

19-7606
No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

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ROBERT MCKINNON, III – PETITIONER

Vs.

MARK S. INCH,

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY – RESPONDENT

ON DIRECT APPEAL FROM INTERLOCUTORY ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

PETITIONER'S JURISDICTIONAL STATEMENT

ROBERT MCKINNON, III
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QUESTION(S) PRESENTED

1. DOES STATUTORY TOLLING AS DESCRIBED IN 28 U.S.C. § 2244(d)(1)(B) AND (D) PERMIT A PETITIONER'S DIRECT FILING OF SECOND 28 U.S.C. § 2254 HABEAS CORPUS PETITION IN THE UNITED STATES DISTRICT COURT?

2. DOES EQUITABLE TOLLING DOCTRINE ANNOUNCED IN *HOLLAND v. FLORIDA*, 560 U.S. 631 (2010) APPLY IN 28 U.S.C. § 2244(d)(1)(B) ISSUE WHERE STATE AGENT IMPEDED A PETITIONER'S FILING OF A FEDERAL APPLICATION BY COMMITTING EXTRINSIC FRAUD ON THE COURT?

3. DOES STATUTORY TOLLING AS DESCRIBED IN 28 U.S.C. § 2244(d)(1)(B) AND (D) APPLY TO CASE WHERE STATE COURT'S DEFAULT OF LACK OF SUBJECT MATTER JURISDICTION CLAIM COMPELLED A PETITIONER'S FILING OF ISSUE IN FEDERAL HABEAS CORPUS PETITION?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties in the proceeding, regarding the question of equitable and statutory tolling, in the foregoing Petitioner's Jurisdictional Statement:

(1) The United States District Court – Northern District of Florida – Office of the Clerk – 401 S.E. 1st Avenue, Suite 243 – Gainesville, Florida 32601-6805;

(2) The District Court of Appeal – First District – Office of the Clerk – 2000 Drayton Drive – Tallahassee, Florida 32399;

(3) The Eighth Judicial Circuit Court (Alachua County, Florida) – Office of the Clerk – 201 East University Avenue – Gainesville, Florida 32601;

(4) The Supreme Court of Florida (Office of the Clerk) – 500 South Duval Street – Tallahassee, Florida 32399;

(5) The United States Court of Appeals (Eleventh Circuit) – Office of the Clerk – 56 Forsyth Street, N.W. – Atlanta, Georgia 30303;

(6) The Florida Department of Corrections – Attn: Mark S. Inch, Secretary – 501 South Calhoun Street – Tallahassee, Florida 32399; and

(7) The Office of the Attorney General of Florida – the Honorable Ashley Brooke Moody – PL-01 – The Capitol – Tallahassee, Florida 32399

- **Note:** The Office of the Attorney General of Florida (Honorable Ashley Brooke Moody) operates as head counsel for all of the above listed parties.

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	
INVOLVED.....	3
STATEMENT OF THE CASE.....	4-5
REASONS FOR GRANTING THE WRIT.....	6-7
CONCLUSION.....	8

INDEX TO APPENDICES

APPENDIX A: United States District Court January 21, 2020 Order in Case Number **1:20-cv-15-MW-GRJ**

APPENDIX A (1): January 23, 2020 Notice of Appeal Seeking Direct Review by United States Supreme Court

APPENDIX A (2): First District Court of Appeal April 24, 2019 Order Denying Case Number **1D18-4052** (*regarding the trial court's lack of subject matter jurisdiction*).

APPENDIX A (3): Eighth Judicial Circuit Court August 27, 2018 Order Denying Motion to Cure Subject Matter Jurisdiction Issue

APPENDIX A (4): Supreme Court of Florida December 2, 2019 Order Dismissing Case Number **SC19-986**.

APPENDIX A (5): Supreme Court of Florida November 26, 2019 Order Denying Case Number **SC19-998**.

APPENDIX B: First District Court of Appeal February 25, 2019 Order Denying Case Number **1D18-1302**.

APPENDIX B (1): Eighth Judicial Circuit Court March 16, 2018 Order Denying *Fla. R. Crim. P. 3.850(b)(1)* Motion for Post-Conviction Relief as untimely.

APPENDIX B (2): Supreme Court of Florida March 14, 2019 Order Denying Case Number **SC19-407**, due to lack of subject matter jurisdiction.

APPENDIX B (3): Supreme Court of Florida June 4, 2019 Order Denying Case Number **SC19-404** (*regarding issuance of sanctions*)

APPENDIX B (4): First District Court of Appeal July 15, 2019 Order Authorizing Sanctions in Case Number **1D18-1302**.

TABLE OF AUTHORITIES CITED

Cases

<i>Cadet v. Fla. Dep't of Corr.</i> ("Cadet II"), 853 F.3d 1216, 1225 (11th Cir. 2017)	7
<i>Holland v. Florida</i> , 560 U.S. 631, 649, 130 S. Ct. 2549, 2562, 177 L. Ed. 2d 130 (2010)	7
<i>Jancar v. State</i> , 711 So. 2d 143, 144 (Fla. 2d DCA 1998)	5
<i>Larry Brown v. Sec'y, Dep't of Corr.</i> , 530 F.3d 1335, 1338 (11th Cir. 2008)	7
<i>State v. Spencer</i> , 751 So.2d 47 (Fla. 1999)	6
<i>Wyzykowski v. Dep't of Corr.</i> , 226 F.3d 1213, 1216 (11th Cir. 2000)	7

State Court Rules

Fla. R. Crim. P. 3.850(b)(1).....	4
Fla. R. Crim. P. 3.850(a)(1), (2) and (3).....	4
Fla. R. App. P. 9.410(a).....	4

Federal Statutes: United States Code

28 U.S.C. § 2244(d)(1)(B) and (D).....	6
28 U.S.C. § 2244(d)(2).....	6
28 U.S.C. § 2101(b).....	8
28 U.S.C. § 2104.....	8
28 U.S.C. § 2106.....	8

IN THE
UNITED STATES SUPREME COURT
PETITIONER'S JURISDICTIONAL STATEMENT

Mr. McKinnon respectfully prays this Honorable Court accepts jurisdiction to review the judgment(s) below.

OPINIONS BELOW

[] For cases from **Federal courts**:

The opinion of the United States District Court appears at **Appendix A** to the petition and is

[] reported at unknown; or

[] has been designated for publication but is not yet reported; or,

[] is unpublished.

[] For cases from **State courts**:

The opinion(s) of the highest state court(s) to review the instant claim(s) appear at **Appendix A (2)** through **Appendix A (5)**; **Appendix B** and **Appendix B (1)** through **Appendix B (4)** to the instant petition and is

[] reported at unknown; 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 District Court partially ruled in my case was January 21, 2020 (**Appendix A**)

A motion for rehearing was not filed.

The jurisdiction of this Court is invoked under **28 U.S.C. § 2101(b)** and **28 U.S.C. § 2244(d)(1)(B)** and **(D)**.

For cases from **State courts**:

The date(s) on which the highest state court decided my case was December 2, 2019, November 26, 2019 and March 14, 2019.

A copy of those decision(s) appears at **Appendix A (4)**, **Appendix A (5)** and **Appendix B (2)**.

A motion for rehearing was not filed.

The jurisdiction of this Court is invoked under **28 U.S.C. § 2104**; and **28 U.S.C. § 2244(d)(1)(B)** and **(D)**.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment Fourteen (14)

(Statutory and Procedural Due Process)

Florida Constitution – Article I, Section 9

(Statutory and Procedural Due Process)

28 U.S.C. § 2244(d)(1)(B) and (D) United States Code

28 U.S.C. § 2244(d)(2) United States Code

28 U.S.C. § 2254 United States Code

28 U.S.C. § 2101(b) United States Code

28 U.S.C. § 2104 United States Code

28 U.S.C. § 2106 United States Code

STATEMENT OF THE CASE

On January 10, 2020, McKinnon filed a 28 U.S.C. § 2254 Habeas Corpus Petition in the United States District Court for the Northern District of Florida (*Tallahassee Division*).

On January 21, 2020, Gainesville Division Magistrate Judge Gary R. Jones issued an order directing McKinnon to pay the filing fee and file amended petition to correct deficiency. (**Appendix A**)

On January 23, 2020, McKinnon filed a direct appeal, so the United States Supreme Court could review the statutory & equitable tolling issue, and the State court defaulted lack of subject matter jurisdiction issue. (**Appendix A (1)**)

On January 28, 2020, McKinnon filed a motion demonstrating compliance to the magistrate Judge's order in the United States District Court for the Northern District of Florida (*Gainesville Division*). Such motion forwarded with amended habeas corpus petition.

On August 20, 2018, McKinnon filed a *Fla. R. Crim. P. 3.850(a)(1), (2) and (3)* motion in the State trial court. Such motion raised sole claim asserting that the court was without subject matter jurisdiction to enter its September 15, 2011 sentence and judgment order.

On August 27, 2018, the State trial court did not reach the merits of the jurisdictional claim, but denied the motion as untimely and procedurally barred. (**Appendix A (3)**)

On September 14, 2018, McKinnon filed a notice of appeal. The First DCA assigned case number **1D18-4052**.

On September 24, 2018, McKinnon filed a motion requesting the First DCA to certify the jurisdiction issue to the Supreme Court of Florida as a question of great public importance. Such request met to no avail. On October 1, 2018, McKinnon filed an Initial Brief.

On April 24, 2019, the First DCA per curiam affirmed case number **1D18-4052**. (**Appendix A (2)**) On May 22, 2019, the First DCA issued its mandate in case number **1D18-4052**.

On June 10, 2019, McKinnon filed two petitions for writ of prohibition in the Supreme Court of Florida. The Supreme Court of Florida assigned case number(s) **SC19-986** and **SC19-998**.

On October 7, 2019, McKinnon filed the appropriate petition (*raised claims based on newly discovered facts establishing ineffective assistance of trial counsel*) requesting leave to file a second or successive habeas corpus petition, which the United States Court of Appeals for the Eleventh Circuit denied on October 29, 2019.

On November 25, 2019, McKinnon filed a Petition for Writ of Certiorari in the United States Supreme Court. On December 2, 2019 and November 26, 2019, the Supreme Court of Florida denied the first petition for writ of prohibition, and dismissed the second petition. See case number(s) **SC19-986** and **SC19-998**. (**Appendix A (4)**) and (**Appendix A (5)**)

On December 18, 2019, McKinnon filed duplicate copy of the petition for writ of certiorari in the United States Supreme Court. The petition and its appendix forwarded back to McKinnon, because a denial of authorization by a court of appeals to file a second or successive petition for writ of habeas corpus may not be reviewed on certiorari.

On January 29, 2018, McKinnon raised claims based on newly discovered facts in accordance with the procedures of *Fla. R. Crim. P. 3.850(b)(1)*. Those newly discovered facts (*applying Jancar v. State, 711 So.2d 143, 144 (Fla. 2d DCA 1998)*) established ineffective assistance of trial counsel claims.

On March 16, 2018, the State trial court did not address those newly discovered facts and denied the motion as untimely. (**Appendix B (1)**) On March 22, 2018, McKinnon filed a notice of appeal. The First DCA assigned case number **1D18-1302**. On April 16, 2018, McKinnon filed an Initial Brief.

On February 15, 2019, before giving McKinnon any warning under *Fla. R. Crim. P. 9.410(a)*, the First DCA issued a show cause order seeking sanctions. Such order did not include the appeal regarding the trial court's lack of subject matter jurisdiction. See case number **1D18-1302**. On February 25, 2019, the First DCA per curiam affirmed case number **1D18-1302**. (**Appendix B**)

On February 26, 2019, McKinnon filed a response to the First DCA show cause order. On March 1, 2019, McKinnon filed a notice to invoke the discretionary jurisdiction of the Supreme Court of Florida. The Supreme Court assigned case numbers **SC19-404** and **SC19-407**. On March 11, 2019, McKinnon filed a Jurisdictional Brief in the Supreme Court of Florida.

On March 14, 2019, the Supreme Court of Florida dismissed case number **SC19-407** for lack of subject matter jurisdiction. (**Appendix B (2)**) On March 25, 2019, the First DCA issued its mandate in case number **1D18-1302**. On April 12, 2019, the State filed its Jurisdiction Brief corresponding to Supreme Court of Florida case number **SC19-404**.

On June 4, 2019, the Supreme Court of Florida ruled it was without subject matter jurisdiction to accept case number **SC19-404**. (**Appendix B (3)**)

On July 3, 2019, McKinnon requested former Northwest Florida Reception Center (*Main Unit*) Librarian, L. Peterson to check the Fifth Judicial Circuit (*Citrus County, Florida*) Clerks docket summary, to review his prior criminal record, so he could gather information for future clemency filing. McKinnon discovered that his prior criminal record included case numbers and criminal charges belonging to an Inverness/Floral City, Florida man named **Robert Foster McKinnon**. Such discovery revealed newly discovered facts of prosecutor misconduct for committing extrinsic fraud on the Eighth Judicial Circuit Court (*Alachua County, Florida*).

On July 11, 2019, McKinnon filed a motion to clarify in the Fifth Judicial Circuit Court. Such motion requested the court to clarify as to which of those case numbers belonged to him.

On July 15, 2019, the First District Court of Appeal (*hereafter referred to as First DCA*) issued an Order issuing sanctions against McKinnon under *State v. Spencer*, 751 So.2d 47 (Fla. 1999), which barred him from filing any pro se motions or appeals challenging the judgment and conviction in case number **01-2010-CF-001293-A. (Appendix B (4))**

On July 23, 2019, the Fifth Judicial Circuit Court issued an order responding to the motion to clarify. Therein the court designated only nine (9) of those case numbers to McKinnon. The remaining two (2) case numbers (**1995-CF-000135** and **2005-CF-000728**) belonged to **Robert Foster McKinnon**.

JURISDICTIONAL STATEMENT

McKinnon is eligible for statutory tolling under *28 U.S.C. § 2244(d)(1)(B)* and *(D)*, to file the second habeas corpus petition directly in the United States District Court.

According to *28 U.S.C. § 2244(d)(1)(B)* and *(D)*, AEDPA's limitation period runs from the latest of either 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", or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. *Id. 28 U.S.C. § 2244(d)(1)(B)* and *(D)*.

The time during which a properly filed application for State post-conviction review is pending shall not be counted toward any period of limitation computed through application of these provisions. *Id.* 28 U.S.C. § 2244(d)(2).

"To delay the running of the statute of limitations, 28 U.S.C. § 2244(d)(1)(B) requires state action(s) that both violated the Constitution or laws of the United States and prevented the prisoner from filing his federal petition." "The limitation period does not begin until after the state impediment is removed." *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1216 (11th Cir. 2000). And 28 U.S.C. § 2244(d)(1)(D) will toll the limitations period when, for instance, post-conviction motions "produce newly discovered exculpatory evidence." *Larry Brown v. Sec'y, Dep't of Corr.*, 530 F.3d 1335, 1338 (11th Cir. 2008). "AEDPA grants the movant a year from that discovery to challenge their conviction in federal habeas proceedings." *Id.*

For claims that are not newly discovered, the petitioner would be entitled to "equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 2562, 177 L. Ed. 2d 130 (2010) (*quotation marks omitted*). These "are separate elements, both of which must be met before there can be any equitable tolling." *Cadet v. Fla. Dep't of Corr.* ("Cadet II"), 853 F.3d 1216, 1225 (11th Cir. 2017)

Due diligence, a question of fact, is "reasonable diligence," which requires reasonable efforts. Reasonable diligence "does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option." To make a determination that a petitioner has been diligent requires individualized consideration.

CONCLUSION

Under 28 U.S.C. § 2101(b), 28 U.S.C. § 2104 and 28 U.S.C. § 2106, this Honorable Court has exclusive jurisdiction to review and take action in such interlocutory issue. Moreover, this Honorable Court can authorize McKinnon's statutory and equitable tolling to file the second habeas corpus petition directly in the United States District Court.

Respectfully Submitted,

/s/ Robert McKinnon, III

Robert McKinnon, III