

PNo. _____

IN THE SPREME COURT OF THE UNITED STATES

James Ray Booth,
Petitioner,

VS.
Secretary, Florida Department of Corrections, et al.,
Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS
OF THE UNITED STATES

James Ray Booth #058857
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Pro se

QUESTION PRESENTEND

The question presented is whether the Circuit Court's decision which held that the term "ministerial correction" nullified amendments to Petitioners' sentences and depriving him of the ability to seek habeas corpus relief in the district court?

[] All parties appear in the caption or the case on the cover page.

[x] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Those persons having an interest in the outcome of the case are as follows:

Anderson, Eleventh Circuit Court of Appeals Justice

Berger, Wendy W. Judge fifth District Court of Appeal.

Bondi, Pamela Jo, Attorney General, State of Florida.

Booth, James, Appellant.

Carnes, Ed, Chief Judge, Eleventh Circuit Court of Appeals

Cohen, Jay P., Judge Fifth, District Court of Appeal.

Evander, Kerry I., Judge, Fifth District Court of Appeal.

Graves. Michael, Public Defender, State of Florida.

Heidt, Wesley, Assistant Attorney General.

Jacobus, Bruce W., Judge, Fifth District Court of Appeal.

Jenkins, Tricia C., Assistant Public Defender.

Jolley, Mary G., Assistant Attorney General

King, Brad, Elected State Attorney, State of Florida.

Koller, Pamela J., Assistant Attorney General

Labarga, Jorge, Justice Supreme Court of Florida.

Lewis, R. Fred, Justice, Supreme Court of Florida

Lawson, C. Alan, Judge Fifth District Court of Appeal

Magrino, Peter F., Assistant State Attorney

Marshall, Deana K., Defense Attorney

Merritt, Daniel B., Circuit Court Judge, Fifth Judicial Circuit

Orfinger, Richard B., Judge Fifth District Court of Appeal

Palmer, Williams D. Judge, Fifth District Court of Appeal
Pariente, Barbara J., Justice, Supreme Court of Florida
Polston, Ricky, Justice Supreme Court of Florida
Purdy, James S., Elected Public Defender, Florida
Pryor, William, Justice Eleventh Circuit Court of Appeals
Quince, Peggy A., Justice, Supreme Court of Florida
Sansone, Amanda Arnold, United States Magistrate Judge
Sharkey, T. Devon, Assistant Public Defender
Springstead, Jack, Circuit Judge, fifth Judicial Circuit, Florida
Tropy, Vincent G. Jr., Judge, Fifth District Court of Appeal
Wallis, F. Rand, Judge, Fifth District Court of Appeal
Weiss, Edward J., Assistant Public Defender
Whitemore, James D., United States District Judge.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of Certiorari issue to review the judgment below:

For cases from Federal Courts:

The Opinion of the United States Court of Appeals at Appendix A to the Petition and is

reported at _____ ; or,
 has been designated for publication but is not yet reported; Or,
 is unpublished.

The opinion of the United States District Court appears at appendix ___ to the Petition and is

reported at _____ ; or,
 has been designated for publication but is not yet reported; Or,
 is unpublished.

for cases from the State court:

The opinion of the highest state court to review the merits appear at appendix ___ to the petition and is

reported at _____ ; or,
 has been designated for publication but is not yet reported; Or,
 is unpublished.

The opinion of the _____ court appears at Appendix ___ to the petition and is

reported at _____ or,
 has been designated for publication but is not yet reported; Or,
 is unpublished.

JURISDICTION

For cases from Federal Courts:

The date on which the United States Court of Appeals decided my case was April 6th 2018.

No petition for rehearing was timely filed in my case

A timely petition for rehearing was denied by the United States Court of Appeals of the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the writ of certiorari as granted to and including _____ (date) on _____ (date) in Application No. _____

The jurisdiction of this court is invoked under 38 U.S.C. § 1254 (1).

For cases from State Courts:

The date on which the highest state court decided by case was _____ a copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted up to and included _____ (date) on _____ (date) in Application No. _____

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This Petition invokes the Sixth Amendment to the United States Constitution, which holds “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense”: invokes the Fourteenth Amendment to the United States Constitution which holds “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

This Petition also invokes the Statutory provision of Title 28 U.S.C. § 2254 (d) (1).

STATEMENT OF CASE

Petitioner was convicted after a jury trial of Murder in the third degree with a firearm, count one; and Aggravated Assault with a firearm, count four (Doc. 11-10, pg. 80-84) Petitioner entered a plea to Possession of a firearm by a felon, count five. (Doc 11-10, pg. 88-90). The jury returned not guilty verdicts on counts two and three of the indictment. (Doc. 11-10, pg. 82-83).

The trial court sentenced Petitioner to Consecutive terms of life imprisonment as an habitual felony offender (“HFO”) as to counts one and four and a sentence of 20.25 years on count five with a three year minimum mandatory for the firearm, concurrent with count one (Doc. 11-11, pg. 2-12). The court granted Petitioner’s motion to correct certain sentencing errors pursuant to Rule 3.800(b) (2) *Fla. R. Crim. P.*, during the direct appeal, and resentenced Petitioner as to count four to ten years as a habitual felony offender consecutive to count one (Doc. 11-11, pg. 72, Doc. 11-12, pg. 7). No other changes were made. Florida’s Fifth District Court of Appeals affirmed the convictions but reversed for the imposition of concurrent HFO sentences in counts one and four, and to correct sentencing documents to reflect that count one was a second degree felony. *Booth v. State*, 18 So3d 1142, 1143-44 (Fla. App. 5th Dist. 2009).

Petitioner filed a motion for postconviction relief pursuant to Florida Rules of Criminal Procedure 3.850 (Doc. 11-12, pg. 63, Doc. 11-13, pg. 37). The

postconviction court denied relief and the order was affirmed without opinion by the Fifth District Court of Appeal on November 5, 2013. (Doc. 11-13, pg.39-55); Doc. 11-22, pg. 54-60, 66; Doc. 11-13, pg. 83). Petitioner also filed a motion to correct illegal sentence under *Fla. R. Crim. P.*, 3.800(a), which was denied. (Doc. 11-23, pg. 88, Doc. 11-25, pg. 28). On rehearing the State postconviction court entered an order resentencing Petitioner to concurrent terms in count's one and four on November 6th, 2014.

After getting no other relief, Petitioner filed a petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida. (Doc. 1-2). At the direction of the Magistrate, the Respondents file a response to the petition and moved the District to dismiss the petition as untimely, unexhausted, or otherwise procedurally barred. (Doc. 10, pg. 20-27), Petitioner filed a response arguing his November 6, 2014 resentencing restarted the clock, and his petition was timely. (Doc. 12, 6-19).

Consistent with Respondents pleadings, the District Court issued an order dismissing the habeas petition as untimely, unexhausted, or procedurally barred. The District Court also denied a certificate of appealability. *Id.*

On a timely notice of appeal, the Eleventh Circuit Court of Appeals issued a certificate of appealability. The Certificate addressed two questions, only one at issue in this proceeding which asked whether it was proper for the District Court to

dismiss the habeas petition as untimely, and whether the petition raised a constitutional challenge in claim one which argued the trial counsel's ineffectiveness deprived Petitioner of the ability to make a rational decision to accept the states favorable plea offer.

On April 6, 2018, the Eleventh Circuit Court of Appeals affirmed the order holding that no resentencing occurred because the post conviction court designated the amendments to Petitioner's sentences as "ministerial correction". This nullified the effects of the new directive to the Florida Department of Corrections. (App. A).

This petition for writ of Certiorari follows:

REASONS FOR GRANTING THE PETITION

In the proceedings below, the Eleventh Circuit affirmed the District Court's order dismissing Petitioner's habeas petition as time-barred, unexhausted and procedurally barred. The Eleventh Circuit maintained that the *nunc pro tunc* order correcting petitioner's sentence did not result in a new judgment for purposes of restarting the statute of limitations. (Appx. A)

Magwood v Patterson, 561 U.S. 320 (2010) held that a habeas petitioner's resentencing constitutes a new judgment that authorizes habeas corpus relief anew. See also *Burton v. Stewart*, 549 U.S. 147 (2007) *Burton* confirms that the existence of a new judgment is dispositive.

The Eleventh Circuit Court of Appeals followed this court's mandate ruling that timeliness of a new petition has been held to begin anew from the date of resentencing. *Patterson v. Fla. Dep't of Corr.*, 812 F.3d 885 (11th Cir. 2016) ("[W]here a state court corrects a legal error in an initial sentence and imposes a new sentence that is substantively different than the one originally imposed, there is a new judgment under *Magwood*.").

Looking to the label "ministerial corrections" attached by the post conviction court, the Eleventh Circuit Court of appeals determined Petitioner had not been resentenced. (Appx A) Petitioner avers that this ruling violates his due process rights wherein the post conviction court's amendment to his sentences changed the

directive to the Florida Department of Corrections which in all other cases is a new Judgment.

Florida's Constitution prohibits a sentencing judge from imposing enhanced habitual felony offender sentences consecutively where all the offenses before the court for sentencing took place in a single criminal episode. *Hale v. State*, 630 So2d 521 (Fla. 1993). Notwithstanding this prohibition against consecutive habitual felony offender sentences, the sentencing judge adjudicated Petitioner a habitual felony offender and imposed two life sentences consecutively. During direct appeal Respondents conceded the consecutive terms were unauthorized and the Fifth District Court of Appeals ordered the terms corrected to reflect they be served concurrently, along with other amendments to the judgments.

Following the direct appeal mandate, the original sentencing court corrected the judgment to reflect that count's one was a second degree felony as ordered in the appeal courts mandate. However, the sentencing court never corrected the sentencing orders directing how the terms in counts one and four were to be served. Having failed to have his sentences corrected Petitioner moved the post-conviction court to correct his sentences, by among other things, ordering the sentences in counts one and four to be served concurrently.

The post-conviction court corrected the sentences November 6th, 2014.

This corrections to the sentences gave a new directive to the Florida Department of Corrections authorizing Petitioner's detention for a term of life, rather than life followed by ten years as a habitual felony offender. Under the dictates of *Magwood* and, *Burton*, the alteration to the original sentence directing concurrent detention is a new judgment under *Magwood*;

The Court's below determined that Petitioner's had not been resentenced, a view that completely overlooks the effects of the order that the sentences in counts one and four be served concurrently.

This Court's Certiorari review is necessary to clarify to all federal courts that the label of the act in amending the sentences does not nullify the mandate imbedded within the corrections to the sentences. *Burton*.

The Eleventh Circuit determined that Petitioner was not resentenced because the amendments to the sentences were labeled a "ministerial correction" which had no effect on the directive to the Florida Department of Corrections. (Appx A)

Espinosa v. Jones, 2016 U.S. Dist. Lexis 152014 (S.D. Fla. 201) address this specific claim and held; (through the grant of a Rule 3.800, which corrected the written judgment to exclude the habitual felony offender designation, which in the past was considered a ministerial act, the petitioner has apparently bypassed the AEDPA's restrictions, not only by restarting the one-year limitations period, but also

eliminating the ban on second or successive filings before the district court without first obtaining permission from the Eleventh Circuit.)

The Eleventh Circuit's decision is an intradistrict conflict causing confusion in the court's and in the administration of justice. Equal protection authorizes certiorari review in this case.

Dismissal of the habeas petition, a harsh punishment to attach to the postconviction court's use of the term "ministerial corrections" results in the denial of due process, where similar situated prisoners had their habeas petitions reviewed on the merits following the same "ministerial corrections" in collateral proceedings from the State Courts. *Espinosa*.

The directive to the Florida Department of Corrections is not the same as originally imposed, the judgment in count one was reduced from a first degree felony to a second degree felony, and sentence in count four, was ordered to be served concurrent to count one. These actions are amendments to the directive to the Florida Department of Corrections, re new sentences. *Burton; Magwood*.

This Court must decide whether the order of concurrent sentences constitute a new judgment that authorizes unbridled access to federal courts within the one year limitations period? Or does the fact that the post conviction judge labeled the corrections "ministerial" nullify the resentencing?

“Ministerial Correction” a term of art in the courts’ and is a government action “performed according to legal authority. Established procedures or instructions from a superior, without exercising any individual judgment.” It can be any act a functionary or bureaucrat performs in a prescribed manner, without exercising any individual judgment or discretion. Under law, this would be classified under the rubric of public policy.

Under the terms meaning, “ministerial” required the Florida Courts to correct Petitioner’s sentences by ordering them to be served concurrently. The fact that there was no formal hearing, and the resentencing court had no discretion in concurrent or consecutive sentences should have no bearing on the effect of the post conviction court’s actions.

The force attached to the term “ministerial” in the context of this case could never be the reason to dismiss a timely filed habeas petition. Florida’s Constitution prohibits consecutive habitual felony offender sentences where multiple offense before the court for sentencing occurred in one criminal episode. Does judicial economy ¹ override Petitioner’s substantive rights to due process?

¹ There is no need to hold a full resentencing hearing because the judge had no discretion in the sentencing order, the documents could be amended without a full hearing.

This Court must grant certiorari jurisdiction to give substance to the effects of resentencing orders that took place in chambers rather than in open court with all rights enforceable.

Any question as to whether Petitioner was resentenced is answered when the directive to the Florida Department of Corrections changed by merging the ten year term into the life sentence. *Espinosa*.

Had Petitioner been allowed to proceed to the merits in his habeas petition, he would have argued that he was denied effective assistance of counsel who failed to object to the procedure used by the Respondents in withholding their intent to seek sentencing as a habitual felony offender until after he rejected the States plea offer of ten years. *Apprendi v. New Jersey*, 520 U.S. 466 (2000) (explaining that due process requires, at a minimum, notice of the conduct and maximum punishment attached).

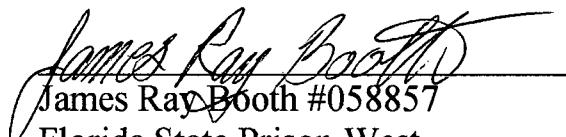
In this proceeding Petitioner rejected a favorable ten year sentence in exchange for a plea. At the time Petitioner rejected the plea offer, his maximum sentence exposure was thirty years. However, after the jury verdict Respondents moved to declare Petitioner a Habitual Felony Offender which authorized sentences up to life.

Petitioner's sentences were imposed in violation of the right to notice under the due process clause of the U.S. Constitution, and effective assistance of counsel. *Apprendi; Strickland v. Washington*, 466 U.S. 668 (1984).

CONCLUSION

Petitioner prays this Court grant Certiorari review, and decide that he was resentenced on November 6, 2014, making his habeas petition timely being filed within the statutorily one year limitations period.

This 11 day of May, 2017.



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