

No. 20-5460

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LT# 19-14269-C

IN THE

SUPREME COURT OF THE UNITED STATES

WASHINGTON D.C. 20543

KEITH L. CALVIN, JR. PETITIONER
(Your Name)

FILED
JUL 31 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

vs.
STATE OF FLORIDA,
SEC, FLA Dept of Corr — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

11th Cir Court of Appeals; Atlanta, Georgia.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Keith L. Calvin DC#626305
(Your Name)

UNION CORRECTIONAL INSTITUTIONS
P.O. Box 1000
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Barford, Fla. 32083
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Notice: All appendix's as Exhibits is attached hereto...

Question #(1) of great public importance: Does Section 2244(d)(1)(A) of the AEDPA of (1996) stating that: The Antiterrorism and Effective Death Penalty Act requires a state prisoner seeking a federal habeas Corpus remedy to file his federal petition within One-year of conclusion of direct review or the expiration of the time for seeking such review? U.S.C.S. § 2244(d)(1)(A).

Question #(2) of great public importance: Does Section 2244(d)(2) of the AEDPA of (1996) also apply to state prisoner seeking federal habeas Corpus remedy to file his federal petition within the One-year conclusion of his properly filed application for state post-conviction relief or other collateral review pending in the state court?

The statute does state that: However, Under the AEDPA, 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 towards any period of limitations under this subsection. 28, U.S.C.S § 2244(d)(2). See Exhibit B-C.

Does both of the two subsections apply to a state prisoner seeking Federal Habeas Corpus relief or Only One of the subsections apply?

If Question #(2) applies equally pursuant to Subsection 2244(d)(2). Petitioner Calvin should have been granted his constitutional right to allow his Federal Habeas Corpus to travel as timely after the conclusion of his state court post-conviction motion 3:805(a), on April 12, 2014, As well in Calvin v. Lannon 157 So. 3d 1041 (Fla 2014). A State Habeas Corpus petition, decided on Dec 8th 2014 see Exh B-C. Thus, within case No: 5:15-CV-00030-WTH-PRL.

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 to the proceeding in the court whose judgment is the subject of this petition is as follows:

- #1. Fifth Judicial Circuit Court, of Marion County, Fla. 34475
P.O. Box 1040 Ocala, Fla. 34475 Case # 04-526-CF-AW 10/14/06
- #2. United States District Court Case # 5:11-cv-462 Oc-33 PRL
207 N.W. 2nd St Rm #337
Ocala, Fla. 34475
- #3. United States Court of Appeals Case # 19-14269-C Decided 3/16/20
Eleventh Circuit
56 Forsyth, St N.W.
Atlanta, Georgia, 30303
- #4. Ashley Moody, Atty Gen; 444 Seabreeze Blvd, 5th Floor Daytona Beach,
Fla. 32118.
- #5. Fifth District Court of Appeals, Case # 52-14.1057
- #6. Supreme Court of Florida. case # 157 So.3d 1041 (Fla 2014) 12/8/14

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APPENDIX B	<i>Petitioner's. State Court post-conviction 3.800(a) motion filed on Oct 7th 2008.</i>
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AEDPA of (1996) Subsection 2244(d)(2).

*FLORIDA RULE OF APPELLATE PROCEDURE, Rule 9.020(I)(2) Reading of Orders
by the State Courts,*

28 USC § 2254(b)(1)(A)

OTHER

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.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☒ reported at 19-14269-C; 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 5:11-cv-462-OL-33PRL; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☒ reported at 5D-14-1057; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Florida Supreme Court court appears at Appendix _____ to the petition and is

☒ reported at 157 So.3d 1041 (Fla 2014); 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 3/16/2020. Case # 19-14269

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 16th 2020, 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 to and including Rule 13.1 and 13.3 (150 days) (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was Dec 8th 2014. A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: None, 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 to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All Appendix as Exhibits is attached hereto...

Petitioner Calvin's Constitutional due process rights Under the U.S. 5th and 14th Amendment; Whereas, when the Middle Dist Court ruled in his first Federal Habeas Corpus Petition as untimely, Thus, it was not when the poor pro-se litigant informed them within his petition that he had an Unresolved State Court post-Conviction 3.800(a) motion still pending in the state court properly filed on October 7th, 2008. Exh "A-D" pg# 10 of 14. The Middle Dist Court acknowledged the unresolved state court post-conviction 3.800(a) motion was continuously still pending in the state court and by stating within it dismissal of Calvin's Federal Habeas Corpus petition, as time barred in Case # 5:11-cv-00462-JMS and stating that:

1. The court need not discuss whether the Motion to Correct his Sentence tolled the one year period because that proceeding was concluded before April 3, 2009, the date his federal period began to run. Exh "D" pg# 10 of 14

The final order by the state court upon Calvin's Unresolved post-Conviction 3.800(a) motion was not rendered with a final order by the court until on the date of, April 2nd, 2014. See Exh "C".

Calvin's Constitutional and statutory provisions involved require that the Middle Dist Court in Case # 5:11-cv-00462-JMS, the court should have held Calvin's Federal writ of Habeas Corpus petition in abeyance (or) dismissed it without prejudice until the conclusion of the state courts proceedings by an Order from the court, with instructions for Calvin to refile at that period of time, After April 2nd, 2014. U.S. Const 5th 14th Amend. Exh "B", C, 28 USC § 2254(b)(1)(a) and § 2244(d)(2).

STATEMENT OF THE CASE

Petitioner was Convicted and Sentenced in the Fifth Judicial Circuit Court of Marion County, Fla. On Sep 12th 2006. Direct Appeal was taken in the Fifth Dist Court of Appeals. Case # Calvin v. State 969 So. 2d 1036 Fla App 5th 2007. Calvin filed his very first State Court post Conviction 3.850 Motion on Feb 11th 2008. That motion was denied in the Fifth Judicial Cir Court in March 2008. He Appealed to the Fifth Dist Court of Appeal in Calvin v. State 942 So. 2d 270 Fla 5th DCA 2008, that proceeding was denied on Sep 16, 2008. Again in Calvin v. State 5D08-1928, Fla 5th Dist 2008. An Ineffective Assistance of Appellate Counsel Claim was filed and denied in (2009).

On October 7th 2008. Petitioner Calvin submitted and properly filed his present State Court post Conviction 3.800(a) Motion into the Fifth Judicial Cir Court, Marion County, Fla.

This is the State Court post-Conviction Motion 3.800(a) that tolled the One year period for about (7) years from date filed pursuant to § 2244(d)(2).

This proceedings was not concluded in the trial Sentencing Court until on April 2nd 2014. Thus, with Mandamus proceedings in the Fifth Dist Court of Appeals in Case # 5D14-1057

Petitioner filed yet another state Habeas Corpus in the Florida Supreme Court entitled Calvin v. Cannon 157 So. 3d 1041 (Fla 2014).

In, Calvin v. Sec. Fla Dept of Corr Case # 5:11-CV-462-DC-30PRL

This proceedings was prematurely decided and should had of been held in abeyance or dismissed without prejudice until, Calvin's state court proceedings became final. Thus, with instructions to refile at the conclusion of 3.800(a) motion by Order of the Court on April 2nd 2014 in Case # 5D-14-1057

Thus, Petitioner Calvin's time remained tolled during the period while he had an continued proceedings within the Supreme Court of Florida. A Petition for Writ of Habeas Corpus under Calvin v. Cannon # 157 So. 3d 1041 (Fla 2014)

At the conclusion of the above proceedings, Calvin then filed within the Middle Dist Court his 28 USC § 2254 Habeas Corpus petition under Case # 5:15-CV-30-DC-10PRL As timely filed under § 2244(d)(2) and § 2254(b)(1)(A)

The Middle Dist Court was incorrect in its ruling that Calvin's Habeas Corpus Petition was Second or Successive. Which in deed it was not, but timely under rule § 2244(d)(2). When Calvin's State Court 3.800(a) motion was filed on 10/7/08 and final on April 2nd 2014. in Case # 5D-14-1057.

REASONS FOR GRANTING THE PETITION

Honorable Court, the reasons why Petitioner Calvin's present petition should be granted by this court is due to the legal fact that, a grave fundamental Miscarriage of Justice has occurred, in which has caused an Extraordinary Circumstances by the Middle District Court by it's inadvertently thinking that all of petitioner Calvin's state court proceedings had become final, in which they had not become final on April 3rd 2009. Based upon the reading of the AEDPA 28 U.S.C.S. § 2244(d)(2) that duly states:

The One-Year Statute of Limitations for filing a federal habeas Corpus Petition and this period is tolled, however, for the time during which a properly filed application for State Court post-Conviction, i.e. (Calvin's state court 3.800(a) motion for relief) or other collateral review, i.e. (Calvin's state court habeas Corpus petition) with respect to the pertinent Judgment or Claims pending. The above federal statute § 2244(d)(2) was not applied in Calvin's Case No: 5:11-CV-00462-JMS

Thus, the District Court inadvertently ruled that:

1. The Court need not discuss whether the motion to correct his Sentence tolled the One-Year period because the proceedings was concluded before April 3rd 2009, the date his federal period began to run. See Exh D pg# 10 of 14.

May the Court please acknowledge that, Pro-Se Calvin had inadvertently submitted his first Habeas Corpus petition to early in Case # 5:11-CV-00462-JMS. The District Court on it's own motion should had of held Calvin's Habeas Corpus petition in abeyance until the State Court had properly ruled upon Calvin's 3.800(a) motion (or) dismissed Calvin's habeas Corpus in federal court until the state court had properly resolved his 3.800(a) motion by an Order from that Court. Thus, with instructions for him to refile at the conclusion of state court proceedings in Calvin v. State 5D-14-1057 Fla 5th DCA 2014. See Exh C.

Honorable Court, Exhibit "C" duly Express that the Order of the State Court in resolving Calvin's post-Conviction 3.800(a) motion did-not properly become resolved by the State court until on the Execution date of April 2, 2014.

Wherefore, if § 2244(d)(2) is correctly applied, Then Calvin's Habeas Corpus petition in Case # 5:15-CV-30-0C-10PRL was indeed timely filed in the year of (2015).

Petitioner Calvin now should be allowed his constitutional opportunity to appeal timely in the Middle District Court with the present or anew Federal Habeas Corpus § 2254. U.S. Const 5th 6th and 14th amend.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John D. Calvese

Date: July 30th, 2020

claim is pending shall not be counted toward any period of limitation under this subsection.

Calvin's second and third motions for post-conviction relief were dismissed as successive. That means they were not properly filed under Florida's procedural rules as interpreted by its courts. A state's interpretation of its own procedural rules is purely a state matter and is not for this Court to review. Since they were not properly filed, these motions do not operate to toll the one year federal period within which to bring a habeas petition. *Alderman v. Zant*, 22 F. 3d 1541, 1549 (11th Cir. 1994).

Calvin filed his first 3.850 motion for post-conviction relief before the time for the direct review of his conviction ended. The tolling effect of his first motion for post-conviction relief ended on September 16, 2008, when its denial was affirmed by the appellate court. At that time, Calvin had pending a habeas petition with the appellate court asserting ineffective assistance of his appellate counsel. That habeas petition was denied on April 3, 2009. Therefore, the tolling effect of Calvin's collateral motions ended on April 3, 2009, and his one year federal limitations period began to run.¹ The one year period ended April 3, 2010. Calvin filed his habeas petition with this Court on August 8, 2011, more than one year too late. It is therefore time barred.

¹ The Court need not discuss whether the Motion to Correct his sentence tolled the one year period because that proceeding was concluded before April 3, 2009, the date his federal period began to run.

Since Calvin's petition is time barred, it must be dismissed. But even if it were not time barred, it would have failed on the merits. This Court will proceed to discuss the merits of his claims only to explain why they would have failed.

Ground One: A constitutional fundamental error occurred because the case was based entirely on circumstantial evidence.

In support of ground one, Calvin argues:

A Constitutional Fundamental Error occurred leading to a miscarriage of justice (sic) when the trial court allowed the State to prosecute this case on its circumstantial evidence, knowing the 'Petitioner's' hands tested negative of gunpowder residue on the night less than an hour of the shooting, proving 'Petitioner' had not fired a firearm.

Petition (Dkt. #1), p. 17.


Calvin's claim in ground one appears to argue that the evidence presented was insufficient to convict him. Whether evidence is sufficient for conviction is a matter of state law. *Langford v. Day*, 110 F.3d 1380 (9th Cir. 1996). The evidence must be so insufficient that it rises to the level of fundamental unfairness to warrant federal habeas review. Here, that is not the case.

First, the Court notes that Calvin admits that he went home prior to going to the hospital and, once he arrived at the hospital, some time elapsed before law enforcement arrived. Therefore, Calvin had sufficient opportunity to wash his hands at home and at the hospital. Second, the circumstantial evidence presented in the case was sufficient to make the charge a question for the jury. Thus, a conviction on the circumstantial evidence of this case does not rise to the level of fundamental unfairness.

would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). Petitioner has not made the requisite showing in these circumstances.

Finally, because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal in forma pauperis.

DONE and ORDERED in Tampa, Florida on August 15, 2012.



JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies Furnished To:
Counsel/Parties of Record

F:\Docs\2011\11-cv-462 Ocala deny 2254.wpd