

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

**JIMMIE POWELL,**

**Petitioner,**

**vs.**

**Case No. 4:08cv532-MP/WCS**

**WALTER A. McNEIL,**

**Respondent.**

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**REPORT AND RECOMMENDATION TO DISMISS § 2254 PETITION**

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and motion to proceed in forma pauperis. Docs. 1 and 2. The court granted leave to proceed in forma pauperis and directed Petitioner to show cause, if any there be, why his § 2254 petition should not be dismissed as untimely. Doc. 8 (incorporated herein by reference).

As set forth in the order, Petitioner had one year from January 16, 2004 (when his conviction became final by expiration of the time to file an appeal), to file a § 2254 petition, absent a later commencement date or tolling of the period. Doc. 8, p. 3 (citing § 2244(d)(1) and (2), other citations omitted). The time elapsed on January 17, 2005,

yet Petitioner did not file a Fla.R.Crim.P. 3.850 motion until January 17, 2006, when there was no time left to toll. *Id.*, pp. 2-3. The mandate issued following appeal from denial of the Rule 3.850 motion on September 6, 2006, and some 18 months passed before Petitioner filed a second Rule 3.850 motion on March 24, 2008. *Id.*, p. 3.

Petitioner responds that he proceeds pro se and could not afford counsel to advise him regarding timeliness. Doc. 9, pp. 2-3. He asserts that counsel failed to file a direct appeal, so he lost additional time (that an appeal would have afforded him) to file motions for post conviction relief. *Id.*, pp. 3-4. Petitioner has not argued or demonstrated that a later commencement date applies, or entitlement to statutory or equitable tolling.

It is therefore respectfully **RECOMMENDED** that the § 2254 petition, seeking relief from the 2003 judgment of the Second Judicial Circuit in Leon County, be **SUMMARILY DISMISSED** as untimely.

**IN CHAMBERS** at Tallahassee, Florida, on March 18, 2009.

S/ William C. Sherrill, Jr.  
**WILLIAM C. SHERRILL, JR.**  
**UNITED STATES MAGISTRATE JUDGE**

**NOTICE TO THE PARTIES**

**A party may file specific, written objections to the proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.**