COA under 28 U.S.C. 2253(c)(2) as a basis for excusing the timeliness issue here.²

We do not have authority to review Mr. Woulard's additional claims that his attorney rendered ineffective assistance of counsel, that he is entitled to another evidentiary hearing, and that he has new witness testimony to present because our review is limited to the timeliness issue listed in the COA. *See Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998) (holding that our

appellate review of an unsuccessful habeas petition is limited because 2253(c)(3) "mandates that the COA indicate 'which specific issue or issues satisfy the showing' necessary for granting such a certificate"). In any event, Mr. Woulard has also waived these issues because he did not raise them as a basis for equitable tolling below.

Insofar as Mr. Woulard claims that the actual innocence exception applies, his argument is tied to his ineffective assistance of counsel claim. He contends that if his attorney had been effective in filing a motion to suppress the evidence against him, then the state would not have been able to prove that he committed a crime, and he therefore would not have pled guilty. This claim, if true, may lend support for legal innocence, but Mr. Woulard has not met the high bar of providing new evidence that supports *factual* innocence. See *San Martin*, 633 F.3d at 1268. Cf. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1930, 185 L. Ed. 2d 1019 (2013) (explaining that new evidence must be sufficient to establish that "it is more likely than not that no reasonable juror would have convicted" the petitioner).

Lastly, although Mr. Woulard has not argued that the district court clearly erred in calculating the date that he was required to file a federal habeas corpus petition, we briefly address the district court's finding. We have explained that withdrawing a motion leaves "nothing . . . to review," see *United States v. Montoya*, 782 F.2d 1554, 1556 (11th Cir. 1986), so, the district court did not clearly err by finding that Mr. Woulard's convictions became final on August 30, 2010, because he did not appeal within 30 days after withdrawing his motion to withdraw his guilty plea. See Fla. R. App. P. 9.140(b)(3); *Gust v. State*, 535 So. 2d 642, 643 (1st DCA1988) (observing that a judgment becomes final when the 30-day period for filing a direct appeal expires). The district court then counted 149 days from the start of the limitations period to Mr. Woulard's state post-conviction motion, properly recognized that the limitations period tolled during the pendency of Mr. Woulard's state post-conviction motion, see 2244(d)(2), and added an additional 216 days once the appellate mandate issued on May 2, 2014. See *Nyland*, 216 F.3d at 1267.

In sum, Mr. Woulard has not provided a basis for applying the doctrine of equitable tolling, and we are not left with the firm conviction that the district court committed a factual error in determining that Mr. Woulard was required to file his federal habeas petition by December 4, 2014. See *Smith*, 821 F.3d at 1302.

IV

We affirm the district court's dismissal of Mr. Woulard's habeas corpus petition as untimely.

AFFIRMED.

Footnotes

1 Mr. Woulard filed a second motion to withdraw his guilty plea on August 14, 2010, but it was dismissed as untimely.

2 The only equitable tolling argument that Mr. Woulard made in the district court was that the district court's November 21, 2014 dismissal of his habeas petition without prejudice (for failure to pay the filing fee or to request IFP status) did not give him enough time to re-file on time. At the time, he admitted that his petition should have been filed by December 4, 2010, but that his failure to do so was based on an unconstitutional application of federal law in that the district court denied him access to the courts.

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

No. 16-10469-CC

TIMOTHY D. WOULARD,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

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

BEFORE: TJOFAT, WILLIAM PRYOR, and JORDAN, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by Timothy D. Woulard is DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

ORD-41

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

TIMOTHY D. WOULARD,

Petitioner,

v.

Case No: 6:14-cv-2058-Orl-37DAB

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

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Petition for Writ of Habeas Corpus filed by Timothy D. Woulard is DENIED, and this case is DISMISSED WITH PREJUDICE.

Date: January 11, 2016

SHERYL L. LOESCH, CLERK

s/LMoyer, Deputy Clerk

1. **Appealable Orders:** Courts of Appeals have jurisdiction conferred and strictly limited by statute:
 - (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291:** Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).
 - (b) **In cases involving multiple parties or multiple claims,** a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).
 - (c) **Appeals pursuant to 28 U.S.C. Section 1292(a):** Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.
 - (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.
 - (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).
2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:
 - (a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.
 - (b) **Fed.R.App.P. 4(a)(3):** "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."
 - (c) **Fed.R.App.P.4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.
 - (d) **Fed.R.App.P.4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.
 - (e) **Fed.R.App.P.4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.
3. **Format of the notice of appeal:** Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.
4. **Effect of a notice of appeal:** A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TIMOTHY D. WOULARD,

Petitioner,

v.

CASE NO. 6:14-cv-2058-Orl-37DAB

SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,

Respondents.

ORDER

This cause is before the Court on a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1). Thereafter, Respondents filed a response to the petition for writ of habeas corpus in compliance with this Court's instructions and with the *Rules Governing Section 2254 Cases in the United States District Courts* (Doc. 7). Petitioner filed a reply to the response (Doc. 9) and an amended reply (Doc. 12).

Petitioner alleges three claims for relief in his habeas petition. However, as discussed hereinafter, the Court finds the petition is untimely filed.

I. PROCEDURAL HISTORY

Petitioner was charged by information with second degree murder with a firearm (count one) and possession of a firearm by a convicted felon (count two) (Doc. 7-1 at 5). Petitioner entered into a negotiated plea whereby he agreed to plead guilty to the lesser included offense of manslaughter with a firearm for count one and to count two as charged in exchange for two concurrent fifteen-year sentences followed by ten years of

probation. *Id.* at 8-11. On May 11, 2010, the trial court sentenced Petitioner pursuant to the terms of the plea agreement. *Id.* at 35-36, 41-48.

On June 10, 2010, Petitioner filed a motion to withdraw his plea. *Id.* at 50-51. However, Petitioner later filed a notice that he wanted to withdraw his motion. *Id.* at 53-54. On July 30, 2010, the trial court held a hearing on the matter, and Petitioner stated that he did not wish to go forward on the motion to withdraw plea. *Id.* at 56-67. The trial court allowed Petitioner to withdraw his motion. *Id.* Petitioner did not appeal. Petitioner filed a second motion to withdraw plea on August 14, 2010.¹ *Id.* at 70. The trial court dismissed the motion as untimely. *Id.* at 72-73. Petitioner did not appeal.

On January 26, 2011, Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. *Id.* at 86-112. The trial court denied Petitioner's first claim and determined an evidentiary hearing was warranted on Petitioner's second claim (Doc. 7-2 at 75-81). An evidentiary hearing was held, and on March 29, 2013, the trial court denied Petitioner's remaining claim (Doc. Nos. 7-2 at 109-128; 7-3 at 1-19). Petitioner appealed, and appellate counsel filed an *Anders*² brief and moved to withdraw from the case (Doc. 7-3 at 40-52). The Fifth District Court of Appeal

¹ This is the filing date under the "mailbox rule." See *Thompson v. State*, 761 So. 2d 324, 326 (Fla. 2000) ("[W]e will presume that a legal document submitted by an inmate is timely filed if it contains a certificate of service showing that the pleading was placed in the hands of the prison or jail officials for mailing on a particular date, if that the [sic] pleading would be timely filed if it had been received and file-stamped by the Court on that particular date.").

² *Anders v. California*, 386 U.S. 738 (1967).

("Fifth DCA") granted counsel's motion to withdraw and on April 8, 2014, affirmed *per curiam*. *Id.* at 74-76. Mandate issued on May 2, 2014. *Id.* at 78. Petitioner filed his federal habeas petition on December 10, 2014 (Doc. 1).

II. TIMELINESS OF THE PETITION

Pursuant to 28 U.S.C. § 2244:

- (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 --
 - (A) the date on which the judgment became final by the consideration 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 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 facts supporting 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 section.

28 U.S.C. § 2244(d).

Petitioner did not appeal his conviction and sentence. Consequently, the one-year

limitations period began to run on August 30, 2010, or thirty days after Petitioner's motion to withdraw plea proceedings concluded. *See* Fla. R. App. P. 9.140(b)(3); *Gust v. State*, 535 So. 2d 642 (Fla. 1st DCA 1988) (if a defendant does not appeal the conviction or sentence, judgment becomes final when the 30-day period for filing a direct appeal expires). Therefore, under § 2244(d)(1)(A), Petitioner had through August 30, 2011, absent any tolling, to file a federal habeas petition.³

Pursuant to § 2244(d)(2), the one-year period would be tolled during the pendency of any "properly filed" state post-conviction proceedings. Petitioner filed his Rule 3.850 motion on January 26, 2011. A total of 149 days of the one-year limitations period elapsed before Petitioner filed this motion. The limitations period was tolled from January 26, 2011, through May 2, 2014, the date mandate issued on appeal from the denial of the Rule 3.850 motion. Petitioner had 216 days of the limitations period remaining, or until December 4, 2014, to file his federal habeas petition. The federal habeas petition, filed on December 10, 2014, is untimely filed.

Moreover, Petitioner's federal habeas petition, filed on October 7, 2014, in case number 6:14-cv-1646-Orl-18TBS, did not toll the limitations period. *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (holding "an application for federal habeas corpus review is not an application for State post-conviction or other collateral review within the meaning

³ Petitioner's second motion to withdraw plea did not toll the one-year limitations period because it was untimely filed. *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) ("When a postconviction petition is untimely under state law, that [is] the end of the matter for purposes of § 2244(d)(2).")

of 28 U.S.C. § 2254(d)(2).”); *Day v. Hall*, 528 F.3d 1315, 1318 (11th Cir. 2008). Therefore, the instant habeas petition is untimely filed.

III. EQUITABLE TOLLING

To overcome his untimely filing, Petitioner contends that he is entitled to equitable tolling (Doc. 9). In support of this claim, Petitioner states that the Court erred when it dismissed case number 6:14-cv-1646-Orl-18TBS due to his failure to pay the filing fee. *Id.* at 2. Petitioner states that a dismissal due to failure to pay the filing fee amounts to a denial of his right to access the courts, and as such, is unconstitutional. *Id.*

The Supreme Court of the United States held in *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010), 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*, 544 U.S. at 418).

In *Smallwood v. Sec’y, Dep’t of Corr*, 178 F. App’x 944, 945 (11th Cir. 2006), the Eleventh Circuit concluded that a habeas petitioner was not entitled to equitable tolling of the one-year limitations period during the time his first federal habeas petition was pending because the petitioner was not the victim of extraordinary circumstances that were beyond his control and unavoidable even with due diligence. The court stated that the petitioner received notice of the dismissal of the first federal habeas action, and instead of appealing the dismissal of the initial action, he chose to file a new petition. *Id.* The court reasoned that because the petitioner “did not exhaust the options available to him when his first federal habeas petition was dismissed, he did not exercise the level of

diligence required to show the rare and exceptional circumstances that qualify a petitioner for equitable tolling.” *Id.* (quotation omitted).

Similar to *Smallwood*, Petitioner received the notice of dismissal in case number 6:14-cv-1646-Orl-18TBS. However, rather than file a motion for reconsideration or pursue an appeal of the dismissal, Petitioner filed a new petition. Petitioner has not demonstrated extraordinary circumstances or due diligence. Therefore, he is not entitled to equitable tolling on this basis.⁴

Any of Petitioner’s allegations that attempt to excuse his failure to file the instant petition within the one-year limitations period and that are not specifically addressed herein have been found to be without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner “makes a substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c)(2). To make such a showing “the petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec’y Dep’t of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition

⁴Additionally, contrary to Petitioner’s arguments, the Court dismissed Petitioner’s first case because he failed to comply with Local Rule 1.03(e), which requires a *pro se* party to pay the full filing fee or move to proceed in forma pauperis within thirty days of commencement of the action. *See* Doc. 4, case number 6:14-cv-1646-Orl-18TBS. Therefore, the Court did not deny Petitioner his right to access the court. Moreover, as noted above, Petitioner did not move for reconsideration of that order, nor did he appeal.

on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a Petitioner 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." *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

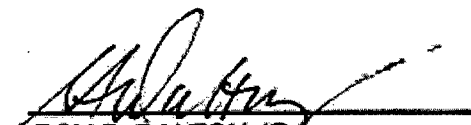
The Court concludes that Petitioner has not made the requisite showing in these circumstances. Petitioner is not entitled to a certificate of appealability.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus filed by Timothy D. Woulard (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.
2. Petitioner is **DENIED** a certificate of appealability.
3. The Clerk of the Court is directed to enter judgment and close this case.

DONE AND ORDERED in Orlando, Florida, this 7th day of January, 2016.




ROY B. DALTON JR.
United States District Judge

Copies to:
OrIP-3 1/7
Counsel of Record

Timothy D. Woulard