No. 17-3624

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BILL CONROY,	)	Appeal from the United States
	)	District Court for the Southern
Petitioner-Appellant,	)	District of Illinois, East St. Louis
	)	Division
v.	)	
	)	No. 16-338-DRH
SCOTT THOMPSON, Warden,	)	
	)	The Honorable
Respondent-Appellee.	)	David R. Herndon,
	)	Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE

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JURISDICTIONAL STATEMENT

Petitioner-Appellant Bill Conroy's jurisdictional statement is not complete and correct. Petitioner filed a habeas corpus petition under 28 U.S.C. § 2254. R50.[1] The district court lacked jurisdiction because the petition was successive. The district court dismissed the petition and entered judgment on December 12, 2017. A1. Petitioner filed his notice of appeal on December 22, 2017. R590. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court lacked jurisdiction because petitioner's second petition was successive.

2. Whether the district court acted within its discretion in denying equitable tolling where the second petition was filed more than nine years late.

3. Whether petitioner's ineffective assistance claim is procedurally defaulted, meritless, and barred from relitigation by 28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

In June 2004, following a "domestic issue" involving Jena Kistler, petitioner's common-law wife and the mother of his three children, petitioner asked an undercover police officer to kill Kistler in exchange for handguns and other property. R121-22 (factual basis for guilty plea), 113, 124. Petitioner's conversation with the officer was recorded, and he was arrested and placed in custody. R121-22 (factual

[1] Respondent cites the record on appeal as "R"; petitioner's brief as "Pet. Br."; district court documents as "Doc."; and petitioner's appendix as "A."

basis). In October 2004, while petitioner was in custody for arranging Kistler's murder, he asked another undercover officer to kill Kistler, as well as Michael Iverson and Richard Stanley, in exchange for guns and explosives. R122-23 (factual basis). In November 2004, petitioner "gave a handwritten confession admitting to wanting to kill [Kistler, Iverson, and Stanley] for various reasons." R123 (factual basis). Petitioner was charged with attempted murder and solicitation of murder for hire.

Fitness Hearing

At a competency (in Illinois, "fitness") hearing held in December 2005 and January 2006, the State called two experts: Dr. Roni Seltzberg, a psychiatrist, and Dr. Erick Neu, a psychologist. R262, 312. Both opined that petitioner was fit to stand trial because he understood the nature of the charges against him and was capable of assisting counsel in his defense. R163, 167-68, 276, 332.

Dr. Seltzberg testified that she reviewed the police reports in petitioner's case and interviewed petitioner on three occasions for a total of more than five hours. R264, 266, 276-77, 304. During their discussions, petitioner appeared to understand the roles of the judge, jury, prosecutor, and defense counsel, as well as the nature of the charges against him. R267-74, 305. Dr. Seltzberg noted that although petitioner reported experiencing auditory hallucinations, he did not appear to have any difficulty communicating, paying attention to the evaluation, or responding appropriately. R300-01. She did not determine whether petitioner was malingering because "whether or not he . . . had any of those hallucinations past or present, there

was no evidence that it was interfering with his fitness for trial." R300-01. Dr. Seltzberg further testified that petitioner told her that he had visited the jail law library and "look[ed] up . . . things" to help his lawyer, that he had been "doing some reading" relating to court rules, and that he planned to "go to the library [and] get some help [with] his case" once he received his discovery materials. R270, 281, 284-85, 287.

Dr. Neu also met with petitioner three times and reviewed his statements, police reports, and social history report. R313, 316. He made a "provisional diagnosis" of antisocial personality disorder and concluded that petitioner was "not . . . at all psychotic or delusional." R350-51. Dr. Neu opined that petitioner was fit for trial because he had "an adequate understanding" of the charges and courtroom procedures and was able to cooperate with counsel. R163. He testified that petitioner "generally had correct answers" to questions about the proceedings and the roles of the parties involved and that when he occasionally gave incorrect answers they were "cynical responses that . . . reflected his personality disorder rather th[a]n . . . a lack of understanding." R330. Dr. Neu stated in his report:

> Although [petitioner] is likely to behave in an oppositional manner towards defense counsel, this is due to maladaptive personality traits and not a mental illness or defect. He is capable of working collaboratively with defense counsel and any reluctance to do so should be viewed as manipulative and intentional.

R163. Dr. Neu further opined that, while petitioner had "some legitimate cognitive problems," he was malingering to some extent and his IQ score of 59 was "likely a significant underestimate of his true IQ." R163, 165; *see also* R334-35.

Finally, Dr. Neu testified that his interviews with petitioner revealed "strong evidence" of malingering and that petitioner's presentation was "typical of malingerers and atypical of somebody with a legitimate psychotic disorder." R319-20, 324. Specifically, Dr. Neu testified, petitioner alleged that he heard voices consistently rather than intermittently; claimed the highly unusual symptom of a visual hallucination of a floating "spirit"; talked to the voices he claimed to hear "all of a sudden" rather than gradually and described them in an "outrageous way" that was "completely inconsistent" with the way in which someone with psychosis would describe his symptoms; mixed up symptoms of different disorders that do not occur together; and purported to obtain information from his auditory hallucinations. R321-24, 327-28.

The defense called Dr. Michael Fields, a psychologist, who conducted clinical tests but did not ask petitioner questions about his case. R185, 194-96, 233. Dr. Fields testified that petitioner performed "poorly" on test questions regarding the roles of the judge and jury and that after those roles were explained to him he continued to give responses that "had nothing to do with what was read to him." R197-98. On one occasion, Dr. Fields testified, petitioner gave "no response at all." R200. Based on his "behavior" and "lifestyle," he concluded that petitioner had a recurrent depressive disorder and a personality disorder and made a provisional diagnosis of mild mental retardation. R217-18, 222-23. Dr. Fields opined that petitioner was unfit based in part on his "distress" and "animosity" toward his lawyer but that he could be restored to fitness within one year with mental health

treatment. R226, 255. He conceded, however, that such treatment would not affect petitioner's intellectual ability and that personality disorders are "very difficult to treat." R216, 226, 229. Dr. Fields further conceded that he had questioned "the validity" of petitioner's responses on the intelligence test he administered and whether petitioner was "purposely underreporting his competency or ability." R236-38. He also acknowledged that one of petitioner's responses was so "bizarre" and "tangential" as to "imply feigning or malingering." R237-38.

The trial court found that petitioner understood the nature of the proceedings and was able to cooperate with counsel and thus that he was fit for trial. R105.

Guilty Plea and Collateral Attacks

On May 8, 2007, petitioner pleaded guilty to the attempted murder of Kistler and three counts of solicitation of murder for hire (with respect to Kistler, Iverson, and Stanley) pursuant to a plea agreement that required the State to make a sentencing recommendation and dismiss other charges. R109-15, 118, 128, 152. The court accepted petitioner's guilty plea, finding that it was made voluntarily; that petitioner understood his rights, the nature of the charges, and the possible penalties; and that petitioner "was in custody at the time he committed th[e solicitation] offenses." R123-24. The court then imposed the recommended aggregate sentence of thirty years' imprisonment: three twenty-year terms on the solicitation counts, concurrent with each other and consecutive to a ten-year term for attempted murder. R125. Petitioner did not appeal or move to withdraw his guilty plea. R151.

On May 21, 2009, petitioner filed a pro se postconviction petition alleging, among other things, that his trial counsel provided ineffective assistance. R129, 136-37. The trial court rejected the ineffective assistance claim on the merits and dismissed the petition. R155-57. Petitioner appealed the dismissal but did not raise an ineffective assistance claim. R158. The state appellate court affirmed on May 13, 2011. R158. Petitioner did not seek leave to appeal to the Illinois Supreme Court.

On February 4, 2014, petitioner filed a motion for sentence reduction and a petition for relief from judgment. R542. The trial court denied relief on February 11, 2014, and petitioner did not appeal. R542, 553, 558, 565.

Petitioner's First Section 2254 Petition

On March 28, 2016, petitioner filed his first section 2254 petition, which named only "Dept of Corrections" as a respondent.[2] R1. As the sole ground for relief, the petition stated: "The petitioner was incapable of understanding the results of his guilty plea." R8. Under "supporting facts," the petition stated only "Mental capability and background." R8. And under the section of the form petition that directs the filer to explain why the petition is not time-barred, the petition stated in full: "I was unaware of time limits, and I did not have anyone to assist me with the decisions I had received from the appellate court. The petitioner, Bill Conway [sic], cannot read or write." R7. Petitioner certified under penalty of perjury that the content of the petition was true. R18.

[2] Respondent did not receive the first petition until June 29, 2016, more than two months after the district court dismissed it.

On April 22, 2016, the district court entered an order that (1) noted that the limitations period applicable to the petition expired "long ago"; (2) declared that the petition would "not be dismissed out of hand" because petitioner might be eligible for equitable tolling of the limitations period; (3) dismissed the petition "without prejudice for failure to name the proper respondent"; (4) appointed the Federal Public Defender for the "limited purpose" of "assist[ing] petitioner in amending his petition to include a statement of the grounds for relief he intends to bring in his federal *habeas* case, a statement of whether he has exhausted those claims in federal court, and if he has not, an explanation of good cause for his failure" and "assist[ing] petitioner in deciding — and stating — how he would like to proceed (does he want to proceed, to dismiss the petition, etc.)"; (5) ordered counsel to file an appearance within fourteen days; and (6) directed petitioner to "file an amended petition and/or otherwise indicate how he wants to proceed" by July 5, 2016. R30-31, 33. Petitioner did not appeal from this order.

Petitioner's Second Section 2254 Petition

Counsel from the Federal Public Defender filed an appearance on June 23, 2016, and then sought and received a series of extensions for filing the second petition. R34; Docs. 7, 9, 12, & 15. Counsel eventually filed the unverified second petition on July 10, 2017. R50. The petition alleged that petitioner's trial counsel was ineffective for failing to argue that Dr. Neu's opinion "was premised on a standard that did not comply with the Supreme Court's standard for competency," conceded that the first petition was untimely, and argued that the limitations period

should be equitably tolled. R62-63, 66-74. In support of his equitable tolling argument, petitioner submitted (1) his unsworn May 2017 statement; (2) an email message and an excerpt of a memorandum written by a defense investigator; and (3) prison medical and educational records. R161-62, 169-82, 369-501.

In his statement, petitioner alleged that that he is "illiterate and cannot write in any legible way"; that he found it "almost . . . impossible" to obtain legal assistance because of "a division" between him and those interested in helping him and because he does "not know[] how to communicate any thoughts"; that prison law library workers "didn't and don't have the time to figure out" what he's talking about; that it has been "impossible for the most part" for him to obtain legal assistance from other inmates because most inmates charge for assistance and he is indigent; and that he is "mentally disable[d]" and suffers from "mental and emotional problems" for which he has taken medication "for the better part of the past 9 years." R161-62. The statement concluded: "all these reasons are why it took the time to file my 28 U.S.C. § 2254 petition."[3] R163.

[3] Although titled "Affidavit," signed, and notarized, petitioner's statement was not sworn or subscribed as true under penalty of perjury, *see* 28 U.S.C. § 1746, and thus lacked evidentiary value. *See, e.g.*, *Pfeil v. Rogers*, 757 F.2d 850, 859 (7th Cir. 1985) (affidavits are statements sworn to before someone authorized to administer oath; "unsworn documents purporting to be affidavits may be rejected"); *United States v. Trainor*, 376 F.3d 1325, 1334 (11th Cir. 2004) (unsworn documents lacked evidentiary value); *Gentile v. Mo. Dep't of Corr. & Human Res.*, 986 F.2d 214, 219 (8th Cir. 1993) ("Unsworn statements cannot be used as a basis for findings of fact.").

Respondent moved to dismiss the petition as untimely, and the district court granted the motion. R511, A13. The court made specific findings as to petitioner's mental condition during two time periods. First, citing a psychiatrist's treatment notes from October 2007 through December 2008, the court found:

> On May 15, 2007, [petitioner] underwent a mental health evaluation upon intake. He was cooperative, alert and oriented, and demonstrated an appropriate mood and affect. He was diagnosed with depressive disorder and referred to a psychiatrist.
>
> Petitioner thereafter attended regular monthly sessions with a psychiatrist. He appeared alert and oriented at each session and demonstrated logical and coherent thoughts, along with fair insight and judgment. He repeatedly denied any side effects from his medications.

A7 (citations omitted).[4]

The court then found the following with respect to petitioner's condition between April 2008 and December 2008:

> Throughout the next nine months, [p]etitioner demonstrated logical, coherent, and goal-directed thought processes. He denied any auditory or visual hallucinations or delusions. His insight and judgment were fair, and he was alert and oriented.

A8 (citing treatment notes from May through December 2008).

The court also found that petitioner "was capable of understanding and acting upon his legal rights"; that he "was cognizant of his right to file" a section 2254 petition "and even took steps toward doing so"; that his mental health records "do not indicate" that his conditions "rose to the level of extraordinary circumstances";

[4] The court also noted that petitioner reported hearing "the devil . . . talking to him" between October 2007 and March 2008. A7-8.

that he "demonstrated logical and coherent thought processes" and was "alert and oriented" "throughout the majority of the limitations period" and that "his psychiatrist opined his judgment and insight were fair"; and that he "cannot show his mental conditions in fact caused his untimely filing." A9-11. The court further found that petitioner failed to show that he was reasonably diligent in pursuing his claims "throughout the entirety of the limitations period and up until he filed" his first petition, a "period [that] encompasses eight years." A11.

Petitioner appealed, and this Court granted a certificate of appealability on the questions "whether trial counsel was ineffective for not arguing that [Dr. Neu's] evaluation revealed" that petitioner was unfit and whether petitioner was entitled to equitable tolling. Pet. Br. 13 (quoting certificate).

SUMMARY OF ARGUMENT

The dismissal of petitioner's first petition resulted in a final and appealable order, notwithstanding the "without prejudice" language in the court's order, because the limitations period had expired before that order was entered. Accordingly, the second petition was successive, and because petitioner did not obtain this Court's permission to file it, the district court lacked jurisdiction to consider it. Assuming it had jurisdiction, the district court acted within its discretion in holding that petitioner had failed to show an entitlement to more than nine years of equitable tolling. In any event, petitioner's ineffective assistance claim is meritless, procedurally defaulted, and barred from relitigation by 28 U.S.C. § 2254(d).

ARGUMENT

I. This Court Should Affirm the Judgment as Modified To Reflect Dismissal for Lack of Jurisdiction Because the Second Petition Was Successive.

A. The dismissal of petitioner's first petition was prejudicial, final, and appealable.

Where a petition is dismissed "without prejudice" but a new petition would be time-barred, the dismissal is effectively prejudicial, final, and appealable. *See Gacho v. Butler*, 792 F.3d 732, 736 (7th Cir. 2015) ("[I]f a new, subsequent federal petition would be time-barred, then the dismissal without prejudice would be effectively final."); *Dolis v. Chambers*, 454 F.3d 721, 723 (7th Cir. 2006) ("The situation that Dolis faces, in which a new federal petition would be barred as untimely, seems to us to be just such a 'special circumstance' where a dismissal without prejudice is effectively final."); *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 923 (7th Cir. 2003) (dismissal without prejudice, though normally not an appealable final judgment, is appealable "if a new suit would be barred by the statute of limitations"); *Duffy v. Ford Motor Co.*, 218 F.3d 623, 629 (6th Cir. 2000) (dismissal that was "technically" without prejudice "operated as a dismissal with prejudice" because statute of limitations had expired); *Hatchet v. Nettles*, 201 F.3d 651, 652-53 (5th Cir. 2000) ("The district court's dismissal without prejudice operates as a dismissal with prejudice because Hatchet is now barred from refiling the action due to the expiration of the two-year limitations period."). That is the case with respect to the April 2016 dismissal of petitioner's first petition: because the statute of limitations

had run, the petition could not be refiled, and the purportedly nonprejudicial judgment of dismissal was final and appealable.[5]

B. Because the first petition reached a final decision, the second petition was successive, and the district court lacked jurisdiction to consider it.

Because the first petition reached a final decision, the second petition was successive, and the district court lacked jurisdiction to consider it. *See Burton v. Stewart*, 549 U.S. 147, 153, 155 (2007) (subsequent petition is successive if earlier petition was adjudicated on merits; district court lacks jurisdiction to entertain successive petition absent authorization from appellate court); *Slack v. McDaniel*, 529 U.S. 473, 485-88 (2000) (second petition is successive if earlier petition was

[5] That the dismissal was effectively final means that the order's language contemplating the filing of an "amended petition" was ineffectual: a pleading cannot be amended after entry of a final judgment of dismissal. *See Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & N.W. Ind.*, 786 F.3d 510, 521 (7th Cir. 2015) ("when a district court has entered a final judgment of dismissal, the plaintiff cannot amend under Rule 15(a) unless the judgment is modified"); *Camp v. Gregory*, 67 F.3d 1286, 1289 (7th Cir. 1995) ("If final judgment is entered dismissing the case . . . the plaintiff loses th[e] right [to amend]. At that juncture, the plaintiff must either appeal the dismissal or seek to have the case reopened so that she may pursue amendment of the complaint.") (citations omitted). And the district court's intent to permit further litigation is irrelevant to the question of finality. *See Principal Mut. Life Ins. Co. v. Cincinnati TV 64 Ltd. P'ship*, 845 F.2d 674, 676 (7th Cir. 1988) ("The district court may have intended that its order be final and appealable, but the court's intention is irrelevant . . . ."); *Glidden v. Chromalloy Am. Corp.*, 808 F.2d 621, 624 (7th Cir. 1986) (noting that jurisdictional issues "turn on what was done" — not on what "could or should have been done" — and that intent of district judge is irrelevant). That the second petition was docketed under the same case number as the first is likewise irrelevant. *See Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999) ("[A]dditional filings in the first collateral attack may be treated as 'second or successive' petitions when the first has reached a final decision.").

adjudicated on merits); *Johnson*, 196 F.3d at 805 ("[A]dditional filings in the first collateral attack may be treated as 'second or successive' petitions when the first has reached a final decision."). Accordingly, this Court should affirm the judgment as modified to reflect dismissal for lack of jurisdiction.

II. In the Alternative, this Court Should Affirm the Dismissal of the Second Petition as Untimely.

Assuming that the district court had jurisdiction to consider the second petition, it properly dismissed that petition as untimely.

A. The relevant dates for determining timeliness are the date the judgment became final and the date the second petition was filed.

The relevant dates for determining timeliness are the date the judgment became final and the date the second petition was filed. *See* 28 U.S.C. § 2244(d)(1)(A) (limitations period runs from date judgment became final by expiration of time for seeking direct review). The judgment in petitioner's case became final on June 7, 2007, thirty days after petitioner entered his guilty plea. *See Farmer v. Litscher*, 303 F.3d 840, 845-46 (7th Cir. 2002) (where no direct appeal is taken, judgment becomes final when time to seek direct review expires); Ill. Sup. Ct. R. 604(d) (to appeal after guilty plea, defendant must move for withdrawal of plea or reconsideration of sentence within thirty days of judgment). And the second petition was filed on July 10, 2017. R50.

The first petition's filing date is irrelevant to the timeliness calculation. *See Elmore v. Henderson*, 227 F.3d 1009, 1011 (7th Cir. 2000) ("[A] suit dismissed

without prejudice is treated for statute of limitations purposes as if it had never been filed."). The first petition did not toll the limitations period. *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (limitations period is "not toll[ed] . . . during the pendency of [a petitioner's] first federal habeas petition"); *Tucker v. Kingston*, 538 F.3d 732, 733 (7th Cir. 2008) (first petition "did not stop the clock"). And the second petition does not "relate back" to the first petition because "the 'relation back' doctrine . . . does not apply" where the "original petition was dismissed." *Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002); *see also Tucker*, 538 F.3d at 734 ("[F]or Tucker to amend his first petition, said petition needed to have been pending when the proposed amendments were offered."); *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) ("We therefore join with all the circuit courts which have addressed this issue, and hold that a habeas petition filed after a previous petition has been dismissed without prejudice for failure to exhaust state remedies does not relate back to the earlier petition."); *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000) ("[A] § 2254 petition cannot relate back to a previously filed petition that has been dismissed without prejudice because there is nothing for the current petition to relate back to.").

B. Petitioner has forfeited any argument for statutory tolling.

Petitioner has forfeited any argument for statutory tolling of the limitations period by failing to include it in his brief. *See* 28 U.S.C. § 2244(d)(2) (tolling limitations period during pendency of application for state collateral review); *Geness v. Cox*, 902 F.3d 344, 355 (3d Cir. 2018) (tolling arguments not raised in brief are

forfeited). Accordingly, because petitioner's second petition was filed more than nine years late, he must show an entitlement to more than nine years of equitable tolling.

C. Equitable tolling cannot save the second petition.

A petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that extraordinary circumstances stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010).

1. Any argument for equitable tolling of the year immediately preceding the filing of the second petition would be forfeited and meritless.

The simplest way to resolve the timeliness question is by working backward from the filing date of the second petition, July 10, 2017. If the year immediately preceding that date cannot be equitably tolled, then the petition is time-barred and no further inquiry is necessary. *See* 28 U.S.C. § 2244(d)(1) (establishing one-year limitations period). Petitioner does not argue that this time should be tolled. Instead, his brief seems to assume that the operative filing date is March 2016, when the first petition was filed. *See* Pet. Br. 25. This, as demonstrated above, is incorrect. *See Elmore*, 227 F.3d at 1011. Accordingly, any argument for equitable tolling of the year leading up to the filing of the second petition is forfeited. *See Geness*, 902 F.3d at 355 (tolling arguments not raised in brief are forfeited).

Such an argument would fail in any event because petitioner has not satisfied either element of equitable tolling with respect to this period. *See Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755-56 (2016) (diligence and extraordinary circumstances are elements of equitable tolling, not mere factors).

First, petitioner has not shown that he made reasonably diligent attempts to file his petition between July 2016 and July 2017.[6] *Holland*, 560 U.S. at 653 (equitable tolling requires "reasonable diligence"); *Carpenter v. Douma*, 840 F.3d 867, 870 (7th Cir. 2016) (to qualify for equitable tolling, petitioner must demonstrate "that he was reasonably diligent in pursuing his rights throughout the limitations period and until he finally filed his untimely habeas petition"). Petitioner knew that his first petition was untimely and thus was aware that any subsequent petition would be even later. *See* R7 (petitioner, explaining in verified first petition that he filed late because he was "unaware of time limits" and "did not have anyone to assist" him); R30 (district court's order dismissing first petition, noting that filing deadline "passed long ago"). Yet there is no evidence that petitioner made any effort to see that his second petition was filed promptly. On the contrary, the record reflects that although petitioner was aware that his second petition still had not been filed as of May 2017 — more than a year after the first petition was dismissed in April 2016 — he delayed its filing even further by asking to meet with counsel a third

[6] The diligence requirement applies even where, as here, a petitioner is counseled during the relevant period. *See Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003) (attorney negligence is not extraordinary; clients bear responsibility for attorneys' failures); *Johnson v. McCaughtry*, 265 F.3d 559, 566 (7th Cir. 2001) (habeas petitioners "must vigilantly oversee the actions of their attorneys and, if necessary, take matters into their own hands"); *Manning v. Epps*, 688 F.3d 177, 185 (5th Cir. 2012) ("[P]etitioners seeking to establish due diligence must exercise diligence even when they receive inadequate legal representation."); *Doe v. Menefee*, 391 F.3d 147, 175 (2d Cir. 2004) ("[T]he act of retaining an attorney does not absolve the petitioner of his responsibility for overseeing the attorney's conduct or the preparation of the petition.") (citation omitted).

time to discuss "certain issues" relating to the petition.[7] Doc. 14 at 1-2 (counsel's extension motion explaining that he was "in the process of finalizing" the second petition when, on May 17, 2017, he "received a letter from Petitioner expressing his desire to further discuss certain issues related to his amended petition with undersigned counsel"). This delay was the antithesis of diligence, and it alone precludes equitable tolling.

Second, petitioner has not shown that extraordinary circumstances prevented him from filing his petition during this period. The only evidence specifically relating to this time period appears to be (1) a progress note from a twenty-minute session with a psychiatrist in July 2016 in which the doctor rated petitioner's concentration, memory, speech, thoughts, and behavior as "appropriate" and listed a primary diagnosis of depression with hypothyroidism and a rule-out[8] diagnosis of mood disorder; (2) petitioner's unsworn May 2017 statement; and (3) counsel's extension motion stating that he received a letter from petitioner on May 17, 2017, "expressing his desire to further discuss certain issues" related to the second petition. R369 (progress note: "Depression w Hypothyroid R/o Mood D.O."); R161-62 (petitioner's statement); Doc. 14 at 1-2 (extension motion).

Neither the psychiatrist's progress note nor petitioner's statement — which alleges that petitioner is illiterate and cannot write legibly; that he is indigent; and

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[7] Counsel's extension motions reflect two earlier meetings with petitioner at the Pinckneyville Correctional Center. Doc. 6 at 1; Doc. 8 at 1.

[8] A "rule-out" diagnosis is a diagnosis that "needs to be ruled out." *Schimpf v. Astrue*, 780 F. Supp. 2d 798, 801 (S.D. Ind. 2011) (emphasis omitted).

that he suffers from unspecified "mental and emotional problems" — comes close to establishing that petitioner's mental condition amounted to an extraordinary circumstance during the relevant period. *See Carpenter*, 840 F.3d 867, 872 (7th Cir. 2016) (mental health issues and indigence are common among prisoners and thus not "extraordinary"); *Boulb v. United States*, 818 F.3d 334, 340 (7th Cir. 2016) (conclusory allegations of illiteracy and intellectual disability were insufficient to warrant hearing on equitable tolling). And the district court was not required to consider petitioner's statement at all because it was unsworn and thus lacked evidentiary value. *See, e.g.*, *Pfeil*, 757 F.2d at 859 ("unsworn documents purporting to be affidavits may be rejected"); *Trainor*, 376 F.3d at 1334 (unsworn documents lacked evidentiary value). As for petitioner's letter to counsel seeking to discuss his case, it shows that petitioner was capable of monitoring and managing his legal affairs, and therefore weighs *against* equitable tolling. *See Carpenter*, 840 F.3d at 872 (mental illness tolls limitations period only if it prevents sufferer from managing his affairs).

Moreover, even assuming that petitioner could show that his mental condition rose to the level of an extraordinary circumstance during this time, he would not be able to show a causal connection between his condition and his failure to file his federal petition because he was represented by counsel during this period. *See* R34 (counsel's appearance filed June 23, 2016). Petitioner's failure to file sooner was due to his counsel's strategic decision to gather relevant materials and thoroughly investigate the case before proceeding, rather than petitioner's personal

circumstances.[9] If there was any error in counsel's approach it was at most ordinary negligence, not the type of serious misconduct that might warrant equitable tolling, and thus petitioner would not be eligible for tolling on that basis, either. *See Holland*, 560 U.S. at 652 ("serious instances of attorney misconduct" may warrant equitable tolling); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("[P]rinciples of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect."); *Modrowski*, 322 F.3d at 968 ("attorney negligence is not extraordinary").

For these reasons, petitioner cannot toll the year immediately preceding the date his second petition was filed. Accordingly, his second petition was properly dismissed as untimely and no further analysis is required.

[9] Counsel's investigation was extensive. *See generally* Docs. 6, 8 (extension motions describing counsel's meetings with petitioner in June and October 2016 and counsel's efforts to obtain records); R43 (counsel's February 2017 motion to subpoena petitioner's cell assignment history, educational records, and visitor list from IDOC); R84-160, 163-68, 183-368 (state court records filed with second petition); R161-62 (petitioner's May 2017 statement filed with second petition); R169-70 (March 2017 memorandum from counsel's investigator regarding prison educational records); R171-79 (IDOC educational records filed with second petition); R180-81 (email message from counsel's investigator recounting April 2017 interview with petitioner); R182 (excerpt of investigator's March 2017 memorandum regarding interviews with petitioner's family members); R369-501 (IDOC medical records filed with second petition).

2. In the alternative, the district court did not abuse its discretion in holding that equitable tolling could not save the second petition.

Even putting aside petitioner's failure to meet the requirements of equitable tolling for the year preceding the filing of the second petition, equitable tolling is unwarranted for two additional, independent reasons.

a. Petitioner's admission that his first petition was late because he was unaware of the statute of limitations forecloses his equitable tolling claim.

First, although petitioner now claims that he is entitled to more than seven years of equitable tolling between the date his judgment became final under § 2244(d)(1)(A) and the filing of his first habeas petition because his "mental conditions and other deficiencies" prevented him from acting on his rights, Pet. Br. 2, he maintained in his first petition that he missed the filing deadline because he was "unaware of time limits," R7 (Timeliness of Petition: "I was unaware of time limits and I did not have anyone to assist me with the decisions I had received from the appellate court. The petitioner, Bill Conway [sic], cannot read or write."). That explanation — which petitioner verified as true under penalty of perjury, R18 — forecloses his present equitable tolling claim because ignorance of the limitations period is not a basis for tolling. *See Griffith v. Rednour*, 614 F.3d 328, 331 (7th Cir. 2010) (miscalculation of time available for filing not extraordinary circumstance); *Arrieta v. Battaglia*, 461 F.3d 861, 867 (7th Cir. 2006) ("Mistakes of law or ignorance of proper legal procedures are not extraordinary circumstances warranting invocation of the doctrine of equitable tolling."); *Williams v. Sims*, 390 F.3d 958, 963

(7th Cir. 2004) ("[E]ven reasonable mistakes of law are not a basis for equitable tolling."). Petitioner's admission that his late filing was due to ignorance of the limitations period means that equitable tolling is categorically unavailable, and thus the district court did not abuse its discretion in denying tolling. *See Obriecht v. Foster*, 727 F.3d 744, 748 (7th Cir. 2013) (denial of equitable tolling reviewed for abuse of discretion); *Felder v. Johnson*, 204 F.3d 168, 172 (5th Cir. 2000) ("lack of knowledge of filing deadlines does not justify equitable tolling").

b. The district court did not abuse its discretion in holding that petitioner failed to satisfy either element of equitable tolling.

Second, the district court did not abuse its discretion in concluding that petitioner met neither requirement for equitable tolling: (1) that extraordinary circumstances prevented timely filing; and (2) that he had been pursuing his rights diligently. A9-11; *see Obriecht*, 727 F.3d at 748 (denial of equitable tolling reviewed for abuse of discretion).

i. The district court's determination that petitioner failed to show extraordinary circumstances that prevented timely filing was not an abuse of discretion.

As petitioner acknowledges, Pet. Br. 26, the district court's determination that he failed to satisfy the "extraordinary circumstances" element was based in part on its finding that, at a series of "regular monthly sessions with a psychiatrist" beginning in May 2007, petitioner "appeared alert and oriented . . . and demonstrated logical and coherent thoughts[] along with fair insight and judgment" and

"repeatedly denied any side effects from his medications," A7 (citing prison medical records). This finding is supported by the prison medical records petitioner submitted, and he does not claim otherwise. Instead, he suggests that the district court should not have relied on the records at all because they reflect only "quick observations based on routine questions as part of monthly medication checks" rather than any "in[-]depth assessment" of his condition. Pet. Br. 26.

Petitioner's characterization of these records as "cursory" is incorrect. Each record, which is labeled "Mental Health Diagnostic and Treatment Note," is signed and dated by a psychiatrist and includes petitioner's own description of his condition, with direct quotations, as well as the doctor's detailed observations, diagnosis, and treatment plan. R448, 450-51, 453-54, 456, 459, 462, 464, 467, 469, 471-72, 474-75. In addition, several notes reflect that the doctor answered petitioner's questions and provided advice regarding his conditions and medications. R450, 462, 464, 469. As the district court found, these records reflect "sessions with a psychiatrist" rather than cursory "medication checks." The district court's reliance on these records was not clear error. *See, e.g.*, *Torres-Lazarini v. United States*, 523 F.3d 69, 73 (1st Cir. 2008) (district court's decision to credit medical records over plaintiff's testimony not clear error).

The district court's ruling also rested on its finding that petitioner "was alert and oriented" and "demonstrated logical and coherent thought processes" and "fair" judgment and insight "[t]hroughout the majority of the limitations period" that ran from June 2007 through June 2008. A10; A4. Contrary to petitioner's contention,

Pet. Br. 26, this finding was not "unreasonable": the medical records cited elsewhere in the court's opinion cover this time period and support the court's conclusion. A7 (citing R456, 459, 462, 464, 467, 469, 471-72, 474-75).

The court further found that petitioner was "capable of understanding and acting upon his legal rights" as a general matter and, in particular, that he was "cognizant of his right" to file a federal habeas petition.[10] A9-10. The finding that petitioner was capable of understanding and acting on his right to challenge his conviction as a general matter is supported by (1) the defense investigator's report that petitioner submitted to the district court, which recounted petitioner's claims that he receives ten dollars per month in commissary credit and that he had used that credit to pay other inmates to prepare legal documents on multiple occasions "over the years," paying "$10 each time" and "spen[ding] a total of $100," R180; and (2) the court's finding (which petitioner does not challenge) that petitioner filed multiple collateral attacks on his convictions in state court, A9-10. Accordingly, that finding was not clearly erroneous. *Cf.* Pet. Br. 26. As for the finding that petitioner was aware of his right to file a habeas petition, petitioner has forfeited any challenge

[10] Petitioner's suggestion that the district court erroneously found that he was "consistently capable" of exercising his rights, Pet. Br. 28, is misleading: the court made no such finding, and no such finding was necessary to defeat petitioner's equitable tolling claim. Rather, petitioner was required prove that he was consistently *in*capable of exercising his rights throughout the entire nine-plus years he needs to toll. The district court's finding that petitioner was capable of collaterally attacking his convictions at various points during that period was sufficient to defeat petitioner's sweeping tolling argument.

to that finding by failing to raise it in his brief. *See Carroll v. Lynch*, 698 F.3d 561, 568 (7th Cir. 2012) (arguments not raised in opening brief are forfeited). In any event, the finding is supported by petitioner's verified first petition, which suggests that petitioner was aware of the existence of the federal habeas remedy but unaware of the limitations period. R7 (petitioner, claiming as explanation for untimely filing that he was "unaware of time limits"). In sum, the district court did not clearly err in finding that petitioner was capable of exercising his right to seek federal habeas relief, and that fact alone precludes equitable tolling. *See Holland*, 560 U.S. at 649 (petitioner must show that circumstances "prevented timely filing").

ii. The district court's determination that petitioner failed to diligently pursue his rights during the entire period he sought to toll was not clearly erroneous.

Nor did the district court clearly err in finding that petitioner failed to show that he acted with reasonable diligence throughout the entire period he sought to toll. Petitioner argues only that this finding is clearly erroneous because it was "premised on the unreasonable inference that [petitioner] was capable of finding legal assistance when he wanted to." Pet. Br. 29-30. But that inference was supported by the defense investigator's report that petitioner submitted to the district court, which recounted petitioner's claims that he receives ten dollars per month in commissary credit and that he had used that credit to pay other inmates to prepare legal documents on multiple occasions "over the years," paying "$10 each

time" and "spen[ding] a total of $100."[11] R180. Petitioner's own submission demonstrates that he *was* "capable of finding legal assistance when he wanted to."

That inference is further supported by the district court's unchallenged finding that petitioner filed multiple documents in state court during the time period he seeks to toll. A9-10 (finding that petitioner filed a postconviction petition and motion for appointment of counsel in 2009 and a petition for relief from judgment, sentence reduction motion, and motions for appointment of counsel and to proceed in forma pauperis in 2014). But despite being "cognizant of his right" to file a federal petition during that same time period, petitioner (so far as appears from the record) made no attempt to do so. A10. Such inaction does not constitute diligence.

III. In the Further Alternative, This Court Should Affirm the Judgment on the Grounds that Petitioner's Ineffective Assistance Claim is Procedurally Defaulted, Meritless, and Barred from Relitigation by 28 U.S.C. § 2254(d).

A. Petitioner's Ineffective Assistance Claim Is Barred from Relitigation Because the Supreme Court Has Not Extended the Sixth Amendment Right to Counsel to Fitness Hearings.

Petitioner's claim that he was denied his Sixth Amendment right to counsel at his fitness hearing is barred from relitigation by 28 U.S.C. § 2254(d) because "the Supreme Court . . . has not provided any guidance on the procedures required to be employed in such a hearing as a matter of federal constitutional law." *Lloyd v. Bell*,

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[11] Petitioner's statements in the report undermine his claim in his unsworn statement that it was "impossible for the most part" for him to obtain help from "prison lawyers" because he is "well beyond indigent." R462; *see also* Pet. Br. 27 (arguing that petitioner "had no money for prison lawyers").

No. 2:08-CV-14232, 2011 WL 1831725, at *22 (E.D. Mich. Mar. 10, 2011), *report and recommendation adopted*, No. 08-CV-14232, 2011 WL 1828383 (E.D. Mich. May 13, 2011); *see also Crawley v. Dinwiddie*, 584 F.3d 916, 920 (10th Cir. 2009) (noting that *Pate v. Robinson*, 383 U.S. 375 (1966), holds "at most [that] a competency hearing is required where the evidence before the court strongly suggests the defendant's competence is questionable"); *Hatfield v. Ballard*, 878 F. Supp. 2d 633, 657 (S.D. W. Va. 2012) ("[T]he United States Supreme Court has not described the precise procedures mandated by the Constitution [for ensuring fitness].").

Although the Court has held that the Sixth Amendment right to counsel attaches when adversary judicial criminal proceedings commence and applies at all "critical stages" of those proceedings, *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008), it has never held that a fitness hearing qualifies as a critical stage. And it is far from clear that it would because fitness hearings are not necessarily adversarial. *See Bishop v. Super. Ct.,* 724 P.2d 23, 26-27 (Ariz. 1986) (en banc) ("[T]he competency hearing has an essentially non-adversarial objective."); *Manning v. State*, 766 S.W.2d 551, 554 (Tex. App. 1989) ("Because a defendant cannot be tried at all if he is unable to assist in his defense, the only purpose for the determination of competency to stand trial is to see whether the adversarial process can be commenced or continued. Thus, raising the issue of competency suspends the adversarial process.") (citations omitted), *aff'd*, 773 S.W.2d 568 (Tex. Crim. App. 1989) (en banc); *see also United States v. Gillenwater*, 717 F.3d 1070, 1078 (9th Cir. 2013) (fitness hearings have narrower focus than trials because

sole question is whether defendant may be subjected to trial); *O'Rourke v. Endell*, 153 F.3d 560, 567 (8th Cir. 1998) (noting, in context of appeal waiver in capital case, that "the Supreme Court has yet to hold that a competency hearing must be adversarial in nature"). Because Supreme Court decisions give no clear answer to the question presented, let alone one in petitioner's favor, the state court could not have unreasonably applied Supreme Court law in rejecting petitioner's ineffective assistance claim, and thus section 2254(d) bars its relitigation here. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008).

B. Petitioner's Ineffective Assistance Claim Is Procedurally Defaulted.

Petitioner's ineffective assistance claim is procedurally defaulted because he did not raise it in the state appellate or supreme court, thereby failing to present it through "one complete round" of state court review. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

C. Both Variants of Petitioner's Ineffective Assistance Claim Are Meritless.

1. Petitioner's claim that his trial counsel was ineffective in failing to argue that Dr. Neu's evaluation "revealed" that petitioner was unfit is forfeited and meritless.

The version of petitioner's ineffective assistance claim listed in his issue statement and point heading — that trial counsel was ineffective for failing to argue that Dr. Neu's evaluation "revealed" that petitioner was unfit, Pet. Br. 2, 15 — was neither raised in his second habeas petition nor developed in his opening brief and is therefore waived. *See, e.g.*, *Johnson v. Hulett*, 574 F.3d 428, 432 (7th Cir. 2009)

("Claims not made in the district court in a habeas petition are deemed waived and cannot be raised for the first time on appeal."); *Pitsonbarger v. Gramley*, 141 F.3d 728, 738 (7th Cir. 1998) (argument not developed in brief is waived). This theory of ineffective assistance is also meritless because Dr. Neu's evaluation did not "reveal" that petitioner was unfit. On the contrary, Dr. Neu opined that petitioner was *fit* to stand trial because he "he had an adequate understanding" of the charges and was "capable of working collaboratively with defense counsel." R163; *see also* R332. Accordingly, trial counsel was not ineffective in failing to raise this argument. *See Warren v. Baenen*, 712 F.3d 1090, 1104 (7th Cir. 2013) ("Counsel is not ineffective for failing to raise meritless claims.").

2. Petitioner's claim that his trial counsel was ineffective in failing to argue that Dr. Neu applied the wrong fitness standard is meritless.

The only ineffective assistance argument developed in petitioner's brief — that trial counsel was ineffective in failing to argue that Dr. Neu applied the wrong fitness standard — was not specifically identified in the certificate of appealability. Such arguments are not properly before the Court and do not require a response. *See Lavin v. Rednour*, 641 F.3d 830, 832 (7th Cir. 2011) ("[N]on-certified claims are not properly before this court."); *Lipson v. United States*, 233 F.3d 942, 944 (7th Cir. 2000) (expansion of certificate necessary where petitioner briefed ineffective assistance theory that differed from "precise theory of ineffective assistance" identified in certificate); *Peterson v. Douma*, 751 F.3d 524, 529 (7th Cir. 2014) (opposing counsel need not address uncertified issues).

In any event, the argument is meritless. Petitioner contends that Dr. Neu testified and opined in his written report that petitioner suffered from a "personality disorder [that] negatively affected his ability to consult with and assist his attorney" but that he "refus[ed] to consider the effects" of that disorder on petitioner's fitness because he mistakenly believed that only a "mental illness or defect" could result in unfitness and that petitioner's disorder did not qualify. Pet. Br. 19, 21; *see also* Pet. Br. 10, 14, 18, 20. Petitioner's argument mischaracterizes the evidence: Dr. Neu testified that he "provisional[ly]" diagnosed petitioner with antisocial personality disorder, R350, but he did not testify that the disorder negatively affected petitioner's ability to consult with counsel. Nor did he draw that conclusion in his written report, which makes no mention of a personality disorder. R163.

Further, Dr. Neu did not "refuse to consider" the effects of petitioner's personality traits on his fitness. On the contrary, Dr. Neu explicitly stated that he considered those traits and concluded that while they made petitioner "likely to behave in an oppositional manner towards defense counsel," they did not make him incapable of cooperating with counsel. R163 ("[Petitioner] is capable of working collaboratively with defense counsel and any reluctance to do so should be viewed as manipulative and intentional.").

Dr. Neu did testify in response to a hypothetical question that a defendant's belief that his lawyer was "set against him" would affect his opinion regarding fitness only if "the defendant's hostility and mistrust of defense counsel" resulted from a "mental illness or defect," rather than from "the defendant's personality." R352. But

the most logical reading of this testimony is that Dr. Neu was distinguishing volitional behaviors from those behaviors caused by mental illness, *see* R163 (distinguishing "manipulative and intentional" behaviors resulting from "personality traits" from behaviors resulting from "mental illness"); R349 (distinguishing choice not to cooperate with counsel from inability to cooperate due to mental illness). In any event, any mistake on Dr. Neu's part about the potential causes of a defendant's inability to cooperate with counsel in a hypothetical case would not have affected his opinion in petitioner's case because petitioner was "capable of working" with counsel in this case. R163. Accordingly, defense counsel's failure to point out Dr. Neu's purported error did not amount to ineffective assistance. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

CONCLUSION

This Court should affirm the district court's judgment as modified to reflect dismissal for lack of jurisdiction. In the alternative, this Court should affirm the judgment.

December 28, 2018

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RULE 32(a)(7) CERTIFICATION

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 9478 words. In preparing this certificate, I relied on the word count of the Word 2013 word-processing system used to prepare this brief.

s/ Retha Stotts
RETHA STOTTS

CERTIFICATE OF SERVICE

I certify that on December 28, 2018, I electronically filed the foregoing **Brief of Respondent-Appellee** with the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Retha Stotts
RETHA STOTTS