

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

JAMES L. TOLIVER,

Petitioner,

v.

Case No. 3:14-cv-106-J-32JRK

SECRETARY OF THE FLORIDA
DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

I. Status

Petitioner initiated this action by filing a pro se Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (Doc. 1) (Petition) on January 21, 2014.¹ He is currently proceeding on an Amended Petition (Doc. 25). He challenges a 2006 state court (Duval County, Florida) judgment of conviction for second degree murder on 7 grounds. Petitioner is serving a sentence of life imprisonment with a minimum mandatory term of imprisonment of 25 years.

Respondents filed a response to the Amended Petition and relied on the exhibits attached to the original response. See Respondents' Answer in Response to Order to Show Cause and Petition for Writ of Habeas Corpus (Doc. 33) (Response); Exhibits (Docs. 17-1 to 17-14) (Ex.). Respondents argue that the Petition was untimely filed and thus the case

¹ Giving Petitioner the benefit of the mailbox rule, this Court finds that the Petition was filed on the date he handed it to prison authorities for mailing to this Court. See Houston v. Lack, 487 U.S. 266, 276 (1988). The Court will also give Petitioner the benefit of the mailbox rule with respect to his pro se filings in state court when calculating the one-year limitations period under 28 U.S.C. § 2244(d).

should be dismissed.² Respondents alternatively address each claim on the merits. After the Response was filed, Petitioner retained counsel to represent him. On January 17, 2017, Petitioner, through counsel, filed a limited reply addressing only the timeliness issue (Doc. 38) (Reply). Petitioner requests that he be given an additional 90 days to file a reply on the merits if the Court determines the Petition was timely filed.

II. One-Year Limitations Period

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended 28 U.S.C. § 2244 by adding the following subsection:

(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 conclusion of direct review or the expiration of the time for seeking such review;

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

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

² Notably, Respondents did not specifically argue that the Petition was untimely filed in the original response (Doc. 17).

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

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

III. Procedural History³ / Analysis

On April 27, 2006, a jury found Petitioner guilty of second degree murder. Ex. C at 256-57. On May 25, 2006, the circuit court entered judgment adjudicating Petitioner guilty and sentencing him to life imprisonment with a minimum mandatory term of imprisonment of twenty-five years. *Id.* at 263-68. On April 9, 2007, the First District Court of Appeal (DCA) per curiam affirmed the judgment and issued a written opinion. Ex. I; Toliver v. State, 953 So. 2d 713 (Fla. 1st DCA 2007). Petitioner sought discretionary review in the Florida Supreme Court, Exs. K, L, and on September 10, 2007, the Florida Supreme Court declined to accept jurisdiction and denied the petition for review. Ex. N; Toliver v. State, 966 So. 2d 971 (Fla. 2007). Petitioner's judgment became final 90 days later on December 10, 2007.⁴ See Supreme Court Rule 13.1;⁵ see also Clay v. United States, 537 U.S. 522, 525 (2003)

³ The Court sets forth only the pertinent procedural history relating to the one-year limitations period.

⁴ The 90th day fell on a Sunday, so the Court uses the following day for purposes of calculating the one-year limitations period.

⁵ Supreme Court Rule 13.1 states, in pertinent part: "A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely filed when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."

(holding that “a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court’s affirmation of the conviction”); Matos v. Sec’y, Fla. Dep’t of Corr., 603 F. App’x 763, 766 (11th Cir. 2015) (finding that the petitioner’s conviction became final “when his opportunity to file a petition for a writ of certiorari to the United States Supreme Court expired 90 days after the Florida Supreme Court declined to accept jurisdiction of his direct appeal”); Pugh v. Smith, 465 F.3d 1295, 1299 (11th Cir. 2006) (“In our decisions regarding the timeliness of habeas petitions filed by Florida prisoners, we have required the inclusion of the 90-day period for seeking direct review in the Supreme Court whenever the prisoner sought review in the highest court of Florida in which direct review could have been had.”); Nix v. Sec’y for Dep’t of Corr., 393 F.3d 1235, 1236-37 (11th Cir. 2004) (finding that a state prisoner’s conviction becomes final when the U.S. Supreme Court denies certiorari or issues a decision on the merits, or when the ninety-day period in which to seek certiorari expires regardless of whether the prisoner raised any federal issues in his direct appeal).

The one-year period of limitations began to run on December 11, 2007, and it continued to run for 77 days until February 26, 2008, when Petitioner filed a post-conviction motion pursuant to Florida Rule of Criminal Procedure 3.850. Ex. P at 754-80. Petitioner filed several post-conviction motions and time remained tolled until July 26, 2013, when the mandate issued from the First DCA in Petitioner’s second Rule 3.850 proceeding.⁶ Ex. LL. Six days of untolled time passed until Petitioner filed a habeas petition in the Florida

⁶ The parties agree that the time was tolled from February 26, 2008, to July 26, 2013. See Response at 4-5; Reply at 6-7.

Supreme Court on August 2, 2013. Toliver v. Crews, No. SC13-1510 (Fla. 2014). On January 9, 2014, the Florida Supreme Court entered the following order:

To the extent that petitioner seeks a writ of mandamus, the petition is denied because a writ of mandamus cannot be issued to direct the manner in which a court shall act in the lawful exercise of its jurisdiction. . . . To the extent that petitioner seeks a writ of habeas corpus, the petition is hereby denied as successive.

Doc. 1-1 at 77 (citations omitted). An additional 11 days of untolled time passed until January 21, 2014, when Petitioner filed the federal habeas Petition in this Court.⁷

Respondents argue that Petitioner's August 2, 2013 petition filed in the Florida Supreme Court did not toll the one-year limitations period "because it was not properly filed as a state habeas petition, and mandamus petitions do not toll AEDPA time." Response at 5.

Whether an application is properly filed is distinct from whether the application's claims are meritorious or procedurally barred. Consequently, the Supreme Court determined in Artuz that an application raising procedurally barred claims was nonetheless "properly filed" for purposes of § 2244(d)(2). The Court explained that an application may include claims that are not properly presented or raised, "irrespective of whether the application containing those claims was properly filed." In other words, even though an application may not succeed in obtaining the desired relief, it may still be considered "properly filed" so long as it satisfies the statutory filing conditions.

Thompson v. Sec'y, Dep't of Corr., 595 F.3d 1233, 1236 (11th Cir. 2010) (citations omitted); see also Drew v. Dep't of Corr., 297 F.3d 1278, 1284 (11th Cir. 2002) (explaining that "the fact that a motion is successive," and may therefore fail on the merits, "does not render it

⁷ Both parties state that the Petition was filed on March 7, 2014. See Response at 3; Reply at 7. However, the Petition was date-stamped by the prison and signed by Petitioner on January 21, 2014. See Petition at 1, 9.

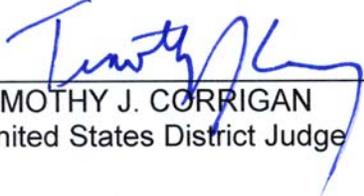
improperly filed”). “A successive petition can thus toll the statute of limitations.” Drew, 297 F.3d at 1284.

Assuming the August 2, 2013 petition filed in the Florida Supreme Court tolled the one-year limitations period, a total of 94 days of untolled time passed between Petitioner’s conviction becoming final and the filing of the Petition. Even assuming that petition did not toll the time, only 255 days of untolled time passed before the Petition was filed in this Court. Accordingly, it is

ORDERED:

1. Respondents’ request that this case be dismissed as untimely is **DENIED**.
2. Petitioner’s request for a ninety-day extension of time to file a reply on the merits is **GRANTED**. By **May 31, 2017**, Petitioner shall file a reply addressing the merits.⁸
3. Given counsel’s request for the 90-day hiatus, the Clerk shall administratively close the file at this time. Upon receipt of the reply, the Clerk shall reopen this case.

DONE AND ORDERED at Jacksonville, Florida, this 2nd day of March, 2017.


TIMOTHY J. CORRIGAN
United States District Judge

cr 3/1
C:
Counsel of Record

⁸ In the merits analysis of grounds two and seven in the Response, Respondents conclude that these grounds do not relate back to the original Petition and are untimely. Petitioner shall address the relation-back of these grounds in his reply on the merits.