No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES IVAN BRANHAM,

PETITIONER

v.

STATE OF MONTANA; PATRICK McTIGHE,

RESPONDENTS,

AND

JIM SALMONSEN,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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SUBMITTED: September 23, 2021

QUESTION PRESENTED

The issue is whether proceedings of the Sentence Review Division of the Montana Supreme Court are a part of the "direct review" process under 28 U.S.C. § 2244(d)(1)(a) that delays the start of the running of the statute of limitations when defendants cannot raise an equitable challenge to their sentences on direct appeal, but must instead file an application for review of sentence with the Montana Sentence Review Division.

RELATED PROCEEDINGS

United States District Court (D. Mont.):

Branham v. Montana, No. CV 18-59-M-DLC-KLD (Sep. 23, 2019)

United States Court of Appeals (9th Cir.):

Branham v. Montana, No. 19-35829 (May 6, 2021)

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Petitioner, Charles Ivan Branham, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *Branham v. Montana*, 996 F.3d 959 (9th Cir. 2021). App., *infra*, 1A to 15A.

The District Court's order dismissing Branham's 28 U.S.C. § 2254 Petition for the Issuance of a Writ of Habeas Corpus is attached. App., *infra*, 16B to 23B; see also, *Branham v. Montana*, No. CV 18-59-M-DLC-KLD, 2019 U.S. Dist. LEXIS 162181 (D. Mont. Sep. 23, 2019).

The Magistrate Judge's recommendations to the District Court are also attached hereto. App., *infra*, 24C to 35C.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's Opinion was filed on May 6, 2021. On July 19, 2021, this Court extended the time to file a petition for a writ of certiorari 150 days from the date of that judgment or order. See, Sup. Ct. Rule 13, ¶ 1, *as amended* by the Court's July 19, 2021, order. Under that order, the deadline for filing a petition for a writ of certiorari is October 6, 2021. This Court's jurisdiction arises under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Relevant statutory provisions and rules are reprinted in the appendix to this petition. App., *infra*, 36D and 38E. The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), in particular, 28 U.S.C. §2244(d)(1)(A),

provides:

> (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

App., *infra*, 37D.

Rule 2 of the Sentence Review Division of the Montana Supreme Court states:

> Within sixty (60) days after sentence was imposed, a defendant may apply for the sentence to be reviewed by the Division.
>
> If an appeal to the Supreme Court or petition for post conviction relief is filed, the 60 day period commences when the appeal or petition is complete.

App., *infra*, 38E.

Rule 12 of the Sentence Review Division of the Montana Supreme Court states:

> The sentence imposed by the District Court is presumed correct. The sentence shall not be reduced or increased unless it is clearly inadequate or clearly excessive.

App., *infra*, 39E.

STATEMENT OF THE CASE AND THE FACTS

A. Legal Background.

The AEDPA's one-year statute of limitations runs "from the latest of" four specified dates, including "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). A properly filed application for state postconviction or other collateral review with respect to the pertinent judgment or claim tolls the one-year limitation period for filing a federal habeas petition. 28 U.S.C. § 2244(d)(2). The phrases "direct review" and "collateral review" are not defined in AEDPA.

However, "the conclusion of direct review occurs" once finality attaches. *Gonzalez v. Thaler*, 565 U.S. 134, 150, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012). The phrase "collateral review" in § 2244(d)(2) means judicial review of a judgment in a proceeding that is not part of direct review. *Wall v. Kholi*, 562 U.S. 545, 547, 131 S.Ct. 1278, 1282, (2011). In footnote 3, the Court noted, without deciding the merit of the argument, that direct review can

occur when defendants cannot raise a challenge to their sentence on direct appeal; instead, they must bring an alternate motion. *Id.*, 562 U.S. at 555, 131 S.Ct. at 1286, fn. 3. This case presents the situation and the argument referred to by the Court in footnote 3 of *Wall v. Kholi*.

B. The Nature of the Case.

Charles Branham was convicted in the State of Montana of mitigated deliberate homicide and sentenced to a 40-year period of confinement without eligibility for parole. After pursuing his state court remedies, he filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. The District Court dismissed his petition as untimely. Because the Ninth Circuit had "not clearly ruled on the issue," the District Court also granted a certificate of appealability on the question of whether the Montana Supreme Court's Sentence Review Division proceedings were a form of "direct review" under 28 U.S.C. § 2244(d)(1)(A) that delayed the start of the running of the statute of limitations.

The Ninth Circuit Court of Appeals affirmed, concluding that a proceeding in the Sentence Review Division of the Montana Supreme Court is collateral review.

C. The Proceedings in the State Courts.

Charles Branham was charged with the felony offense of Deliberate

Homicide in violation of § 45-5-102(1), MCA, after Branham fatally stabbed Michael Kinross-Wright during a fight between the two of them. Branham asserted the justifiable use-of-force defense and testified at trial that the fatal stab wound was inflicted when he was on his hands and knees striking backwards over his shoulder with a knife as Kinross-Wright was standing behind him, punching the back of his head. The prosecution contended that the fatal wound was inflicted at the beginning of the fight while Branham and Kinross-Wright were facing each other and before Branham's life was threatened. Branham was convicted by jury verdict of Mitigated Deliberate Homicide and sentenced to a 40-year period of confinement without eligibility for parole.

He appealed his conviction to the Montana Supreme Court, which affirmed his conviction. *State v. Branham*, 2012 MT 1, 363 Mont. 281, 269 P.3d 891.

Branham then petitioned for post-conviction relief in the state district court. Branham alleged that his trial and appellate counsel were ineffective. The state district court denied his petition.

Branham appealed the district court's denial of his petition for post conviction relief. The Montana Supreme Court issued its opinion on March 7, 2017, affirming the district court's order. *Branham v. State*, 2017 MT 47N,

387 Mont. 536, 390 P.3d 162.

Rule 2 of the Montana Sentence Review Division of the Supreme Court Rules allows a defendant to apply for his or her sentence to be reviewed within 60 days after sentence was imposed. However, "if an appeal to the Supreme Court or petition for post conviction relief is filed, the 60 day period commences when the appeal or petition is complete." In compliance with this rule, Branham timely filed his Application for Review of Sentence by the Sentence Review Division of the Supreme Court of Montana on March 20, 2017.

D. The Equitabilities of Branham's Sentence.

A hearing was held on Branham's application for review by the Montana Supreme Court's Sentence Review Division on August 4, 2017. Branham's equitable argument to the Sentence Review Division was that his sentence of 40 years, none of which was suspended and which restricted parole eligibility, was clearly excessive. When imposing sentence, the sentencing judge did not engage in any sort of analysis or discussion of the legislatively-mandated sentencing policy and factors set forth in § 46-18-101, MCA. He did not analyze or refer to the facts of the case and how they applied to Branham and the statutory sentencing policy of § 46-18-101, MCA. The sentencing judge based the sentence only on Branham's "extensive

history of drugs and alcohol use and the circumstances of the case." While Branham had reported some drug and alcohol use, it was not extensive. He further did not have a substantial criminal history. He was convicted of two property offenses, one of which was when he was a juvenile, and some traffic violations. He had no history of violence. The circumstances of the case mandated a much more lenient sentence. The victim, Michael Kinross-Wright, did have a criminal history and was supplying drugs to and having an affair with Branham's girlfriend. He had a BAC of 0.15 as well as THC in his bloodstream at the time of his death, and he physically attacked Branham with the very knife that he ended up being stabbed with during the ensuing altercation. The presentence report writer recommended a sentence of forty years with twenty suspended, and without any parole restrictions. She reasoned that such a sentence would allow Branham to be monitored in the community while $13,123.82 in restitution could be paid to the victim's family. The sentencing judge rejected that recommendation, but gave no reason for doing so. Branham requested the Sentence Review Division to impose the sentence that was recommended by the presentence report writer: 40 years with 20 years suspended and parole eligibility. That is a sentence that would satisfy the correctional and sentencing policies mandated by the Montana Legislature and was neither inadequate nor excessive. These were

equitable arguments that Branham made to the Sentence Review Division that the Montana Supreme Court could not hear on direct appeal.

A hearing was held on August 4, 2017, and the Sentence Review Division of the Supreme Court affirmed Branham's sentence on August 25, 2017. *State v. Branham*, MT Sent. Rev. Div. Cause No DC-10-008.

E. Federal Habeas Corpus Proceedings.

Branham filed his 28 U.S.C. § 2254 Petition for a Writ of Habeas Corpus in the District Court on March 21, 2018.

On May 21, 2019, the United States Magistrate Judge issued his Findings and Recommendations. In it, he found that Branham's Petition was untimely by some 184 days and recommended that Branham's Petition be dismissed as time-barred without excuse.

Branham timely filed his objections to the Magistrate Judge's Findings and Recommendations on May 29, 2019. Branham objected that the Magistrate Judge mistakenly applied a statutory tolling analysis and that the statute of limitations did not begin to run until Branham's Sentence Review Division proceedings were complete on August 25, 2017. Branham argued that the proceedings of the Sentence Review Division of the Montana Supreme Court were a form of direct review under 28 U.S.C. § 2244(d)(1)(A) that delayed the start of the running of the statute of limitations. In fact,

Branham had 164 days left before his limitations period would expire and his Petition for Habeas Corpus was well within the time period for filing. The Magistrate Judge's calculations were therefore incorrect and the District Court should reject his recommendation.

The District Court performed a *de novo* review and on September 23, 2019, issued its order dismissing Branham's Petition, but granting his request for the issuance of a certificate of appealability. App., *infra*, 16B.

Branham appealed to the Ninth Circuit Court of Appeals. On May 6, 2021, the Court of Appeals affirmed the District Court. App., *infra*, 1A.

In its Opinion the Court of Appeals first noted that "[its] precedent does not resolve the issue before us." *Branham v. Montana*, 996 F.3d 959, 963 (9th Cir. 2021). The Court of Appeals then referred to this Court's definition of "collateral review" in *Wall v. Kholi*, 562 U.S. 545, 552 (2011) as "a form of review that is not part of the direct appeal process," noting that a "collateral attack" is "[a]n attack on a judgment in a proceeding other than a direct appeal." *Branham*, 996 F.3d at 964. It then expressed doubts about its own criticism in *Summers v. Schriro*, 481 F.3d 710, 712-13 (9th Cir. 2007) of the suggestion that the phrase "direct review excludes any form of review that is not a direct appeal," stating that such a suggestion would be irreconcilable with *Kholi* and *McMonagle v. Meyer*, 802 F.3d 1093, 1098 (9th

Cir. 2015) ("[i]t is when a direct appeal becomes final that [the] 1-year statute of limitations begins running." The Court of Appeals examined "how a state procedure functions, rather than the particular name it bears" and concluded that " 'direct review' includes a proceeding that, although not called an 'appeal,' is nevertheless the 'functional equivalent of a direct appeal.' " *Branham*, 996 F.3d at 964. It then reviewed three factors: first, how the proceeding is characterized under state law; second, the timing of the proceeding; and third, whether the proceeding takes the place of an appeal in the State's system.

It was while examining the third factor that the Court of Appeals gave a nod toward footnote 3 of *Wall v. Kholi*. Looking at Rhode Island's Rule of Criminal Procedure 35 and Arizona's Rule of Criminal Procedure 32, the Court of Appeals recognized that a proceeding that substitutes for an appeal can be a form of direct review even if it is not called an "appeal." *Branham*, 996 F.3d at 965. The Court of Appeals acknowledged that "Branham observes that a Sentence Review Division proceeding is 'the only opportunity a criminal defendant has to challenge an otherwise lawful sentence on *equitable* grounds.' " (Italics in original). *Id.*, at 967, citing *Ranta v. State*, 1998 MT 95, ¶27, 288 Mont. 391, 401, ¶ 27, 958 P.2d 670, 676, ¶ 27. The Court of Appeals then stated, "[a]lthough we have found no decision

addressing a state procedure precisely like Montana's sentence review, our conclusion is consistent with the decisions of other courts that have examined similar state proceedings in which a prisoner can challenge the length of a sentence." *Branham*, at 968. The Court noted that when such a proceeding results in the vacatur of the sentence and the imposition of a new sentence, then the statute of limitations will run anew from the imposition of the new judgment. *Id*., citing *Magwood v. Patterson*, 561 U.S. 320, 323-24, 130 S. Ct. 2788, 177 L. Ed. 2d 592 (2010) and *Smith v. Williams*, 871 F.3d 684, 685-86 (9th Cir. 2017). The Court then referred to rules from Maryland, Florida, and Georgia – rules that are much different from Montana's Sentence Review Division proceeding rules – and noted that when it doesn't result in the vacatur of a sentence and the imposition of a new sentence, the proceeding is generally characterized as collateral review and does not restart the limitations period, *Branham*, at 968. The Court of Appeals, however, admitted "[w]e are aware of no authority treating a procedure similar to Montana's as a form of direct review that restarts the statute of limitations under section 2244(d)." *Branham*, at 968.

This is the case that would treat Montana's procedure as a form of direct review that delays or resets the statute of limitations. The Court of Appeals was wrong as a matter of law. Montana's Sentence Review Division

proceedings *are* a form of "direct review" that delay the statute of limitations, and Branham's § 2254 habeas petition was timely.

REASONS FOR GRANTING THE PETITION

In *Wall v. Kholi*, 562 U.S. 545, 555, 131 S.Ct. 1278, 1286, fn. 3 (2011) this Court stated that it could imagine the argument that a sentence reduction proceeding is in fact part of direct review under the Antiterrorism and Effective Death Penalty Act of 1996 because defendants cannot raise a challenge to their sentences on direct appeal; instead, they must bring a motion to reduce their sentence. Because that issue was not briefed or argued by the parties, this Court expressed no opinion as to the merit of such an argument. *Kholi*, 562 U.S. at 555, fn. 3.

Here, Branham *did* brief and make the argument. The Court of Appeals gave only a nod toward it, expressing criticism about its own case, *Summers v. Schriro*. The Court of Appeals acknowledged that there was no precedent or cases addressing a proceeding like Montana's Sentence Review Division procedure and referred to other state procedures that are substantially different from Montana's. Its decision is significantly flawed and did not decide the argument addressed in footnote 3 of *Wall v. Kholi*. The question in this case goes to the merits of that argument. Circuit precedent does not address the issue and there is no decision addressing a procedure

precisely like Montana's sentence review. Compelling reasons exist and a writ of certiorari should be granted so that the Court can address this important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. Rule 10(c).

A. How the Sentence Review Division proceedings of the Montana Supreme Court are characterized under Montana state law.

The Montana Supreme Court has appellate jurisdiction and may make rules governing appellate procedure. Mont. Const, Art. VII, § 2; § 3-2-201(2), MCA. Its appellate jurisdiction extends to all cases at law and in equity. § 3-2-203, MCA. In proceedings of an equitable nature, it shall review all questions of fact arising upon the evidence presented in the record, and determine the same, as well as questions of law. § 3-2-204(5), MCA.

An appeal in a criminal case may be taken only from a final judgment and orders which affect a defendant's substantial rights. § 46-20-104(1), MCA. Upon appeal from a judgment, the court may review any alleged error which involves the merits or necessarily affects the judgment. § 46-20-105, MCA.

Montana has a bifurcated appellate review process for criminal sentences. The Montana Supreme Court will review a criminal sentence for legality only. It considers whether the sentence falls within the parameters

set by the applicable sentencing statutes. The Montana Supreme Court leaves equitable claims to its Sentence Review Division. *Jordan v. State*, 2008 MT 334, ¶ 18, 346 Mont. 193, 197-98, 194 P.3d 657, 660-61.

The Sentence Review Division of the Montana Supreme Court was created in 1967. Its statutory authority is found in Part 9, chapter 18, of Title 46 of the Montana Code Annotated, and is entitled "Appellate Review of Legal Sentences." The Sentence Review Division was created to provide appellate review of legal sentences challenged by the recipient as being unjust or inequitable. *State v. Simtob*, 154 Mont. 286, 288, 462 P.2d 873, 874 (1969). It "functions as an arm of th[e Montana Supreme] Court." *Ranta*, ¶¶ 12, 27. It is a "division" of the Montana Supreme Court in which the chief justice appoints three district court judges to act as a "review division" of the Supreme Court and designates one of the judges to act as presiding officer of the review division. § 46-18-901, MCA. As a "division" of the Montana Supreme Court, district courts have no jurisdiction to review a decision of the Sentence Review Division. *Jordan*, at ¶ 23.

The Sentence Review Division reviews a judgment as it relates to the sentence imposed and any other sentence imposed on the person at the same time. It may order a different sentence or sentences to be imposed as could have been imposed at the time of the imposition of the sentence under review,

including a decrease or increase in the penalty, or decide that the sentence under review should stand. § 46-18-904(1), MCA. The sentence imposed by the district court is presumed correct. § 46-18-904(3), MCA. It is reviewed by three district court judges who decide whether the sentence imposed was "clearly inadequate or clearly excessive." SRD, Rule 12. Their decision is final and cannot be appealed. § 46-18-905, MCA.

A proceeding before the Sentence Review Division of the Montana Supreme Court is the only means a defendant has available to exercise the right to appellate review of the "equitability" of a sentence. It is the first and only time that the equitability of a sentence can be directly reviewed by an "arm" of the Montana Supreme Court. Before the Sentence Review Division was created, the Montana Supreme Court reviewed criminal sentences for both legality and equitability. *State v. Brooks*, 150 Mont. 399, 412, 436 P.2d 91, 98 (1967). After its creation, the Sentence Review Division was charged with determining the appropriateness of criminal sentences with respect to the individual offender and a particular offense. *State v. McKenzie*, 186 Mont. 481, 519, 608 P.2d 428, 450 (1980) (overruled in part on other grounds by *State v. Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735). Questions of equitability, such as length of sentence or proportionality to the crime, fall under the purview of the Sentence Review Division, *State v. Kern*, 2003 MT

77, ¶ 54, 315 Mont. 22, ¶ 54, 67 P.3d 272, ¶ 54, whereas the Montana Supreme Court reviews sentences for legality such as whether the sentence is within the parameters of the sentencing statute. *State v. Ashby*, 2008 MT 83, ¶ 8, 342 Mont. 187, ¶ 8, 179 P.3d 1164, ¶ 8. Were the Montana legislature to abolish the Sentence Review Division, the function of reviewing sentences on equitable grounds would return to the Montana Supreme Court. *Ranta*, ¶ 27. As a result of this bifurcated review process, a person can only seek review by the Sentence Review Division of the equitability of his sentence, and review by the Montana Supreme Court of the legality of his sentence. *Jordan v. State*, 2008 MT 334, ¶ 18, 346 Mont. 193, 197-98, 194 P.3d 657, 660-61; see also, SRD, Rule 3. The Sentence Review Division proceeding is therefore *the* appeal of the equitability of a sentence. *Ranta*, ¶ 27 ("It functions as an appellate process because it is the only opportunity a criminal defendant has to challenge an otherwise lawful sentence on equitable grounds"), *cf.*, *Summers v. Schriro*, 481 F.3d at 716 ("direct review includes a proceeding that is "the functional equivalent of a direct appeal"); *Carey v. Saffold*, 536 U.S. 214, 223, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) (for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears.)

The Court of Appeals' reliance on *State v. Moorman*, 279 Mont. 330, 928 P.2d 145 (Mont. 1996) as a basis for characterizing Sentence Review Division proceedings as "collateral review" for purposes of 28 U.S.C. § 2244(d)(1)(A) was misplaced. *Branham*, at 966. *Moorman* was decided in the context of § 46-21-105(2), MCA, which states that "[w]hen a petitioner has been afforded the opportunity for a *direct appeal* of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on *direct appeal* may not be raised, considered, or decided in a proceeding brought under [the Montana Post-Conviction Hearing Act.]" (Italics added.) Moorman did not directly appeal the legality of his sentence – his dangerous offender designation for purposes of parole eligibility – to the Montana Supreme Court. Instead, he petitioned the Sentence Review Division to review his dangerous offender designation, which denied his petition. He then filed a petition for post-conviction relief, and the district court held that he was procedurally barred from raising them in his petition for post-conviction relief by § 46-21-105(2), MCA. *Moorman*, 279 Mont. at 334, 928 P.2d at 148. The Court of Appeals' reliance on *Moorman*'s reasoning was therefore inapplicable to 28 U.S.C. § 2244(d)(1)(A). *Moorman* noted that while a defendant may apply for a review of his sentence with the Sentence Review Division pursuant to the §§ 46-20-901 through 905, MCA, nowhere in the language of

those statutory provisions does the word "appeal" appear. 279 Mont. at 338, 928 P.2d at 150. Lost in both the *Moorman* court's and the Court of Appeals' analysis was the fact that the Sentence Review Division statutory scheme is entitled "*Appellate Review* of Legal Sentences." (Italics added.) Furthermore, nowhere in 28 U.S.C. § 2244(d)(1)(A) does the word "appeal" appear either. The statute says "direct review," it does not say "direct appeal." In the context of AEDPA, Montana's Sentence Review Division proceedings are the "functional equivalent of a direct appeal" (*Summers v. Schriro*, 481 F.3d at 716) and a form of direct review because that is the only time that a defendant can challenge his sentence on equitable grounds. *Carey v. Saffold*, 536 at 223; *Wall v. Kholi*, 562 U.S. at 555, 131 S.Ct. at 1286, fn. 3. *Moorman* is therefore distinguishable and the Court of Appeals' reliance on it for the purpose of determining that Montana's Sentence Review process is collateral review for purposes of § 2244(d)(1)(A) was misplaced.

B. The Maryland, Florida, and Georgia statutes are different than Montana's Sentence Review procedure.

The Court of Appeals admitted that it was aware of no authority treating a procedure similar to Montana's as a form of direct review that restarts the statute of limitations under 2244(d). It then referred to rules from Maryland, Florida, and Georgia as a basis for its ruling.

The Maryland, Florida, and Georgia statutes and cases cited by the Court of Appeals are different from and not even similar to Montana's statute. They involved motions to reduce a sentence filed with the same trial judge who imposed the sentence at the outset. They were requests for leniency or to correct an illegal sentence. Maryland Rule 4-345 allows the court to correct an "illegal sentence," revise a sentence in case of fraud, mistake, or irregularity, or correct an evident mistake in the announcement of a sentence. *Mitchell v. Green*, 922 F.3d 187 (4th Cir. 2019) involved a motion to reduce a sentence under Maryland Rule 4-345 and the question of "tolling" posed by 28 U.S.C. § 2244(d)(2). *Id*., at 190. It did not involve the question of whether Maryland Rule 4-345 was a form of direct review for purposes of 28 U.S.C. § 2244(d)(1)(A). A Rule 4-345 motion can both challenge the legality of a sentence as well as request leniency, and therefore, is both appealable and not appealable. *Mitchell*, 922 F.3d at 193-194.

Florida Rule 3.800 allows a trial court to correct an illegal sentence imposed by it or an incorrect calculation made by it, or to correct a sentencing error, or reduce or modify a legal sentence imposed by it. Fla. R. Crim. P. 3.800. *Baker v. McNeil*, 439 F. App'x 786 (11th Cir. 2011) (Unpublished).

The Georgia rule referred to by the Court of Appeals and cited in *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir. 2002) was repealed in

2007 as unconstitutional. *Sentence Review Panel v. Moseley*, 284 Ga. 128, 663 S.E.2d 679 (2008). *Bridges* was a tolling case under § 2244(d)(2) and Bridges didn't appeal his convictions and sentences. The statute provided that sentence review was to determine whether a sentence was "excessively harsh," was available only to those Georgia state prisoners who had been sentenced to more than 12 years in prison, stated that the sentence review panel did not issue written opinions, nor could it increase or completely eliminate a sentence. *Bridges*, 284 F.3d at 12103.

In contrast, an application submitted to Montana's Sentence Review Division is not heard by the same trial judge who imposed sentence. § 46-18-902, MCA. It is *the* appeal of equitable considerations. It is the one and only time that review of the equities of a sentence can occur. The decision is final, cannot be appealed, and is reported. § 46-18-905, MCA, *cf.*, *Kholi*, 562 U.S. at 549, 554 (Kholi asked trial court to reconsider its prior determination in a "plea for leniency," motion denied and appealed to the Rhode Island Supreme Court). The Maryland, Florida, and Georgia statutes are different from and not even "similar" to Montana's sentence review proceedings.

C. Finality occurred when the Sentence Review Decision issued its decision.

The Court of Appeals' reliance on *Sanchez v. State*, 2004 MT 9, 319

Mont. 226, 86 P.3d 1, 3 (Mont. 2004) for the proposition that a "conviction becomes final when the time for appeal expires, despite a later application to the Sentence Review Division," was also misplaced. *Sanchez* involved the dismissal of a petition for post-conviction relief because it was time-barred. Like *Moorman*, the question of "finality" was again limited to the context of Montana's post-conviction hearing statute, § 46-21-102(2), MCA. Sanchez twice stated that he did not want to proceed with sentence review and his application was twice held in abeyance until he finished his appeal. However, he also twice failed to appeal to the Montana Supreme Court, and instead filed a petition for post-conviction relief that was over one and one-half years late. *Sanchez* did not discuss "finality" within the context of § 46-18-905(1), MCA ("[t]he decision of the review division in each case is final") or *Ranta* at ¶ 27 ("like decisions issued directly by this Court, the decisions of the review division are final, cannot be appealed, and are reported in the Montana Reports"), as is required by *Clay v. United States*, 537 U.S. 522, 527, 123 S. Ct. 1072, 1076 (2003).

Appellate review by the Montana Supreme Court extends to all cases both at law and in equity. § 3-2-203, MCA. In proceedings of an equitable nature, it shall review all questions of fact arising upon the evidence presented in the record, and determine the same, as well as questions of law.

§ 3-2-204(5), MCA. Neither cases at law nor cases in equity have precedence or priority over the other, and there is no basis for a claim that equitable review "lies aside" from legal review or is not part of "main review." They are both equally important, and sentence review is a "critical stage of the proceedings." *Ranta*, ¶ 25. Montana's sentence review procedure functions as an appeal because it is the only opportunity a criminal defendant has to challenge an otherwise lawful sentence on equitable grounds. *Ranta*, ¶ 27. Under Montana law, the Sentence Review Division has *more* authority to change a sentence than does the Supreme Court. *Ranta*, ¶ 28. The *Ranta* court's pronouncement establishes unequivocally that the proceeding takes the place of an appeal in Montana's system. Once the Sentence Review Division issued its decision, nobody – neither Branham nor the State – could appeal its decision.

Finality is a concept that has been "variously defined; like many legal terms, its precise meaning depends on context." *Clay v. United States*, 537 U.S.522, 527, 123 S. Ct. 1072, 1076, 155 L. Ed. 2d 88, 94 (2003). For purposes of 28 U.S.C. § 2255, "finality attaches when this court affirms a conviction on the merits on direct review." *Id.* For purposes of § 2254, Branham's judgment did not become "final" until the Sentence Review Division proceedings were concluded. The date of entry of judgment from Montana's

highest court (*Bowen v. Roe*, 188 F.3d 1157, 1158-1159 (9th Cir. 1999)) is when its "arm," the Sentence Review Division of the Montana Supreme Court, ruled on the equitabilities of Branham's sentence. That was the date that marked Branham's sentence as "final." § 46-18-905, MCA. Once finality attached, "the conclusion of direct review occurs." *Gonzalez v. Thaler*, 565 U.S. 134, 150, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012).

In *Jimenez v. Quarterman*, 555 U.S. 113, 129 S. Ct. 681, 172 L. Ed. 2d 475 (2009) the state court had permitted Jimenez to file an out-of-time direct appeal. This Court held that this "reset" the limitations period; Jimenez's judgment would now become final at "the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that [out-of-time] appeal." *Id.*, at 120-121, 129 S. Ct. 681, 172 L. Ed. 2d 475. This Court adopted the out-of-time appeal's date of finality over the initial appeal's date of finality. *Id.*, at 119-121, 129 S. Ct.681, 172 L. Ed. 2d 475.

The Sentence Review Division's decision date of finality is therefore entirely consistent with *Jimenez*, because a state court's reopening of direct review will reset the limitations period. If the Sentence Review Division *had* modified Branham's sentence on equitable grounds, then there would have been no question that AEDPA's one-year statute of limitations would have run from August 25, 2017. *Magwood v. Patterson*, 561 U.S. at 341-342.

Appellate review of the equitabilities of a legal sentence is not "collateral" or "lying aside from the main subject." This Court rejected Rhode Island's contention that "collateral review" includes only "legal" challenges to a conviction or a sentence and excludes motions seeking a discretionary sentence reduction. *Wall v. Kholi*, 562 U.S. at 550, 131 S.Ct. 1283-1284. Applying the same reasoning, because only legal challenges can be made on direct appeal in Montana, it necessarily follows that equitable challenges to a legal sentence are also a form of direct appellate review. *Kholi*, 562 U.S. at 555, fn. 3.

D. This Court's review is warranted.

The Court of Appeals recognized that no court has decided this important question of federal law and its decision seemed to be hampered by the lack of this Court's pronouncement on the issue. It questioned its own criticism in *Summers* that "the phrase 'direct review" excludes any form of review that is not a 'direct appeal.' " *Branham*, 996 F.3d at 964. Yet footnote 3 of *Wall v. Kholi* recognizes that a legitimate argument can be made that direct review can occur when there is only one opportunity for a defendant to raise a challenge to his sentence, and that is the case here. The issue has arisen in two prior cases involving Rhode Island and Arizona rules. *Wall v. Kholi*; *Summers v. Schriro*; see also, *Rivera v. Wall*, No. 14-23 S, 2015 U.S.

Dist. LEXIS 127514 (D.R.I. Sep. 22, 2015); *Lane v. Mullin*, No. 12-CV-625-JHP-TLW, 2013 U.S. Dist. LEXIS 68282, fn. 3 (N.D. Okla. May 14, 2013). Even though the particular circumstances of each case and the laws of each state are necessarily somewhat unique, precedential decisions like the one here will affect future § 2254 cases of great importance that warrant this Court's review.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

DATED this 23rd day of September, 2021.

RESPECTFULLY SUBMITTED:

By: /s/ Palmer A. Hoovestal
Palmer Hoovestal
Attorney for Petitioner
CHARLES IVAN BRANHAM

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES IVAN BRANHAM, *Petitioner-Appellant*, v. STATE OF MONTANA; PATRICK MCTIGHE, *Respondents-Appellees*, and JIM SALMONSEN, *Respondent.*	No. 19-35829 D.C. No. 9:18-cv-00059-DLC-KLD OPINION

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, District Judge, Presiding

Argued and Submitted July 10, 2020
Portland, Oregon

Filed May 6, 2021

Before: Michael R. Murphy,* Mark J. Bennett, and Eric D. Miller, Circuit Judges.

Opinion by Judge Miller

SUMMARY**

Habeas Corpus

The panel affirmed the district court's judgment dismissing as barred by the one-year statute of limitations a Montana state prisoner's habeas corpus petition brought pursuant to 28 U.S.C. § 2254.

Under 28 U.S.C. § 2244(d), the one-year period begins to run upon "the conclusion of direct review" of the conviction, and it is suspended during the pendency of any "properly filed application for State post-conviction or other collateral review." The panel held that a proceeding in the Sentence Review Division of the Montana Supreme Court is collateral review, not direct review, which rendered the petition in this case untimely.

* The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Palmer A. Hoovestal (argued), Hoovestal Law Firm PLLC, Helena, Montana, for Petitioner-Appellant.

Mardell Ployhar (argued), Assistant Attorney General; Timothy C. Fox, Attorney General; Office of the Attorney General, Helena, Montana; for Respondents-Appellees.

OPINION

MILLER, Circuit Judge:

A prisoner who seeks a federal writ of habeas corpus to review a state-court conviction must satisfy a one-year statute of limitations. 28 U.S.C. § 2244(d). The one-year period begins to run upon "the conclusion of direct review" of the conviction, and it is suspended during the pendency of any "properly filed application for State post-conviction or other collateral review." *Id.* We are asked to decide whether a proceeding in the Sentence Review Division of the Montana Supreme Court constitutes direct review or collateral review. We conclude that it is collateral review.

I

On the night of December 10, 2009, Charles Branham fatally stabbed Michael Kinross-Wright. Branham admitted the stabbing but claimed that he acted in self-defense. A Montana jury found Branham guilty of mitigated deliberate homicide, and he was sentenced to 40 years of imprisonment without eligibility for parole. The Montana Supreme Court affirmed. *State v. Branham*, 269 P.3d 891, 897 (Mont. 2012). Branham did not file a petition for a writ of certiorari in the United States Supreme Court.

About 11 months after the time for filing a petition for a writ of certiorari expired, Branham filed a petition for state post-conviction relief, arguing that he had received ineffective assistance of counsel. *See* Mont. Code Ann. § 46-21-101 *et seq.* The state district court denied his petition, and the Montana Supreme Court affirmed. *Branham v. State*, 390 P.3d 162 (Mont. 2017) (unpublished table decision).

About two weeks later, Branham filed an application for review of his sentence by the Sentence Review Division of the Montana Supreme Court. *See* Mont. Code Ann. § 46-18-901 *et seq*. The Sentence Review Division affirmed the sentence, concluding that it was neither "clearly inadequate [n]or clearly excessive."

More than six months later, Branham filed a petition for a writ of habeas corpus in federal district court. He alleged that both trial and appellate counsel were unconstitutionally ineffective and that he was deprived of due process by various procedural errors at trial and in post-conviction proceedings.

A magistrate judge recommended that the petition be dismissed as time barred. The magistrate judge applied 28 U.S.C. § 2244(d)(1), which provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." As relevant here, the period begins to run upon "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). But the statute also provides that "[t]he 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." *Id.* § 2244(d)(2).

The magistrate judge determined that the statute of limitations began to run after the expiration of the period for seeking certiorari to review the Montana Supreme Court's 2012 decision affirming Branham's conviction. The magistrate judge treated both Branham's petition for post-conviction relief and his application for review by the Sentence Review Division as forms of "State post-conviction or other collateral review," which meant that the statute of limitations was tolled during those proceedings. Once the proceedings concluded, Branham had 23 days remaining in which to file, but he did not file until several months later, making his petition untimely.

The district court adopted the magistrate judge's recommendation and dismissed the petition. The court noted that "[b]ecause Branham does not dispute [the] actual calculation of the various dates involved, but rather disputes when the statute of limitations period began, the narrow issue is whether Montana's [Sentence Review Division] proceeding is a form of direct or collateral review." The court stated that our decision in *Rogers v. Ferriter*, 796 F.3d 1009 (9th Cir. 2015), "largely resolves the issue." In the court's view, although the decision in *Rogers* "did not directly address whether Montana's [Sentence Review Division] process is direct or collateral, it was a basic assumption of the case that it was a collateral proceeding." The court added that because review in the Sentence Review Division "may occur after a post-conviction review it is necessarily collateral."

The district court granted a certificate of appealability.

II

The timeliness of Branham's habeas petition—and, thus, the resolution of this appeal—depends on how to

characterize Montana's Sentence Review Division proceeding. If that proceeding is a form of "direct review" under section 2244(d)(1)(A), then the one-year statute of limitations began to run upon its conclusion, making Branham's petition timely. If it is instead a form of "State post-conviction or other collateral review" under section 2244(d)(2), then the statute of limitations was tolled while that proceeding was ongoing but did not reset upon its conclusion, making Branham's petition untimely. Reviewing de novo, *McMonagle v. Meyer*, 802 F.3d 1093, 1096 (9th Cir. 2015) (en banc), we agree with the district court that the proceeding is a form of collateral review.

At the outset, we conclude that our precedent does not resolve the issue before us. The district court relied on our decision in *Rogers*, in which we considered whether a Sentence Review Division proceeding was "pending," for purposes of tolling under section 2244(d)(2), during the time that the Sentence Review Division held it in abeyance so that the petitioner could pursue state post-conviction relief. 796 F.3d at 1010. In describing the issue, we referred to the Sentence Review Division as part of "Montana's dual-track system for collateral review of criminal sentences." *Id.* Thus, as the district court correctly observed, "a basic assumption" of our decision was that a proceeding in the Sentence Review Division was collateral. But no party in *Rogers* suggested that the proceeding might constitute direct review, and the issue of how to characterize it was not before us. "Judicial assumptions concerning . . . issues that are not contested are not holdings," so the assumption reflected in *Rogers* is not binding here. *FDIC v. McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992) (omission in original) (quoting *United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990)); *accord Summers v. Schriro*, 481 F.3d 710, 712–13 (9th Cir. 2007).

Because our precedent does not answer the specific question presented, we turn to more general guidance on the difference between direct review and collateral review. The Supreme Court has held that "'collateral review' means a form of review that is not part of the direct appeal process." *Wall v. Kholi*, 562 U.S. 545, 552 (2011); *see also id.* (noting that a "collateral attack" is "[a]n attack on a judgment in a proceeding *other than a direct appeal*" (alteration and emphasis in original) (quoting Black's Law Dictionary (9th ed. 2009))). To illustrate the distinction, the Court has observed that "habeas corpus is a form of collateral review," as are *coram nobis* proceedings and proceedings under 28 U.S.C. § 2255. *Id.*

In *Summers*, a case that preceded *Kholi*, we noted that section 2244(d) uses "the phrase 'direct review' rather than the phrase 'direct appeal,'" and we criticized the suggestion that "the phrase 'direct review' excludes any form of review that is not a 'direct appeal.'" 481 F.3d at 713. On its broadest reading, that language would be irreconcilable with the statement in *Kholi* that "'collateral review' means a form of review that is not part of the direct appeal process," 562 U.S. at 552, as well as with our subsequent en banc decision in *McMonagle*, in which we said that "[i]t is when a direct appeal becomes final that [the] 1-year statute of limitations begins running," 802 F.3d at 1098. But our holding in *Summers* was much more limited: We held that the label a State attaches to a proceeding is not controlling, and that "direct review" includes a proceeding that, although not called an "appeal," is nevertheless "the functional equivalent of a direct appeal." 481 F.3d at 716 (quoting *State v. Ward*, 118 P.3d 1122, 1126 (Ariz. Ct. App. 2005)); *see also Carey v. Saffold*, 536 U.S. 214, 223 (2002) ("[F]or purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than

the particular name that it bears."). That holding is consistent with *Kholi* and *McMonagle*, and it guides our analysis here.

A review of our cases and those of the Supreme Court reveals three factors that are relevant to determining whether a proceeding is functionally "part of the direct appeal process" or is instead a form of collateral review. *Kholi*, 562 U.S. at 552.

First, we consider how the proceeding is characterized under state law. Of course, "[b]ecause the question of what constitutes direct review is intertwined with the question of when a decision on direct review becomes final, it makes sense to decide both questions by reference to uniform federal law." *Summers*, 481 F.3d at 714. And as we have already explained, the label a State attaches to a proceeding is not determinative. *Id.* But how the State "characterize[s]" the proceeding "may affect" our analysis insofar as it explains how the proceeding "functions in the [state] criminal justice system." *Id.*; *see McMonagle*, 802 F.3d at 1097 ("[W]e look to [state] law to determine when direct review of a [state] conviction concludes.").

Second, we consider the timing of the proceeding. In assessing the finality of federal convictions, the Supreme Court has explained that "[f]inality attaches" once the Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003). And "[i]n construing the similar language of § 2244(d)(1)(A)," the Court has identified "no reason to depart from this settled understanding, which comports with the most natural reading of the statutory text." *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009). That understanding is important here because once finality attaches, "the conclusion of direct review occurs." *Id.*; *see Gonzalez v.*

Thaler, 565 U.S. 134, 150 (2012). A distinguishing feature of collateral review, therefore, is that it "necessarily follows direct review." *Lopez v. Wilson*, 426 F.3d 339, 351 (6th Cir. 2005) (en banc) (citation omitted).

In addition, direct review is generally "governed by short, definite deadlines." *Summers*, 481 F.3d at 717. That, too, is a significant feature of direct review for purposes of the federal habeas statute of limitations. The Supreme Court has observed that the statute of limitations is aimed at "safeguard[ing] the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lend[ing] finality to state court judgments within a reasonable time." *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) (quoting *Day v. McDonough*, 547 U.S. 198, 205–06 (2006)); *see also Rhines v. Weber*, 544 U.S. 269, 277 (2005). Those aims are achieved by using the completion of direct review as the triggering event for the start of the limitations period. By contrast, while direct review "generally is constrained by tight, non-waivable time limits," the time limits governing collateral review "are generally looser and waivable for good cause." *Lopez*, 426 F.3d at 351 (citation omitted).

Third, we consider whether the proceeding takes the place of an appeal in the State's system. In *Kholi*, the Court suggested that it could "imagine an argument" that the proceeding at issue—a motion for a reduction of sentence under Rhode Island Rule of Criminal Procedure 35—"is in fact part of direct review" because it is the only opportunity for defendants to "raise any challenge to their sentences." 562 U.S. at 555 n.3. We applied similar reasoning in *Summers*, concluding that a proceeding under Arizona Rule of Criminal Procedure 32 is a form of "direct review" because, for those defendants whose convictions rest on a

guilty plea, the proceeding represents "the only means available for exercising the constitutional right to appellate review" under Arizona law. 481 F.3d at 716 (quoting *Montgomery v. Sheldon*, 889 P.2d 614, 616 (Ariz. 1995)); *see id.* ("[A] Rule 32 proceeding is *the* appeal for a defendant pleading guilty." (emphasis in original) (quoting *Montgomery v. Sheldon*, 893 P.2d 1281, 1282 (Ariz. 1995))). A proceeding that substitutes for an appeal can be a form of direct review even if it is not called an "appeal."

III

With those principles in mind, we examine Montana's Sentence Review Division proceeding.

In Montana, the review of criminal sentences is bifurcated. The Montana Supreme Court "reviews sentences for legality—that is, whether the sentence is within the parameters of the sentencing statute," *Jordan v. State*, 194 P.3d 657, 661 (Mont. 2008), while the Sentence Review Division is charged with reviewing "the inequity or disparity of [a] sentence," *State v. Moorman*, 928 P.2d 145, 149 (Mont. 1996). The Sentence Review Division consists of three Montana district court judges designated by the Chief Justice of the Montana Supreme Court. Mont. Code Ann. § 46-18-901(1). Anyone sentenced to a term of imprisonment of one year or more may apply to the Sentence Review Division to review the sentence. *Id.* § 46-18-903(1).

As we next explain, the state-law characterization of a Sentence Review Division proceeding, the timing of the proceeding, and the relationship of the proceeding to other forms of review under Montana law all indicate that the proceeding is a form of collateral review. That conclusion comports with the decisions of courts that have examined similar systems in other States.

A

Montana law does not characterize a Sentence Review Division proceeding as part of the direct review process. First, Montana law provides that a petitioner seeking post-conviction relief may not raise "grounds for relief that were or could reasonably have been raised on direct appeal." Mont. Code Ann. § 46-21-105(2). The Montana Supreme Court has held that "an application for review of the sentence" by the Sentence Review Division is not a direct appeal for purposes of that statute. *Moorman*, 928 P.2d at 150. In reaching that conclusion, the court "explained the difference between an application to the Sentence Review Division and a direct appeal," emphasizing the limited nature of the Division's review. *Id.* at 149. *Moorman* demonstrates that Montana considers sentence review to be distinct from the direct review process.

Second, the Montana post-conviction relief statute provides that a decision becomes "final" for purposes of computing the deadlines for seeking relief "when the time for appeal to the Montana supreme court expires," or, "if an appeal is taken to the Montana supreme court," when the deadline for filing a petition for a writ of certiorari to the United States Supreme Court expires or when the United States Supreme Court issues its final order. Mont. Code Ann. § 46-21-102(1). The statute does not mention the Sentence Review Division. The Montana Supreme Court has therefore held that a conviction becomes "final" when the "time for appeal [to the Montana Supreme Court] expire[s]," despite a defendant's later application to the Sentence Review Division. *Sanchez v. State*, 86 P.3d 1, 3 (Mont. 2004); *see id.* at 1–2 (distinguishing between a "direct appeal" to the Montana Supreme Court and "sentence review" by the Division).

Branham challenges that interpretation of Montana law. He relies on a statement by the Montana Supreme Court in *Ranta v. State*, 958 P.2d 670, 678 (Mont. 1998), that "[w]ere the legislature to abolish the review division, the function of reviewing sentences on equitable grounds would . . . return to [the Montana Supreme] Court." But simply because the Montana Supreme Court reviewed equitable challenges to sentences in the past—and could potentially do so again in the future—does not change the reality that, at present, a prisoner must raise those challenges in a separate forum.

Branham also points to *Ranta*'s holding that the Montana Constitution gives a prisoner a right to counsel in the Sentence Review Division. *See* 958 P.2d at 676–77. But the Montana Supreme Court based that holding on its view that sentence review is "a critical stage of the proceedings against a defendant." *Id.* at 674. It expressly declined to hold that it "constitutes a first appeal provided as a matter of right." *Id.* at 677. Under Montana law, the proceeding is not a direct appeal.

B

The deadlines to apply for review by the Sentence Review Division also suggest that that proceeding is appropriately characterized as a form of collateral review. A prisoner seeking sentence review must apply within 60 days of the date the sentence was imposed, of the determination of an appeal to the Montana Supreme Court, or of the determination of a petition for post-conviction relief, whichever is latest. Mont. Code Ann. § 46-18-903(1); Mont. Sentence Rev. Div. R. 2. In addition, if the prisoner is unable to meet those deadlines and can show cause, the Sentence Review Division may "consider any late request for review of sentence and may grant or deny the request." Mont. Code Ann. § 46-18-903(3); Mont. Sentence Rev. Div. R. 7.

The timing rules are significant for two reasons. First, a prisoner can seek review by the Sentence Review Division *after* seeking Montana post-conviction relief, which everyone agrees is a form of collateral review. That alone suggests that sentence review is a form of collateral review. Collateral review, after all, "necessarily follows direct review." *Lopez*, 426 F.3d at 351 (citation omitted). Indeed, we are aware of no form of direct review that takes place after collateral review.

Second, as we observed in *Summers*, direct review is generally "governed by short, definite deadlines." 481 F.3d at 717. Because sentence review need not begin until after the conclusion of a direct appeal and a petition for post-conviction relief, it can take place years after conviction, even without the exercise of the Sentence Review Division's broad authority to "consider any late request." Mont. Code Ann. § 46-18-903(3). Such permissive deadlines are a characteristic of collateral review, not direct review.

C

A Sentence Review Division proceeding does not take the place of an appeal under Montana law. To the contrary, a Montana prisoner who wishes to challenge the legality of a sentence has two alternatives to review by the Sentence Review Division. First, a prisoner can directly appeal to the Montana Supreme Court to challenge the constitutionality or legal sufficiency of the sentence. *See, e.g.*, *State v. Wardell*, 122 P.3d 443, 448–49 (Mont. 2005) (reviewing on direct appeal whether a sentence was "so disproportionate" or "excessive" that it violated the Eighth Amendment's prohibition against cruel and unusual punishment). Second, a prisoner may seek post-conviction relief. Mont. Code Ann. § 46-21-101(1). Although post-conviction relief "is not available to attack the validity of the . . . sentence," *id.* § 46-

22-101(2), the Montana Supreme Court has held that "an individual incarcerated pursuant to a facially invalid sentence" nonetheless "ha[s] the ability to challenge its legality," including, "for example, a sentence which either exceeds the statutory maximum for the crime charged or which violates [a] constitutional right." *Lott v. State*, 150 P.3d 337, 342 (Mont. 2006).

Branham observes that a Sentence Review Division proceeding is "the only opportunity a criminal defendant has to challenge an otherwise lawful sentence on *equitable* grounds." *Ranta*, 958 P.2d at 676 (emphasis added). He adds that he "could not have exhausted his state court remedies" without pursuing sentence review. But precisely because sentence review is limited to examining "the inequity or disparity of [a] sentence"—and "does not review errors of law"—it is unclear whether any claim advanced in the Sentence Review Division would even be cognizable on federal habeas review. *Moorman*, 928 P.2d at 149. In any event, "exhaustion and finality are distinct concepts," and sometimes exhaustion can require pursuing collateral review. *McMonagle*, 802 F.3d at 1098; *see Burger v. Scott*, 317 F.3d 1133, 1138 (10th Cir. 2003) ("Congress did not draft the federal limitations period to begin running only at the end of a particular state's exhaustion process."). In addition, to the extent that sentence review is equitable in nature, it resembles habeas corpus, which "is, at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995), and which is also the archetypal example of collateral review, *Kholi*, 562 U.S. at 552.

D

Although we have found no decision addressing a state procedure precisely like Montana's sentence review, our conclusion is consistent with the decisions of other courts

that have examined similar state proceedings in which a prisoner can challenge the length of a sentence. When such a proceeding results in the vacatur of the sentence and imposition of a new sentence, then the statute of limitations will run anew from the imposition of the new judgment. *See Magwood v. Patterson*, 561 U.S. 320, 323–24 (2010); *Smith v. Williams*, 871 F.3d 684, 685–86 (9th Cir. 2017). But when it does not, the proceeding is generally characterized as collateral review and does not restart the limitations period. *See*, *e.g.*, *Mitchell v. Green*, 922 F.3d 187, 195–98 (4th Cir. 2019) ("[A] Maryland Rule 4-345 motion to reduce sentence 'is not part of the direct review process.'" (quoting *Kholi*, 562 U.S. at 555)); *Rogers v. Secretary, Dep't of Corr.*, 855 F.3d 1274, 1277 (11th Cir. 2017) (holding that a Florida Rule 3.800(c) motion to correct or reduce sentence "is an application for collateral review"); *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir. 2002) ("[A]n application for sentence review is not a part of the direct appeal process under Georgia law."). We are aware of no authority treating a procedure similar to Montana's as a form of direct review that restarts the statute of limitations under section 2244(d).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CHARLES IVAN BRANHAM, Petitioner, vs. STATE OF MONTANA, ET AL., Respondents.	CV 18–59–M–DLC–KLD ORDER

Three matters are pending before the Court: (1) United States Magistrate Judge Jeremiah C. Lynch's Findings and Recommendation (Doc. 21); (2) Branham's Request for Oral Argument (Doc. 24); and (3) Branham's Motion for Leave to File First Amended Petition (Doc. 25). For the reasons explained below, the Court will adopt Judge Lynch's recommendation in part. The Court agrees that Branham's claim is barred by the statute of limitations, but it will grant Branham's request for a certificate of appealability. The Court will deny both other motions.

STANDARD OF REVIEW

On May 21, 2019 Judge Lynch recommended that Branham's petition be dismissed with prejudice as time-barred without excuse. (*Id.*) Branham timely objected to the Findings and Recommendation, and is entitled to de novo review of those findings to which he specifically objects. 28 U.S.C. § 636(b)(1)(C). The Court reviews for clear error those findings to which no party objects. *United*

States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000) (citations omitted).

DISCUSSION

I. Branham's Objections

Branham raises three objections to the Findings and Recommendation. First, he argues that the statute of limitations issue should be resolved by motion, or alternatively, after the Court orders full briefing of the issue. (Doc. 22 at 7–11.) Next, he argues that his petition is timely because the statute of limitations did not begin to run until the Sentence Review Division's ("SRD") proceeding was complete. (*Id.* at 12–23.) Finally, he argues that the Magistrate Judge erred in denying a certificate of appealability. (*Id.* at 23–24.) The Court will address each argument below.

Branham's first objection is procedural. He argues the Court should not dismiss his petition without first providing the opportunity for full briefing of the matter. He contends that the Federal Rules of Civil Procedure control and this matter ought to be resolved by a motion to dismiss or motion for summary judgment. Alternatively, he argues that the Could should order additional briefing as it has in previous cases in the form of a show cause order. (Doc. 22 at 7–11.)

The State responds that additional briefing is not required because Branham has had adequate opportunity to address this issue. The State argues that Branham could have raised the issue more thoroughly in his initial petition, which had no page limit. Alternatively, Branham could have addressed the issue in an optional reply brief after the State filed its Answer, which he did not do. Additionally, the State asserts that Branham is not entitled to show cause under Ninth Circuit law. (Doc. 23 at 5–6.)

The Court agrees with the State that it is not required to issue a Show Cause Order. The Ninth Circuit has clearly held that a court is only required to provide a petitioner with an opportunity to respond to a statute of limitations dismissal when the Court raises the issue sua sponte. *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001). Here, the Court did not raise the issue sua sponte. The State raised the issue and Branham had an opportunity to file a reply brief but did not do so. Branham argues that a reply would not have provided a meaningful opportunity to address this claim because replies are limited to ten pages by local rule and the State raised many defenses in its Answer. (Doc. 22. at 10.) However, Branham could have asked the Court for permission to file an overlength brief, as he did for the brief in support of his petition. (Doc. 12.) Branham also claims that he did not file a reply because he believed he would have another opportunity to address his legal contentions in response to a motion. However, his concern is immaterial

because Branham *did* brief the issue in his objections. This has allowed the Court to give his arguments due consideration. The Court will not grant additional briefing on this matter but will instead turn to the substance of his argument.

Branham claims that his petition is timely because the clock on his federal habeas claim did not begin to run until the SRD issued its final order, which, if true, would mean that Branham filed his federal habeas petition with 164 days to spare. (Doc. 22 at 12–23.) The State agrees with Judge Lynch's determination that the petition is not timely because the SRD's proceedings are a form of collateral review, making his claim 184 days too late. (Doc. 21 at 8.) The characterization of the SRD's proceedings as either direct or collateral is significant because the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which now governs federal habeas claims, provides for a one-year statute of limitations period that commences from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Because Branham does not dispute Judge Lynch's actual calculation of the various dates involved, but rather disputes when the statute of limitations period began, the narrow issue is whether Montana's SRD proceeding is a form of direct or collateral review.

The Ninth Circuit's decision in *Rogers v. Ferriter*, 796 F.3d 1009, 1010 (9th Cir. 2015) largely resolves the issue. In *Rogers*, the court held that review by the

SRD tolled AEDPA's one-year statute of limitations. *Id.* Though the Ninth Circuit did not directly address whether Montana's SRD process is direct or collateral, it was a basic assumption of the case that it was a collateral proceeding. *See id.* In fact, the court's explanation of Montana's bifurcated review process is oriented under a heading entitled "Collateral Review in Montana." *Id.*

Measured another way, the Ninth Circuit has instructed that a case becomes "final" for purposes of AEDPA's one-year statute of limitations ninety days (the period with which to file certiorari) after the date of entry of judgment from the state's highest court. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). This would indicate that any review that could be conducted 90 days after entry of judgment from the state's highest court would qualify as collateral review under AEDPA. A petition for review by Montana's SRD is timely so long as it is filed within 60 days of the sentence imposed, or 60 days of the entry of judgment on direct appeal or post-conviction review. *Rogers*, 796 F.3d at 1011. Because the SRD's review may occur after a post-conviction review it is necessarily collateral.

The additional arguments raised by the State in response to Branham's objections provide compelling justification for the Court to determine that the SRD's proceedings are collateral. While Ninth Circuit law points in the same direction, the Court nevertheless recognizes that the Ninth Circuit has not clearly

ruled on this issue. For this reason, the Court will grant Branham's request for a certificate of appealability.

Finally, Branham did not object to Judge Lynch's determination that equitable tolling did not apply nor was there any excuse for the delay in his petition. The Court will therefore review for clear error and, finding none, conclude that Branham's claim is time barred.

II. Branham's Request for Oral Argument

Branham requests that the Court allow oral argument on his objections because the local rules do not permit a reply at the objection stage. (Doc. 24.) Branham argues that denying any opportunity to reply violates his due process rights. (*Id.* at 2.) However, the decision to grant oral argument is one that is rooted in the court's discretion. *United States v. Walczak*, 783 F.2d 852, 857 (9th Cir. 1986). Branham has no right to an oral argument that arises from the Federal Rules of Civil Procedure or this Court's Local Rules. Furthermore, this Court will not exercise its discretion to grant oral argument as the questions in this case are not factually nor legally complex, even if not firmly settled. Branham's request is denied.

III. Branham's Motion for an Amended Petition

Finally, Branham requests that this Court grant him leave to amend his petition so that he can fully brief the statute of limitations issue. Amendment is

governed by Federal Rule of Civil Procedure 15(a), which provides that a party may amend its pleading more than 21 days after a response has been filed only with the opposing party's written consent or the court's leave. "The Court should freely give leave when justice so requires." Fed. Civ. P. 15(a)(2). Though Rule 15 has a strong policy favoring amendment, *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999), a court may decline to grant leave based on consideration of "bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the party has already amended [its] pleadings." *Bonin v. Calderon*, 59 F.3d 815, 845–46 (9th Cir. 1995) (citing *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 204 (9th Cir. 1991).

Here, Branham seeks to amend his petition in order to permit him to fully brief the statute of limitations issue. As required by the local rules, Branham submitted a copy of his proposed amendment along with his motion. (Doc. 25-1.) Aside from the statute of limitations issue, Branham's Amended Petition is identical to his initial petition. (Doc. 26 at 2–3.) A statute of limitations is an affirmative defense that the State loses if it does not raise during its first responsive pleading. Fed. R. Civ. P. 8(c)(1). Therefore, Branham was not required to anticipate and brief this issue in his petition. Branham had the opportunity to respond to this issue by filing a reply brief which he chose not to do. When Judge Lynch recommended dismissal, Branham briefed his legal concerns in his

objections. Therefore, rewinding the clock on this litigation to allow for more briefing of issues already adequately raise and addressed by this Court is duplicative and would lead to unnecessary delay. The Court denies Branham's request.

IT IS ORDERED that Judge Lynch's Findings and Recommendation (Doc. 21) is ADOPTED in part and REJECTED in part.

1. Branham's Petition (Doc. 1) is DISMISSED with prejudice as time-barred without excuse.

2. The Clerk of Court is directed to enter by separate document a judgment in favor of Respondents and against Petitioner.

3. Branham's request for a certificate of appealability is GRANTED.

IT IS FURTHER ORDERED that Branham's Request for Oral Argument (Doc. 24) is DENIED.

IT IS FURTHER ORDERED that Branham's Motion for Leave to File First Amended Petition (Doc. 25) is DENIED.

DATED this 23rd day of September, 2019.

Dana L. Christensen, Chief Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CHARLES IVAN BRANHAM, Petitioner, vs. STATE OF MONTANA, ET AL., Respondents.	Cause No. CV 18-59-M-DLC-JCL FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on Charles Ivan Branham's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and brief in support. See, (Docs. 1 & 11.) Branham is a state prisoner represented by counsel.

Branham filed the present petition on March 21, 2018. (Doc. 1.) Branham asserts his petition is timely because he believes it was filed within one-year of the date his conviction became final. *Id.* at 5-6. Respondents were directed to file an Answer. (Doc. 2.) In their Answer, Respondents asserted a statute of limitations defense, arguing Branham's petition was filed more than six-months past the federal filing deadline. (Doc. 16 at 37-42.) Despite being provided the opportunity to do so, Branham has not submitted a reply to either dispute the

allegation of untimeliness or provide a basis to excuse his purportedly late filing.

I. Procedural History

On January 5, 2010, Branham was charged with Deliberate Homicide in Montana's Fourth Judicial District, Missoula County, for the stabbing death of Michael Kinross-Wright. Following a July 2010 trial, the jury returned a verdict finding Branham guilty of the lesser-included offense of Mitigated Deliberate Homicide. On October 5, 2010, Branham was sentenced to the Montana State Prison for 40 years without the possibility of parole. See, Judg. (Doc. 5 at 126-129.) Written judgment was entered on October 22, 2010. *Id.* at 129.

On December 16, 2010, the Office of the Appellate Defender timely filed a Notice of Appeal on Branham's behalf. See, Not. (Doc. 6 at 8-10.) Branham's opening brief was filed on July 6, 2011. Branham argued (1) the district court erred by refusing to admit character evidence of Kinross-Wright's propensity for violence; (2) the conviction should be reversed due to prosecutorial misconduct; and, (3) the sentence imposed was illegal. See, Br. Appellant (Doc. 6 at 22-37.)

On January 3, 2012, the Montana Supreme Court issued its decision affirming Branham's conviction and sentence, *State v. Branham*, 2012 MT 1, 363 Mont. 281, 269 P. 3d 891. See also, (Doc. 6 at 95-106.) Branham did not file a petition for writ of certiorari with the United States Supreme Court.

On February 28, 2013, Branham, through counsel, filed his petition for

Postconviction Relief (PCR). See, PCR Pet. (Doc. 7 at 8-37.) Branham filed an Amended PCR petition on January 24, 2014. Branham challenged the effectiveness of both trial and appellate counsel. See, Am. Pet. (Doc. 7 at 40-63). On May 7, 2015, the state district court entered its order dismissing Branham's PCR petition without holding an evidentiary hearing. See, Or. (Doc. 8 at 8-49.) The district court determined Branham's claims either failed on procedural grounds for failing to demonstrate by a preponderance of the evidence that the facts supported relief or were barred because the claim(s) could have been raised on direct appeal.

On June 3, 2015, Branham timely filed a Notice of Appeal from the dismissal of his PCR petition. On March 7, 2017, the Montana Supreme Court in a non-cite memorandum opinion affirmed the denial of Branham's PCR petition. (Doc. 8 at 135-142.)

On March 20, 2017, Branham filed his application for review of his sentence with the Montana Sentence Review Division (SRD). (Doc. 16-15.) On August 25, 2017, the SRD issued its decision affirming Branham's sentence. (Doc. 16-16.)

Branham filed his petition with this Court on March 21, 2018. (Doc. 1.)

II. Branham's Claims

Branham alleges he was denied effective assistance of counsel, because trial counsel failed to: (1) understand the defense, (Doc. 1 at 8-9); (2) perform an

adequate pretrial investigation, *id.* at 9-10; (3) present defense witnesses, *id.* at 10; (4) present expert testimony, *id.* at 10-13; (4) object to various arguments advanced by the prosecution, *id.* at 13-14; and, (5) make an offer of proof, *id.* at 14-15. Branham also asserts appellate counsel was ineffective for misstating the evidence on appeal. *Id.* at 15.

Additionally, Branham claims his right to due process was violated by: (1) the trial court's refusal to admit evidence tending to show Kinross-Wright's propensity for violence, *id.* at 16-17; (2) the improper merging of his criminal case with his ongoing dependency and neglect proceedings, *id.* at 17; (3) the postconviction courts' refusal to hold an evidentiary hearing, *id.* at 18; (4) prosecutorial misconduct during closing argument, *id.* at 18; and, (5) the *Gillham* order[1] issued to trial counsel, *id.* at 18-19.

III. Analysis

The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. §2244, applies to all federal habeas petitions filed after April 24, 1996. *Woodford v. Garceau*, 538 U.S. 202, 204 (2003)(citing *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). AEDPA "sets a one-year limitations period in which a state prisoner must

[1] The *Gillham* order derives from *In re Gillham*, 216 Mont. 279, 282, 704 P. 2d 1019, 1021 (1985). The rule from *Gillham* provides that if a convicted person files a postconviction petition alleging ineffective assistance of counsel, the court may order the attorney to respond to the allegation(s). The order protects the attorney from discipline or malpractice claims for potentially revealing necessary confidential information obtained from representing the convicted person. See also, *State v. Stone*, 2017 MT 198, fn. 1, 388 Mont. 239, 400 P. 3d 692.

file a federal habeas corpus petition." *Thompson v. Lea*, 681 F. 3d 1093, 1093 (9th Cir. 2012)(citations omitted); see also, 28 U.S.C. § 2244(d)(1). The purpose of AEDPA's one-year limitations period is to "encourage prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Carey v. Saffold*, 536 U.S. 214, 226 (2002).

Under federal procedure, the statue of limitations is an affirmative defense that must be raised in a responsive pleading. Fed. R. Civ. Proc. Rule 8(c)(1). Under federal habeas rules, a respondent must assert a statute of limitations defense in the responsive pleading or it is waived. Rule 5(b) of the Rules Governing §2254 cases; *Morrison v. Mahoney*, 399 F. 3d 1042, 1046-47 (9th Cir. 2005). It is appropriate to dismiss a federal petition for writ of habeas corpus with prejudice when it was not filed within AEDPA's one-year statute of limitations. *Jiminez v. Rice*, 276 F. 3d 478, 482-83 (9th Cir. 2001). Thus, the statute of limitations is a threshold issue that courts may resolve before the merits of individual claims. See, *White v. Klitzkie*, 281 F. 3d 920, 921-22 (9th Cir. 2002); see also, *Lambrix v. Singletary,* 520 U.S. 518, 525 (1997)("We do not mean to suggest that the procedural bar-issue must invariably be resolved first; only that it ordinarily should be.") Or, put another way, reviewing the merits of a petition without first addressing an affirmative defense is an exception to the usual practice, unless the petition on its face is clearly not meritorious. See e.g., *Franklin v.*

Johnson, 290 F. 3d 1223, 1323 (9th Cir. 2002); *Day v. McDonough*, 547 U.S. 198, 208-09 (2006).

As set forth below, Branham's petition is time-barred without excuse and, accordingly, should be dismissed with prejudice.

Timeliness of Petition

Absent a reason to apply one of the other "trigger" dates in 28 U.S.C. § 2244(d)(1),[2] Branham's federal petition had to be filed within one year of the date his conviction became final. 28 U.S.C. § 2244(d)(1)(A). On January 3, 2012, the Montana Supreme Court confirmed Branham's conviction and sentence. Branham did not petition for a writ of certiorari, therefore, review on direct appeal was complete when the 90-day period for seeking such review concluded. *Bowen v. Roe*, 188 F. 3d 1157, 1159 (9th Cir. 1999); 28 U.S.C. § 2244(d)(1)(A). Thus, Branham's judgment became final on April 3, 2012. The one-year limitations period commenced on April 4, 2012, and expired one year later, absent applicable periods of tolling. See, *Patterson v. Stewart*, 251 F. 3d 1243, 1245-47 (9th Cir. 2001)(the limitations period begins to run on the day after the triggering event

[2] The limitations period under 2244(d)(1) is triggered and begins to run from the latest of: (A) the date on which the underlying judgment became final through either the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which any impediment to the filing of a federal petition created by unconstitutional state action is removed; (C) the date on which a newly recognized and retroactively applicable constitutional right was first recognized by the United States Supreme Court; or (D) the date on which the factual predicate underlying a claim could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D).

pursuant to Fed. R. Civ. P. 6(a)).

i. Statutory Tolling

The one-year limitations period is subject to statutory tolling during the time in which a "properly filed" application for post-conviction or other collateral relief is pending in the state court. 28 U.S.C. § 2244(d)(2); *Nino v. Galaza*, 183 F. 3d 1003, 1006 (9th Cir. 1999)(explaining an application for collateral review is pending in state court for "all the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state remedies with regard to particular post-conviction proceedings."). Branham filed his PCR petition in the state district court on February 28, 2013. Between Branham's judgment becoming final and the filing of his PCR petition, 330 days had elapsed on Branham's federal filing time clock, but the filing of the PCR petition tolled the federal limitations statute.[3] Branham is not entitled to statutory tolling for any of this time, between the date on which his judgment became final and the date on which he filed his first state collateral challenge, because there was no case "pending." *Id.*

Following the dismissal of his PCR petition, Branham timely appealed. As set forth above, the Montana Supreme Court denied Branham's appeal on March 7, 2017. His federal timeclock began running again the following day. On March 20,

[3] Thus, at the time of the filing of the PCR petition, Branham had 35 days remaining in which to timely file his federal petition.

2017, Branham filed his application with the SRD. That filing tolled the limitations period; but another 12 days had passed. Thus, at the time of his SRD filing, Branham had 23 days remaining in which to file his federal habeas petition.

As set forth above, the SRD entered its order affirming Branham's sentence on August 25, 2017. Accordingly, with Branham's federal filing clock re-initiated on August 26, 2017, he should have filed in this Court on or before Monday, September 18, 2017. But, Branham did not file in this Court until March 21, 2018, more than 184 days too late.

ii. Equitable Tolling

The limitations period may be equitably tolled because it is a statute of limitations, not a jurisdictional bar. *Holland v. Florida*, 560 U.S. 631, 645 (2010). A petitioner is entitled to equitable tolling, however, only if he demonstrates: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); see also *Miles v. Prunty*, 187 F. 3d 1104, 1107 (9th Cir. 1999)("When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate.") The petitioner bears the burden of showing that this "extraordinary exclusion" should apply and the requirements are "very high, lest the exceptions swallow the rule." *Miranda v. Castro*, 292 F. 3d 1963, 1065-66 (9th

Cir. 2002); see also *Waldron Ramsey v. Pacholke*, 556 F. 3d 1008, 1011 (9th Cir. 2009)(characterizing the Circuit's application of equitable tolling doctrine as "sparing" and a "rarity.") Additionally, a petitioner must establish a "causal connection" between the extraordinary circumstance and his failure to file a timely petition. *Bryant v. Arizona Attorney General*, 499 F. 3d 1056, 1060 (9th Cir. 2007).

But Branham did not respond to Respondent's asserted statute of limitations defense. He has not argued that equitable tolling should apply in his case nor has he put forward any facts in his petition that would explain his delay in filing. Branham has not met his burden of establishing that he has been pursuing his rights diligently and that his failure to timely file was the result of extraordinary circumstances beyond his control. See e.g., *Holland*, 560 U.S. at 649.

iii. Actual Innocence

A "credible claim of actual innocence constitutes an equitable exception to AEDPA's one-year limitations period." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Lee v. Lampert*, 653 F. 3d 929, 932 (9th Cir. 2011). "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar or…expiration of the statute of limitations." *McQuiggin*, 569 U.S. at 386. A habeas petitioner must offer "new reliable evidence- whether it be exculpatory scientific evidence, trustworthy eyewitness

accounts, or critical physical evidence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). But here, Branham has not argued that he is actually innocent, nor has he presented this Court with "new credible evidence" that he is innocent of the crime of which he was convicted. Because Branham has not made the requisite showing, the actual innocence doctrine does not excuse his untimely filing.

iv. Conclusion

The Court has determined Branham's petition was over six months delinquent. Branham has failed to provide any reason to support additional statutory tolling. Likewise, he has not established a basis for the application of equitable tolling or the actual innocence gateway. Consequently, the petition should be dismissed with prejudice as untimely.

v. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Proceedings. A COA should issue as to those claims on which the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied if "jurists of reason could disagree with the district court's resolution of [the] constitutional claims" or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484

(2000)).

Branham has not made a substantial showing that he was deprived of a constitutional right. Moreover, his petition is untimely. Thus, reasonable jurists would find no basis to encourage further proceedings in this Court. A certificate of appealability should be denied.

Based on the foregoing, the Court makes the following:

RECOMMENDATION

1. The Petition (Doc. 1) should be DISMISSED with prejudice as time-barred without excuse.

2. The Clerk of Court should be directed to enter by separate document a judgment in favor of Respondents and against Petitioner.

3. A certificate of appealability should be DENIED.

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Mr. Branham may object to this Findings and Recommendation within 14 days. 28 U.S.C. § 636(b)(1). Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

Mr. Branham must immediately notify the Court of any change in his mailing address by filing a "Notice of Change of Address." Failure to do so may result in

dismissal of his case without notice to him.

DATED this 21st day of May, 2019.

/s/ Jeremiah C. Lynch
Jeremiah C. Lynch
United States Magistrate Judge

APPENDIX D

28 USCS § 2244

Current through PL 115-128, approved 2/22/18

United States Code Service - Titles 1 through 54 > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE > PART VI. PARTICULAR PROCEEDINGS > CHAPTER 153. HABEAS CORPUS

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255 [*28 USCS § 2255*].

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 [*28 USCS § 2254*] that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 [*28 USCS § 2254*] that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of

certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) 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;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) 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 toward any period of limitation under this subsection.

(June 25, 1948, ch 646,*62 Stat. 965*; Nov. 2, 1966, *P.L. 89-711*, § 1, *80 Stat. 1104*; April 24, 1996, *P.L. 104-132*, Title I, §§ 101, 106, *110 Stat. 1217*, 1220.)

APPENDIX E

STATE OF MONTANA
SENTENCE REVIEW DIVISION OF THE SUPREME COURT

RULES

In accord with Title 46, Chapter 18, Part 9 of the Montana Code Annotated, the Sentence Review Division of the Supreme Court (hereinafter Division) hereby adopts the following rules which supersede all previous rules.

RULE 1. The Clerk of District Court (hereinafter Clerk) shall serve upon persons who have been sentenced to a term of 1 year or more in the State prison or to the custody of the Department of Corrections:

1) A copy of the Sentence and Judgment
2) Notice of the Right to Apply for Sentence Review
3) Two copies of the Application for Sentence Review

Forms shall be approved by the Division.

RULE 2. Within sixty (60) days after sentence was imposed, a defendant may apply for the sentence to be reviewed by the Division.

If an appeal to the Supreme Court or petition for post conviction relief is filed, the 60 day period commences when the appeal or petition is complete.

Application for review of sentence does not stay execution of the sentence.

RULE 3. The Division shall not consider issues which could have been or should have been addressed in District Court by appeal or post conviction relief.

RULE 4. Application for Sentence Review shall be filed with the Clerk for the county from which the defendant was sentenced. In the event the defendant has been sentenced in more than one county, separate applications shall be filed with each Clerk if defendant requests each sentence to be reviewed.

RULE 5. Upon filing the application for Sentence Review, the Clerk shall complete and file the Clerk's certificate of service and shall within ten (10) business days, serve a copy of the Application for Sentence Review upon the Judge who imposed the sentence, the County Attorney of the County from which the defendant was sentenced and defendant's counsel of record. The Clerk shall mail the original Certificate of Service and deliver all required documents to the Secretary for the Division (hereinafter Secretary).

RULE 6. Defendant, the State, and the sentencing Judge may file briefs within 30 days after notice of the application for review is served by the Clerk.

RULE 7. The Secretary shall record the date the application for review was received by the Clerk. If the application is untimely, the Secretary shall promptly notify the defendant to file within thirty (30) days a statement of reasons why the Division should hear a late application. The Division will review late applications only upon good cause shown.

RULE 8. The Secretary shall serve notice of the time and place for Review at least thirty (30) days before such hearing to each of the following:

1) The Judge who imposed the sentence;
2) The County Attorney for the county from which the defendant was sentenced;
3) The defendant;
4) The defendant's attorney of record;
5) Any other person who has requested notice.

RULE 9. Proceedings shall be informal to the extent possible. The Rules of Evidence do not apply.

RULE 10. The defendant shall have the right to appear and to be represented by counsel.

RULE 11. The Secretary shall provide to the Division from the District Court file such documents as the Division may require.

The Division shall consider only information which was available to the sentencing Judge at the time of sentencing.

RULE 12. The sentence imposed by the District Court is presumed correct. The sentence shall not be reduced or increased unless it is clearly inadequate or clearly excessive.

RULE 13. The Secretary shall file the original decision of the Division with the Clerk where defendant was sentenced and mail copies of the decision to:

1) The Judge who imposed sentence;
2) The County Attorney;
3) The criminal history repository of the Montana Department of Justice;
4) The defendant;
5) The defendant's attorney if represented by counsel;
6) The principal officer of the institution where defendant is incarcerated.

RULE 14. A record of proceedings before the Division shall be made by recording or otherwise and shall be retained for two years after a written decision is rendered.

RULE 15. Without convening the entire Division, the Presiding Officer may rule on procedural issues not affecting the substance of a review.

These rules are effective the 28th day of October, 2013.

SENTENCE REVIEW DIVISION

Presiding Officer, Hon. Loren Tucker

Member, Hon. Bradley G. Newman

Member, Hon. Kathy Seeley