No.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN COOK - PETITIONER

vs.

SECRETARY, DEPARTMENT OF CORRECTIONS, - RESPONDENT(S)
FLORIDA ATTORNEY GENERAL.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Steven H. Cook, pro se
FDC # 130448
Apalachee Correctional Institution
52 West Unit Drive
Sneads, Florida 32460
(850) 718-0577

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13966-B

STEVEN H. COOK,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

ORDER:

Steven H. Cook moves for a certificate of appealability, in order to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

Exh. A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Steven H. Cook,

Petitioner,

v.

Secretary, Florida Department of Corrections, and Florida Attorney General,

Respondents.

No. 5:14-cv-34-PAM-CM

MEMORANDUM AND ORDER

This matter is before the Court on a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. For the following reasons, the Petition is denied.

BACKGROUND

On June 6, 2008, a Florida jury found Petitioner Steven Cook guilty of first-degree murder, and he was sentenced to life imprisonment. (App'x (Docket No. 15) Ex. C at 219-22.) Cook appealed and the Fifth District Court of Appeal affirmed. Cook v. State, 11 So. 3d 371 (Fla. Dist. Ct. App. 2009) (Table). The mandate issued on June 19, 2009. (App'x Ex. E.)

Cook filed a "bare-bones" Rule 3.850 motion on June 11, 2010. The trial court never addressed this motion, however, because there was no record of the motion on its docket. (Id. Ex. VV.) On April 8, 2011, Cook filed another state habeas petition, alleging ineffective assistance of appellate counsel. (App'x Ex. M.) The Fifth District Court of Appeal denied the petition without comment. (Id. Ex. N.) Cook unsuccessfully continued to file numerous motions in Florida state court. (See generally id. Exs. O-UU.)

Exh. B

Cook filed this Petition on January 1, 2014, and later filed an Amended Petition on June 9, 2014. (Docket Nos. 1, 11.) The Court denied Cook's claims as untimely. (Docket No. 23.) Cook appealed that decision to the Eleventh Circuit, which vacated and remanded. Cook v. Sec'y Dep't of Corr., 599 F. App'x. 940 (Mem) (11th Cir. 2017). The Court now recognizes Cook's Amended Petition as timely because the original "bare-bones" state habeas petition tolled the statute of limitations.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act ("AEDPA") strictly limits a federal court's power to review habeas petitions brought by individuals held in custody pursuant to a state court order. The AEDPA restricts the Court's review to state court adjudications of the direct appeal or habeas petition that:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Although a state court may not address the merits of an appeal or a habeas petition, "the summary nature of a state court's decision does not lessen the deference that it is due" under § 2254(d)(1). Wright v. Moore, 278 F.3d 1245, 1254 (11th Cir. 2002).

A. Ineffective Assistance of Counsel

Cook brings only one ground for relief in his Amended Petition, claiming violations of his Sixth and Fourteenth Amendment rights because he received ineffective

assistance of appellate counsel and was denied the right to an appeal. (Am. Pet. at 17.) But Cook does not provide any supporting facts or explain this claim further. In his second state habeas petition, however, Cook elaborated on this claim and alleged that he received ineffective assistance because his appellate counsel failed to: (1) seek and include the voir dire portion of the transcript for appeal; (2) bring an issue before the court concerning several unrecorded portions of the trial; (3) investigate claims that there were inappropriate, prejudicial, and inflammatory statements not included in the record; and (4) file a complete record. (App'x Ex. M at 4-5.) The Court will therefore construe Cook's Amended Petition as raising those claims.

Cook can succeed on an ineffective-assistance-of-counsel claim only if he can show that the trial court's or appellate court's determination of the facts surrounding his claim was unreasonable. 28 U.S.C. § 2254(d). Thus, he must establish both that his counsel was ineffective and that it was unreasonable for the court reviewing his claim to conclude otherwise. To establish ineffective assistance of appellate counsel, Cook must demonstrate "that his counsel's performance was objectively unreasonable by professional standards and that he was prejudiced as a result of the poor performance." Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To show prejudice, Cook "must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Woodford v. Visciotti, 537 U.S. 19, 22 (2002) (quotations omitted).

Moreover, "[t]here is a strong presumption that an attorney's conduct fell within the 'wide range of professional norms.'" Damron v. Florida, 2009 WL 1514269, at *2

including the date a judgment of conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). The limitations period is tolled while a properly filed application for state postconviction or other collateral review is pending. Id. § 2244(d)(2). For example, a properly filed Rule 3.850 motion tolls the limitations period. Brown v. Sec'y for the Dep't of Corr., 530 F.3d 1335, 1338 (11th Cir. 2008).

"[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." Artuz v. Bennett, 531 U.S. 4, 8, 121 S. Ct. 361, 364 (2000). The Florida Supreme Court has adopted the "mailbox rule" for pro se prisoners. Haag v. State, 591 So. 2d 614, 617 (Fla. 1992). "Under the mailbox rule, a petition or notice of appeal filed by a pro se inmate is deemed filed at the moment in time when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state." Id.

"Rule 3.850(c), which sets forth the contents of a 3.850 motion, requires a movant to include a brief statement of the facts (and other conditions) relied on in support of the motion." Valle v. State, 705 So. 2d 1331, 1334 (Fla. 1997). It also requires other basic details about the petitioner's case. Fla. R. Crim. P. 3.850(c).

The district court clearly erred in finding Cook's June 11, 2010 motion was not in the record. The State included the motion in its appendix to its answer. See App. Exs. DD & VV, Cook v. Sec'y, Dep't of Corr., No. 14-00034-CIV (M.D. Fla.

22(b)(1). This Court cannot grant a Certificate of Appealability unless the prisoner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating 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, 327 (2003). The prisoner must establish that the resolution of his constitutional claims "was debatable among jurists of reason." Lott v. Att'y Gen., Fla., 594 F.3d 1296, 1301 (11th Cir. 2010).

Cook has not demonstrated that his claims are debatable or that they "deserve encouragement to proceed further." Miller-El, 537 U.S. at 327. The Court will therefore not grant Cook a Certificate of Appealability.

CONCLUSION

Cook is not entitled to federal habeas relief. Accordingly, **IT IS HEREBY ORDERED that:**

1. Cook's Amended Petition for a Writ of Habeas Corpus (Docket No. 11) is **DENIED**;
2. The Court will NOT issue a Certificate of Appealability; and
3. The Clerk shall enter judgment accordingly, terminate all remaining deadlines as moot, and close the file.

Dated: July 24, 2017

s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13966-B

STEVEN H. COOK,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

Before: TJOFLAT and MARCUS, Circuit Judges.

BY THE COURT:

Steven H. Cook has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 6, 2018, order denying his motion for a certificate of appealability. Upon review, Cook's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Exh. C

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-13922
Non-Argument Calendar

D.C. Docket No. 5:14-cv-00034-WTH-PRL

STEVEN H. COOK,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

(April 26, 2017)

Before HULL, MARCUS, and MARTIN, Circuit Judges.

PER CURIAM:

Steven Cook is a Florida prisoner proceeding pro se. He appeals the district court's dismissal of his habeas corpus petition brought under 28 U.S.C. § 2254 as barred by the one-year statute of limitations. Cook argues the district court erred in

Exh. D

finding he first filed an application for state collateral review on April 8, 2011. He argues instead that he timely and properly filed a postconviction motion under Florida Rule of Criminal Procedure 3.850 when he gave it to prison officials on June 11, 2010. The district court found there was no record of a June 11, 2010 motion, and thus the one-year limitations period expired before Cook filed his April 8, 2011 motion. After careful review, we vacate the district court's decision and remand for further review.

I.

On June 6, 2008, a Florida jury convicted Cook of first-degree murder. Florida's Fifth District Court of Appeal affirmed that decision on April 7, 2009, and denied a motion for rehearing on June 2, 2009. Cook v. State, 11 So. 3d 371 (Fla. 5th DCA 2009) (per curiam). The mandate issued on June 19, 2009. Cook then delivered a Rule 3.850 motion to prison authorities. Prison authorities stamped the motion as received on June 11, 2010. Cook filed several more petitions and motions in the state court, including an April 8, 2011 state habeas petition, a June 4, 2012 motion, and an October 5, 2012 motion. In both of the later motions, he argued the court had not addressed his June 11, 2010 motion. The Florida court denied these motions. Both times it found the June 11, 2010 motion was not in the record.

On January 16, 2014, Cook filed this § 2254 habeas petition, which he later amended. The district court found Cook's petition untimely. Specifically, the court said Cook's one-year statute of limitations for filing a federal habeas petition began to run on September 17, 2009. Thus, the court reasoned that Cook had to file an application for postconviction relief before September 17, 2010, in order to toll the limitations period. It determined Cook's first application for postconviction relief was his April 8, 2011 state habeas petition, which fell outside the one-year limitations period. The district court further found Cook's June 11, 2010 motion was not in the record, and noted the state court twice found no record of the motion.

II.

"We review de novo the dismissal of a habeas petition as untimely." Spottsville v. Terry, 476 F.3d 1241, 1243 (11th Cir. 2007). "We review its factual determinations for clear error." Johnson v. Fla. Dep't of Corr., 513 F.3d 1328, 1330 (11th Cir. 2008). "If there is an issue that the district court did not decide in the first instance, it is not properly before this Court and we remand for the district court's consideration." Nyland v. Moore, 216 F.3d 1264, 1266 (11th Cir. 2000) (per curiam).

28 U.S.C. § 2244(d)(1) applies a one-year statute of limitations to § 2254 petitions. This limitations period begins to run on the latest of four events,

including the date a judgment of conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). The limitations period is tolled while a properly filed application for state postconviction or other collateral review is pending. Id. § 2244(d)(2). For example, a properly filed Rule 3.850 motion tolls the limitations period. Brown v. Sec'y for the Dep't of Corr., 530 F.3d 1335, 1338 (11th Cir. 2008).

"[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." Artuz v. Bennett, 531 U.S. 4, 8, 121 S. Ct. 361, 364 (2000). The Florida Supreme Court has adopted the "mailbox rule" for pro se prisoners. Haag v. State, 591 So. 2d 614, 617 (Fla. 1992). "Under the mailbox rule, a petition or notice of appeal filed by a pro se inmate is deemed filed at the moment in time when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state." Id.

"Rule 3.850(c), which sets forth the contents of a 3.850 motion, requires a movant to include a brief statement of the facts (and other conditions) relied on in support of the motion." Valle v. State, 705 So. 2d 1331, 1334 (Fla. 1997). It also requires other basic details about the petitioner's case. Fla. R. Crim. P. 3.850(c).

The district court clearly erred in finding Cook's June 11, 2010 motion was not in the record. The State included the motion in its appendix to its answer. See App. Exs. DD & VV, Cook v. Sec'y, Dep't of Corr., No. 14-00034-CIV (M.D. Fla.

Sept. 19, 2014), D.E. 16-15:70 to 16-17:9; 16-18:20–21. The Rule 3.850 motion was clearly marked as received on June 11, 2010. Id. at D.E. 16-17:9, 16-18:20–21. And the motion complied with the requirements of Rule 3.850(c). Because the record shows that Cook delivered his motion to prison officials on June 11, 2010, the district court should have deemed it filed on that date under the mailbox rule. See Haag, 591 So. 2d at 617. This means the district court also clearly erred in finding Cook's April 8, 2011 petition was his first application for postconviction relief, and in denying the § 2254 petition as untimely.

Because the district court ruled only on the basis that Cook's habeas petition was untimely, no other issues are properly before this Court. See Nyland, 216 F.3d at 1266. We therefore vacate the district court's order and remand for further consideration of the petition consistent with this opinion.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

Steven H. Cook,

Petitioner,

v.

Secretary, Florida Department of Corrections, and Florida Attorney General,

Respondents.

Case No. 5:14-cv-34

MEMORANDUM AND ORDER

This matter is before the Court on a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. For the reasons that follow, the Petition is denied.

BACKGROUND

On June 6, 2008, a jury in Marion County, Florida found Petitioner Steven Cook guilty of murder in the first degree. (App. C, Resp. (Docket No. 15) 219-20.) He was sentenced to life imprisonment. (Id. at 222.) Cook appealed his conviction to the Fifth District Court of Appeal, but the court per curiam affirmed the verdict. Cook v. State, 11 So. 3d 371 (Fla. Dist. Ct. App. 2009) (Table). The mandate issued on June 19, 2009. (App. E, Resp.)

On August 8, 2011, Cook filed a state habeas petition alleging ineffective assistance of appellate counsel. (App. M, Resp.) The Fifth District Court of Appeal denied the petition. (App. N, Resp.) Cook continued to file numerous motions and

Exb. E

petitions in Florida state court; all proved unsuccessful.[1] (See generally App. P-UU, Resp.)

Cook filed the present Petition on January 1, 2014 and later filed an amended Petition on June 9, 2014.[2] (Pet. (Docket No. 1); Am. Pet. (Docket No. 11).) In the Petition, Cook claims violations of his Sixth and Fourteenth Amendment rights for the "erroneous denial" of his right to post-conviction appeal. (Am. Pet. 16-17.)

DISCUSSION

A. Timeliness

A federal habeas petition must be filed within one year, or 365 days, of the petitioner's conviction becoming final. See 28 U.S.C. § 2241(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."). This limitation period runs 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. Id. § 2241(d)(1)(A). In Florida state courts, a judgment becomes final 90 days after the conclusion of direct review to reflect the time period within which a petitioner can seek a writ of certiorari with the United States Supreme Court or, if a petitioner actually files a writ of certiorari, when the United States Supreme Court addresses the claim on the merits or denies the writ. Chavers v. Sec'y,

[1] Of note, Cook filed two separate motions for post-conviction relief that the trial court dismissed as untimely. (App. AA, Response; App. EE, Response.) All of the other motions are without consequence to the present inquiry.

[2] The Court granted Cook leave to amend the Petition because the initial Petition did not list any grounds for relief. (Order (Docket No. 10) 1.)

468 F.3d 1273, 1274-76 (11th Cir. 2006); Bond v. Moore, 309 F.3d 770, 773-74 (11th Cir. 2002).

Once the judgment is final and the statute of limitations begins to run, the limitations period may be tolled where a prisoner properly files an "application for State post-conviction or other collateral review with respect to the pertinent judgment or claim." 28 U.S.C. § 2244(d)(2). The statute is also subject to equitable tolling where a petitioner shows "that he has been pursuing his rights diligently, and . . . that some extraordinary circumstance stood in his way and prevented timely filing." Holland v. Florida, 130 S. Ct. 2549, 2562 (2010) (internal quotation marks omitted).

Here, Cook's conviction became final on June 19, 2009, when the mandate issued. (App. E, Resp.) Accordingly, the 90-day time period for him to file a petition for certiorari ended on September 17, 2009, and thus the limitations period began to run on that date because he filed no such petition. To toll the limitations period, Cook must have filed an application for state post-conviction relief or collateral review before the expiration of the limitations period on September 17, 2010. The record shows that Cook's first application for state collateral review was a habeas petition filed April 8, 2011—203 days beyond the one-year limitations period. (App. M, Resp.)

But Cook alleges that he filed a "bare-bones" motion for post-conviction relief on June 11, 2010, that tolled the limitations period. However, the Court does not have any record of this motion. Indeed, when Cook raised a similar argument in two previous motions for post-conviction relief in Florida state court, the court similarly noted that there was no record of Cook ever filing such a document. (App. AA, Resp.; App. EE,

including the date a judgment of conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). The limitations period is tolled while a properly filed application for state postconviction or other collateral review is pending. Id. § 2244(d)(2). For example, a properly filed Rule 3.850 motion tolls the limitations period. Brown v. Sec'y for the Dep't of Corr., 530 F.3d 1335, 1338 (11th Cir. 2008).

"[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." Artuz v. Bennett, 531 U.S. 4, 8, 121 S. Ct. 361, 364 (2000). The Florida Supreme Court has adopted the "mailbox rule" for pro se prisoners. Haag v. State, 591 So. 2d 614, 617 (Fla. 1992). "Under the mailbox rule, a petition or notice of appeal filed by a pro se inmate is deemed filed at the moment in time when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state." Id.

"Rule 3.850(c), which sets forth the contents of a 3.850 motion, requires a movant to include a brief statement of the facts (and other conditions) relied on in support of the motion." Valle v. State, 705 So. 2d 1331, 1334 (Fla. 1997). It also requires other basic details about the petitioner's case. Fla. R. Crim. P. 3.850(c).

The district court clearly erred in finding Cook's June 11, 2010 motion was not in the record. The State included the motion in its appendix to its answer. See App. Exs. DD & VV, Cook v. Sec'y, Dep't of Corr., No. 14-00034-CIV (M.D. Fla.

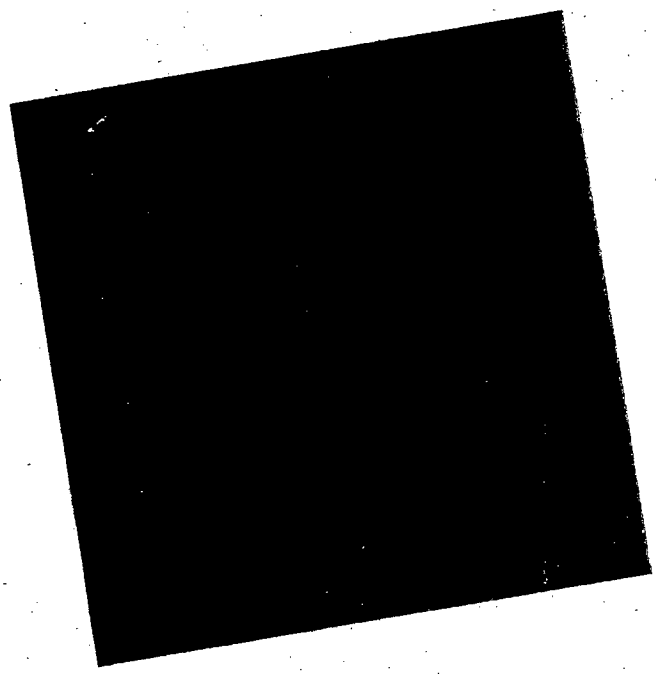
CONCLUSION

Cook has not established that his Petition for a Writ of Habeas Corpus is timely. Accordingly, **IT IS HEREBY ORDERED that**:

1. The Petition for a Writ of Habeas Corpus (Docket No. 11) is **DENIED**;
2. A Certificate of Appealability will **NOT** issue; and
3. The Clerk shall enter judgment accordingly, terminate all remaining deadlines as moot, and close the file.

Dated: July 30, 2015

s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge



Exh. F

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN AND
FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 2004-CF-4163

vs.

STEVEN H. COOK,
Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE is before the Court on the Defendant's *pro se* Motion for Post-Conviction Relief, filed on or around October 5, 2012. On June 6, 2008, the Defendant was found guilty of Murder in the First Degree and was sentenced to life imprisonment. On April 7, 2009, the Fifth District Court of Appeal *per curiam* affirmed his judgment and sentence. *Cook v.* State, 11 So. 3d 371 (Fla. 5th DCA 2009) (Table). Defendant has previously filed an Amended Motion for Post-Conviction Relief, which this Court denied as untimely on June 19, 2012. *See attached Order.* Defendant appealed and the Fifth District Court of Appeal *per curiam* this Court's denial of Defendant's Motion for Post-Conviction Relief. *Cook v. State*, 98 So. 3d 583 (Fla. 5th DCA 2012) (Table).

A motion for postconviction relief under rule 3.850 must be filed within two years of the date the judgment and sentence became final. *See* Fla. R. Crim. P. 3.850(b). The judgment becomes final and the clock starts running on the date of the mandate. *Beaty v. State*, 701 So. 2d 856 (Fla. 1997). Under a rule of practice referred to as the "mailbox rule," a *pro se* postconviction motion is deemed to be "filed" when the inmate loses command over the document by authorizing its further delivery to the state's agents. *Haag v. State*, 591 So. 2d 614 (Fla. 1992).

In this instant case, the judgment and sentence became final and the two-year time limit began to run when the Fifth DCA issued the mandate on June 19, 2009. *See Mandate.*

Exh. 6

The two year window closed on June 19, 2011. The Defendant filed this instant motion on October 5, 2012. This motion is untimely and is therefore procedurally barred.

The Defendant claims that he filed a motion for postconviction relief on June 11, 2010 and because the Court never ruled on the motion, the instant Motion has been timely filed. After review of the record, however, the Court has no record of the Defendant ever filing a Motion on June 11, 2010.

With the Court having considered the Motion, pertinent portions of the file, and being otherwise sufficiently advised, it is hereby

ORDERED: Defendant's Motion for Post-Conviction Relief is DENIED. **Defendant may appeal this decision to the Fifth District Court of Appeal within thirty (30) days of this Order's effective date.**

ORDERED this 4th day of December, 2012, at Ocala, Florida.

David B. Eddy
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been provided by US Mail/Inter-Office Mail this 4th day of December, 2012 to the following:

Steven H. Cook, DC #130448
Apalachee Correctional Institution East
35 Apalachee Drive
Sneads, FL 32460-4166

Office of the State Attorney
(By inter-office mail)

Mary Kisicki
Judicial Assistant

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-13922-D

STEVEN H. COOK,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

ORDER:

Steven H. Cook, a Florida prisoner proceeding pro se, seeks a certificate of appealability ("COA") after the District Court dismissed his amended 28 U.S.C. § 2254 habeas petition as time-barred. Mr. Cook is serving a life sentence for first-degree murder. He claims that he has been wrongfully denied post-conviction relief by the Florida courts. Because reasonable jurists would find debatable the District Court's denial of Mr. Cook's petition, his motion for a COA is granted.

A jury returned a guilty verdict against Mr. Cook on June 6, 2008. Florida's Fifth District Court of Appeals affirmed Mr. Cook's conviction and sentence on

Exh. H

April 7, 2009, and the mandate issued on June 19, 2009. The latter event triggered a 90-day window during which Mr. Cook could have sought review, and that window closed on September 17, 2009. Thus, the one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") began to run on September 17, 2009. See 28 U.S.C. § 2241(d)(1)(A); see also Bond v. Moore, 309 F.3d 770, 773–74 (11th Cir. 2002) (limitations period begins to run upon expiration of 90-day window for seeking certiorari). Barring any equitable or statutory tolling, the limitations period would have expired on September 17, 2010.

Mr. Cook alleged that statutory tolling did occur. He claimed to have delivered a "barebones" Rule 3.850 motion to prison authorities for mailing on June 11, 2010, well before the limitations period expired. The record in fact contains a Rule 3.850 motion with a certificate of service dated June 11, 2010, as well two "received" stamps bearing the same date. The motion's certificate of service is in substantial compliance with Florida Rule of Appellate Procedure 9.420. Mr. Cook claimed that his motion was never ruled on,[1] and thus remained "pending" for purposes of statutory tolling. See 28 U.S.C. § 2244(d)(2).

Nevertheless, the District Court denied Mr. Cook's petition as time-barred, finding that "the Court does not have any record of [the June 11, 2010] motion."

[1] He also claimed that he inquired repeatedly about his motion's status but did not receive a response.

The District Court cited two previous state-court opinions that also said Mr. Cook's Rule 3.850 motion was never received. Presumably, the District Court concluded from this that Mr. Cook's Rule 3.850 motion was never "properly filed" in state court. 28 U.S.C. § 2244(d)(2) (requiring that an application be "properly filed" to activate statutory tolling). "[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." Artuz v. Bennett, 531 U.S. 4, 8–9, 121 S. Ct. 361, 363–64 (2000).

The District Court overlooked the effect of the so-called mailbox rule. "Under the mailbox rule, a pro se inmate's document is deemed filed when the inmate entrusts the document to prison officials for further delivery or processing." Lawson v. State, 107 So. 3d 1228, 1229 (Fla. 2d DCA 2013) (quotation omitted). Even if the prisoner's Rule 3.850 motion never actually reaches the clerk's office—as seems to have been the case here—it should be deemed filed under this rule. See id. This is because a prisoner who delivers an apparently proper Rule 3.850 motion[2] to prison authorities should not be held accountable for its later loss. See Haag v. State, 591 So. 2d 614, 617 (Fla. 1992) (calling it "fundamentally

[2] Mr. Cook's motion was longer than the 50-page prescribed maximum. See Fla. R. Crim. P. 3.850(d). However, because he was never notified of his motion's noncompliance or given an opportunity to correct it, this is not a reason to declare the motion not properly filed. See Fla. R. Crim. P. 3.850(f)(2); cf. Sec'y Dep't of Corr., 489 F. App'x 354, 355–56 (11th Cir. 2012) (per curiam) (unpublished) (holding that a prisoner's 250-page Rule 3.850 motion was not properly filed where the district court dismissed it without prejudice and allowed amendment).

unfair" to hold a prisoner responsible for the actions of prison personnel). Reasonable jurists would thus find the District Court's ruling debatable. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000).

Mr. Cook has filed numerous Rule 3.850 motions, only to have them dismissed as untimely. He filed a copy of his "barebones" Rule 3.850 motion, which includes an apparently proper certificate of service dated June 11, 2010, as well as two "received" stamps bearing the same date. Yet the Florida courts and the District Court seem to have ignored this motion, simply stating that "the court file does not contain [it]." For this reason, Mr. Cook's motion for a COA is GRANTED.

Barry B. Martin

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STEVEN H. COOK
Petitioner/Appellant

Court of Appeals No: 17-13966-B

v.

District Court No: 5:14-cv-34-PAM-PRL

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
Respondent/Appellee

MOTION FOR CERTIFICATE OF APPEALABILITY

COMES NOW, the Appellant, STEVEN H. COOK, ("Cook" or "Appellant"), pro se and in compliance with this Court's Order dated October 31, 2017 granting an extension of time until November 9, 2017, and in consideration of Cook's November 15, 2017 2nd Motion for Enlargement of Time requesting until November 24, 2017 for good cause shown, submits this *Motion for Certificate of Appealability.* On August 22, 2017, the Appellant timely filed his Notice of Appeal, seeking this Court to review and reverse the July 24, 2017 denial of the Appellant's *Amended Petition for Writ of Habeas Corpus and Denial of a Certificate of Appealability.* This denial came after this Court's April 28, 2017 order vacating the dismissal of Cook's Petition as untimely, and remanding back to the District Court for a ruling on the merits of the Petition (see *Cook v. Sec'y Dep't of Corr.*, 599 F.App'x 940 (Mem) (11th Cir. 2017)). The July 24, 2017 denial order on the merits was handed down by the Middle District of Florida (Ocala Division) and was issued by Hon. Paul A. Magnuson. The Appellant must now seek a *Certificate of Appealability* ("COA") to issue directly from this Court.

In Judge Magnuson's Denial Order (Pages 2-3), the District Court construed Cook's June 9, 2014 Amended Petition as raising the same claims alleged in Cook's April 8, 2011 Rule

Exh. I

9.141(c) State Habeas Petition. A copy of Cook's Rule 9.141(c) State habeas petition alleging ineffective assistance of appellate counsel was included in the State Response to the Federal Petition as Exhibit M. Cook's 9.141(c) habeas petition contained four grounds involving claims of ineffective assistance of appellate counsel on direct appeal. The grounds included claims that appellate counsel failed to: (1) seek and include the voir dire portion of the transcript for appeal; (2) bring an issue before the appellate court concerning several unrecorded portions of the trial; (3) investigate claims that there were inappropriate, prejudicial, and inflammatory statements not included in the record on appeal; and (4) ensure that the trial court filed a complete record on direct appeal.

However, reasonable jurists would debate whether the District Court was correct in construing, and then denying, Cook's sole claim in his Amended Federal Petition as claims involving his April 8, 2011 State 9.141(c) petition alleging ineffective assistance of appellate counsel. Cook now petitions this Court for permission to proceed with his appeal on the basis that the District Court has severely misconstrued the nature of the claim raised in Cook's June 9, 2014 Amended Federal Petition, and asks that a conditional writ issue giving the State courts a brief time to rule on Cook's Postconviction motion claims, or else Cook will be released.

LEGAL STANDARD OF REVIEW FOR ISSUANCE OF A CERTIFICATE OF APPEALABILITY

Since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the mechanism for appealing habeas corpus and Section §2254 cases is an application for a "Certificate of Appealability" ("COA") in which the petitioner must make a "substantial showing of a denial of a constitutional right." This "substantial showing" standard has been interpreted to codify the *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) standard, at least

insofar as constitutional claims are at issue. See *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) ("[A] demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues were adequate to deserve encouragement to proceed further)."

The *Barefoot* standard seeks to promote Congress' intent "to prevent frivolous appeals from delaying the State's ability to impose sentences," while at the same time protecting the right of a petitioner to be heard. See *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (quoting *Barefoot* at 463 U.S. 892); cf. *Jefferson v. Wellborn*, 220 F.3d 286, 289 (7th Cir. 2000) (explaining that a COA should issue unless the claims are "utterly without merit"). This general principle reflects the fact that the COA requirement constitutes a gate-keeping mechanism that prevents circuit courts from devoting judicial resources on frivolous issues while at the same time affording petitioners an opportunity to persuade the courts through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit (see *Lambright, supra* at 1025).

Under this showing, a petitioner need not show that he would prevail on the merits (see *Tankleff v. Senkowski*, 135 F.3d 235, 242 (2nd Cir. 1998); and see *U.S. v. Gobert*, 139 F.3d 436, 438 (5th Cir. 1998)), but merely must make a general showing of the denial of a constitutional right. See *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997 (after a "quick look" at the face of the complaint to see if a denial of a constitutional right is "facially alleged," we will grant COA) (see also *Franklin v. Hightower*, 215 F.3d 1196, 1199-1200 (11th Cir. 2000)). See *Miller-El v. Cockrell*, 123 S.Ct. 1029, 1039 (2003) ("the threshold inquiry does not require full consideration [of the merits]... In fact, the statute forbids it").

Where a District Court denies the petitioner's constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" (see *Slack*, 473 U.S. at 484, 120 S.Ct. at 1604). When the district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petitioner 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.* Any doubts about whether a habeas petitioner has met the standard for obtaining a COA should be resolved in petitioner's favor (see *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002)).

ISSUE ON WHICH A COA IS SOUGHT

1. Did the U.S. District Court err in construing the sole claim in the Petitioner's Amended Federal Habeas Corpus Petition as a Federal review of ineffective appellate counsel claims stemming from Cook's direct appeal, and then in denying the claims as speculative and without merit? This improper interpretation of Cook's sole claim in his amended petition resulted in a violation of Cook's 14th Amendment right to due process.

STATEMENT OF THE FACTS

On January 16, 2014, the Appellant/Petitioner, Steven H. Cook ("Appellant" or "Cook") filed his original *Petition for Writ of Federal Habeas Corpus* with the U.S. District Court, Middle District, Ocala Division. On June 9, 2014, upon order from the U.S. District Court, Cook filed his *Amended Petition for Writ of Federal Habeas Corpus*.

On July 30, 2015, U.S. District Court Judge Hon. Paul A. Magnuson issued an order dismissing Cook's Amended Petition as being untimely filed. Cook was granted a Certificate of Appealability from this Honorable Court, and on April 28, 2017 this Court issued its order vacating the dismissal of this Petition as untimely, and remanding back to the District Court for a ruling on the merits of the Petition (see *Cook v. Sec'y Dep't of Corr.*, 599 F.App'x 940 (Mem) (11th Cir. 2017)).

On July 24, 2017, Hon. Paul A. Magnuson issued his final order denying Cook's Amended Petition on the merits, and denying a Certificate of Appealability. In the denial order, Judge Magnuson construed Cook's claim as requesting Federal review for constitutional error of the four grounds alleging ineffective assistance of appellate counsel contained within the Petitioner's April 8, 2011 State Habeas Corpus Petition. Cook disagrees with the District Court's interpretation of his sole claim that was alleged in his June 9, 2014 Amended Federal Petition, and argues that this misconstruing of his claim represents a violation of Cook's 14th Amendment right to due process.

On August 22, 2017, Cook filed his Notice of Appeal and has requested extensions of time to now file this *Motion for Certificate of Appealability* with this Court. Argument supporting the Petitioner's reasons for this Honorable Court to issue a Certificate of Appealability ("COA") regarding the denial order of Cook's June 9, 2014 *Amended Petition for Writ of Habeas Corpus* follow.

REASONS FOR GRANTING THE COA

Reasonable jurists would find the District Court's assessment of the constitutional claims raised in Cook's Federal Petition debatable or wrong.

In his June 9, 2014 *Amended Petition for Writ of Federal Habeas Corpus* (Pages 17, 17(a) and 18), the Petitioner labeled Ground One as: "Sixth and Fourteenth Constitutional Amendment violation for denial of right to Post-Conviction Appeal. Due Process Violation. Manifest Injustice. Ineffective Assistance of Counsel." In the "Supporting Facts" Section (Pages 17 and 17(a)), Cook stated the following:

> "On June 11th 2010, the Petitioner filed a Fla.R. 3.850 Motion alleging over 30 instances of Ineffective Assistance of Counsel. Due to the lack of documentary evidence at the time, the motion was filed as "bare bones"[1] in order to remain timely for Federal and State review. Thereafter (on or about June 4, 2012), Petitioner amended the Fla.R. 3.850 motion and the Fifth Judicial Circuit Court summarily denied as untimely, alleging they had never received the original motion. Petitioner appealed. Many motions were filed and continuous litigation was held. The Fifth District Court of Appeal affirmed the circuit court denial even though both courts had been furnished with the timely date-stamped original Fla.R. 3.850 motion. All State remedies have been exhausted in this cause. Therefore, the single issue/ground challenged in this (Federal) Habeas Petition is the erroneous denial of Petitioner's right to Post-Conviction appeal."

Cook stated on Page 18 of his Amended Federal Petition that he did not raise this issue on direct appeal because "It is a Postconviction procedural issue."

On July 24, 2017, Hon. Paul A. Magnuson issued his final order denying Cook's Amended Petition on the merits, and denying a Certificate of Appealability. In the denial order, Judge Magnuson construed Cook's claim as requesting Federal review for constitutional error of the four grounds alleging ineffective assistance of appellate counsel contained within the Petitioner's April 8, 2011 9.141(c) State Habeas Petition.

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[1] Cook inartfully calls his June 11, 2010 3.850 Motion for Postconviction Relief "bare-bones" only because it lacked any exhibits to support the statement of facts and argument presented. The actual motion was done from memory, but clearly presented over 30 claims for relief spanning over 50 pages of detailed facts and argument. In any event, this Honorable Court, when granting Cook's previous COA, already determined this 3.850 motion was properly filed because Cook was never notified of his motion's non-compliance or given an opportunity to correct it.

Cook argues that this Honorable Court should grant Cook a Certificate of Appealability ("COA") because reasonable jurists would debate, or even disagree that the U.S. District Court was correct in construing Cook's Amended Federal petition claim as having anything to do with his claims of ineffective appellate counsel related to his direct appeal after trial. This fact satisfies one element needed for the granting of the COA. See *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) ("[A] demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues were adequate to deserve encouragement to proceed further)." Cook also meets the second pleading requirement whereby he has met the mere general showing "of the denial of a constitutional right" (see *Isom v. United States*, 2017 U.S. Dist. LEXIS 81268, Case No. 16-22052 (11th Cir. 2017); and see *Hutchinson v. United States*, 2016 U.S. Dist. LEXIS 104951 (11th Cir. 2016))."

In his Petition, Cook clearly claimed that "all State remedies have been exhausted in this cause" involving the fact that his 14th Amendment right to due process was violated when "the Fifth Judicial Circuit Court summarily denied (his Amended 3.850 motion) as untimely, alleging they had never received the original (3.850) motion. Petitioner appealed. Many motions were filed and continuous litigation was held. The Fifth District Court of Appeal affirmed the circuit court denial even though both courts had been furnished with the timely date-stamped original Fla.R. 3.850 motion" (Page 17(a)). In the header of Ground One, Cook claimed the failure of the State courts to rule on his 3.850 claims of ineffective assistance of counsel would result in a manifest injustice, and a violation of his 14th Amendment right to Due Process (Page 17).

It has long been held that a pro se pleading must be broadly construed and held to less stringent standards than formal pleadings drafted by lawyers (see *Haines v. Kerner*, 404 U.S.

519, 520 (1972)). In his closing statement of facts in his Petition (Page 17(a)), Cook concluded "Therefore, the single issue/ground challenged in this (Federal) Habeas Petition is the erroneous denial of Petitioner's right to Post-Conviction appeal." Cook was claiming that the State courts failure to rule on his Amended 3.850 motion involving about 30 claims of ineffective assistance of counsel was precluding him from his right to Postconviction appeal. Cook states that he was interchanging the words "appeal" with "review," and he still correctly argued that under the Federal "exhaustion of claims in the State courts" requirement, Federal review of his 3.850 claims is being denied to Cook in violation of his right to due process. In *Cook v. Sec'y Dep't of Corr.*, 599 F.App'x 940 (Mem) (11th Cir. 2017), this Court has already agreed with Cook that his June 10, 2010 original 3.850 motion was timely filed under the Federal and State "mailbox rule," and the State and U.S. District Court were both in error for finding Cook's original 3.850 motion and Federal habeas petition untimely filed. Cook's Amended Petition was therefore seeking remedy in the form of a conditional writ back to the State trial court to hear and rule on his June 4, 2012 Amended 3.850 motion or else release him from custody due to the State's violation of Cook's constitutional right to due process regarding proper constitutional review of his postconviction ineffective assistance of counsel claims. See *Wilkinson v. Dotson*, 125 S.Ct. 1242, 1250 (2005) (Scalia, J. concurring) ("a habeas court may issue a conditional writ ordering a prisoner to be released unless the State conducts a new [ ] proceeding.... The conditional writ serves only to "delay the release...in order to provide the State an opportunity to correct the constitutional violation." See *Evitts v. Lucey*, 469 U.S. 387, 391, 405 (1985) (finding of ineffective assistance on appeal leads to order requiring release of petitioner unless State affords new appeal or retrial). See *Mayo v. Henderson*, 13 F.3d 528, 537 (2nd Cir. 1994) (petitioner denied effective assistance of counsel on appeal is entitled to release unless State affords

opportunity to present claim erroneously omitted). See *Menefield v. Borg*, 881 F.2d 696, 701 n.7 (9th Cir. 1989) (when State courts unconstitutionally fail to appoint counsel to assist petitioner in preparing new trial motion, proper relief is to order prisoner released unless State courts appoint counsel and permit him to make new trial motion).

Cook argues that reasonable jurists would debate and likely agree that the District Court erred when it construed Cook's Amended Federal Petition sole claim as a claim involving review of his Cook's April 8, 2011 Rule 9.141(c) State habeas petition alleging ineffective assistance of appellate counsel on direct appeal. Nowhere in the Federal claim does Cook mention "direct appeal," or "ineffective assistance of appellate counsel on direct appeal," or the "April 8, 2011 Rule 9.141(c) State habeas petition." In fact, in the Petition (Page 18), Cook stated his claims of ineffective assistance of counsel were not raised on either direct appeal or in Postconviction motions because of a "postconviction procedural problem" (i.e. failure of the State court to recognize the "mailbox rule"). Had Cook even wanted review of his 9.141(c) State Habeas Petition, as the District Court claims, he would have answered "Yes" to having exhausted his Federal claim via petition for habeas corpus in the State Court (Question 1(d), Page 18).

The claim raised in Cook's Amended Federal Petition solely complains of the State's due process violation involving their refusal to hear and rule on Cook's timely filed 3.850 motion. Cook's direct appeal from trial ended back on June 19, 2009, and Cook timely filed his first 3.850 motion on June 11, 2010. This Honorable Court agreed that Cook's 3.850 motion was timely under the mailbox rule and remanded this case back to the District Court for resolution of the Federal petition on the merits. Cook has been waiting over 8 years for the State court to rule on his timely 3.850 claims and this Court should agree enough is enough.

CONCLUSION

For all of the aforementioned reasons, and Cook's showing that reasonable jurists could debate (or, for that matter, argue) that the Amended Petition should have been resolved in a different manner, this Court should grant Cook a *Certificate of Appealabilty* and encourage Cook to proceed with this issue further in this Court.

OATH

Under the penalty of perjury, I certify that I understand English, I have read the foregoing document and that all facts stated in it are true and correct.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Motion for Certificate of Appealabilty was placed in the hands of an institutional official on this 21st day of November 2017 for mailing to:

Clerk of the Court
11th Circuit Court of Appeals
56 Forsyth Street
Atlanta, GA 30303

Office of the Attorney General
444 Seabreeze Boulevard
Suite 500
Daytona Beach, FL 32118

Steven H. Cook, D/C #130448
Apalachee Correctional Institution
35 Apalachee Drive
Sneads, FL 32460-4166

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STEVEN H. COOK
Petitioner/Appellant

Court of Appeals No: 17-13966-B

v.

District Court No: 5:14-cv-34-PAM-PRL

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
Respondent/Appellee

MOTION FOR RECONSIDERATION – CERTIFICATE OF APPEALABILITY

COMES NOW, the Appellant, STEVEN H. COOK, ("Cook" or "Appellant"), pro se and pursuant to Local Rule 11th Cir.R. 27-2, and files this Motion for Reconsideration. Cook is seeking reconsideration of this Court's February 6, 2018 Order denying the Petitioner a Certificate of Appealability. Per rule, this motion must be filed within 21 days of the entry of the order to be reconsidered (on or before February 27, 2018).

Standard of Review

There are three bases for reconsidering an order: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. A Certificate of Appealability ("COA") will not be granted unless a petitioner makes a substantial showing of the denial of a constitutional right. To make such a showing, the petitioner need not show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner. In a case in which the petitioner wishes to challenge on appeal the court's dismissal of a claim for a reason not of constitutional dimension, such as procedural

Exh. J

default, limitations, or lack of exhaustion, the petitioner must show jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether the court was correct in its procedural ruling (see *Dallas v. Dunn*, 2017 U.S. Dist. LEXIS 109749 (11th Cir. 2017)).

Summary of the Facts

On June 11th 2010, Cook filed his original timely 3.850 motion with the State lower court. On or about June 4, 2012, Cook filed an Amended motion. However, the State lower court claimed it never received the original 3.850 motion, and dismissed Cook's 2012 amended 3.850 motion as untimely filed. Despite the fact the Petitioner presented a copy of his June 11, 2010 original 3.850 motion "date stamped" by his prison authorities, Cook could not get a reversal of the lower court's 3.850 time-bar from the State appellate court (5th DCA). On January 16, 2014, Cook filed his timely original *Petition for Writ of Federal Habeas Corpus* with the U.S. District Court, Middle District, Ocala Division, and amended the Petition on June 9, 2014. In the header and body of his sole ground raised in his amended petition, Cook claimed the failure of the State courts to rule on his timely June 2010 and amended 2012 3.850 claims of ineffective assistance of counsel resulted in a manifest injustice, and a violation of his 14th Amendment right to Due Process (Amended Petition, Page 17). On July 14, 2017, the U.S. District Court issued its denial order and decision not to issue a COA. Cook filed a timely notice of appeal and a Motion for COA with this Honorable Court. On February 6, 2018 this Court issued its Order denying the Petitioner a Certificate of Appealability. The argument as to why this Court should reconsider its denial order and grant Cook a COA follows.

The Federal Court Denial Orders

Reasonable jurists would agree that the July 14, 2017 U.S. District Court order denying Cook's petition was incorrect. The lower court erroneously interpreted Cook's Petition as seeking a review of his 4-ground April 8, 2011 Rule 9.141(c) State Habeas Petition, and denied these four grounds on the merits. Clearly Cook had stated only one ground in his Petition involving the Florida postconviction courts denying him due process by dismissing his postconviction filings without regard to the "mail box rule" that made the 2010 3.850 timely.

However, in its February 6, 2018 order, this Honorable Court denied Cook's Federal Petition for another reason. Specifically, this Court held the "motion is denied because (Cook) has failed to make a substantial showing of the denial of a constitutional right." While Cook expressed that the State Court decisions violated his 6th and 14th Amendment rights, he did not include any prevailing U.S. Supreme Court case law to support this argument. This Court has held that petitions seeking relief under 28 U.S.C. §2254(d)(1) need to cite the Federal law or U.S. Supreme Court decision that was violated (see *Wellington v. Moore*, 314 F.3d 1256, 1260-61 (11th Cir. 2002)). However, Cook believes his Petition still should be granted under the language of 28 U.S.C. §2254(d)(2).

Cook's Petition does comply with 28 U.S.C. §2254(d)(2)

28 U.S.C. §2254(d)(2) holds that a petition "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim: or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Cook's Petition did argue that the State courts decision that his 3.850 postconviction motion was untimely was an unreasonable determination of the facts in light of the evidence presented in the State court proceeding (i.e. 28 U.S.C. §2254(d)(2) compliant).

In his June 9, 2014 *Amended Petition for Writ of Federal Habeas Corpus* (Pages 17, 17(a) and 18) Ground One stated the following:

> "On June 11th 2010, the Petitioner filed a Fla.R. 3.850 Motion alleging over 30 instances of Ineffective Assistance of Counsel. Due to the lack of documentary evidence at the time, the motion was filed as "bare bones" in order to remain timely for Federal and State review. Thereafter (on or about June 4, 2012), Petitioner amended the Fla.R. 3.850 motion and the Fifth Judicial Circuit Court summarily denied as untimely, alleging they had never received the original motion. Petitioner appealed. Many motions were filed and continuous litigation was held. The Fifth District Court of Appeal affirmed the circuit court denial even though both courts had been furnished with the timely date-stamped original Fla.R. 3.850 motion. All State remedies have been exhausted in this cause. Therefore, the single issue/ground challenged in this (Federal) Habeas Petition is the erroneous denial of Petitioner's right to Post-Conviction appeal[1]"

While stated in a terse manner, Cook still made clear that he was questioning the validity and correctness of the State court's decision in his case. Cook expressly claimed that the State's denial of accepting his postconviction motion as timely represented a "Sixth and Fourteenth Constitutional Amendment violation for denial of right to Post-Conviction Appeal, a Due Process Violation, a Manifest Injustice and Ineffective Assistance of Counsel" (see Petition claim heading). Because Cook has met the requirements for making a substantial showing of the denial of a constitutional right as authorized by 28 U.S.C. §2254(d)(2), this Court should reconsider your previous denial order, and grant him a Certificate of Appealability.

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[1] *Martinez v. Ryan*, 132 S.Ct. 1309 1317 (2012) holds that when the initial review collateral proceeding is the first designated proceeding for a prisoner to raise a claim, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal." This would make Cook's claim of his right to appeal postconviction claims constitutionally protected, the same as his right to a direct appeal.

See *Presier v. Rodriguez*, 411 US 475, 36 L Ed 2d 439, 93 S Ct 1827 (1973) at US 524 ("And since it is the validity of the state court's decision that is placed in issue, the State will have to endure a federal court inquiry into whether the State's fact-finding process was adequate to afford a full and fair hearing, 28 USC § 2254(d)(2) [28 USCS § 2254(d) (2)], whether the petitioner was denied due process of law in the state court proceeding, id., § 2254(d)(7) [28 USCS § 2254(d)(7)], and whether the state court's factual determinations were fairly supported by the record, id., § 2254(d)(8) [28 USCS § 2254(d)(8)]"). See also *Sumner v. Mata*, 449 US 539, 66 L Ed 2d 722, 101 S Ct 764 (1981) ("On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Rehnquist, J., joined by Burger, Ch. J., and Stewart, White, and Powell, JJ., it was held that the Court of Appeals, in view of the limited nature of the review provided federal courts in habeas corpus proceedings by 28 USCS § 2254, had failed to analyze properly the defendant's challenge to his conviction since the court did not apply, nor give any written indication in its opinion that it had applied, the "presumption of correctness" mandated by § 2254(d) to factual determinations made by the state courts....In order to insure that a state finding not be overturned merely on the basis of the "preponderance of the evidence" standard in a federal habeas corpus proceeding under 28 USCS § 2254, a court granting the writ should include in its opinion the reasoning which led it to conclude that any of the first seven factors enumerated in 28 USCS § 2254(d) were present, or the reasoning which led it to conclude that the state finding was "not fairly supported by the record" within the meaning of § 2254(d)."

In *Cook v. Secretary, Department of Corrections*, 2017 US App LEXIS 7371, Case No. 15-13922 April 26, 2017, Decided (11th Cir. 2017) you held, "[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings" (see *Artuz v. Bennett*, 531 U.S. 4, 8, 121 S. Ct. 361, 364, 148 L. Ed. 2d 213 (2000)....

The district court clearly erred in finding Cook's June 11, 2010 motion was not in the record....Because the record shows that Cook delivered his motion to prison officials on June 11, 2010, the district court should have deemed it filed on that date under the mailbox rule. See *Haag*, 591 So. 2d at 617. This means the district court also clearly erred in finding Cook's April 8, 2011 petition was his first application for postconviction relief, and in denying the § 2254 petition as untimely."

Therefore, since this Court has already decided that the U.S. District Court clearly erred in finding Cook's postconviction motions were not timely filed, it must now answer the same question as to the State Court proceedings and make a determination as to the State Court decision's validity and correctness under the 28 USC § 2254(d)(2) standard of review. This Court should grant Cook's petition on reconsideration because jurists of reason would agree Cook's petition states a valid claim of the denial of a constitutional right and would find that the State court was incorrect in its procedural ruling holding otherwise.

CONCLUSION

For all of the aforementioned reasons, and Cook's showing that his petition should be considered by this Court under the 28 USC § 2254(d)(2) standard of review, this Court should reconsider Cook's petition, grant Cook a *Certificate of Appealabilty* and encourage Cook to proceed with this issue further in this Court.