No. 22-6593

IN THE

Supreme Court of the United States

STEVEN C. HEISER,
Petitioner,
v.

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In order to appeal a final order by a district court denying a state prisoner's petition for writ of habeas corpus, the prisoner must be granted a certificate of appealability. 28 U.S.C. § 2253(c)(1). To merit a certificate of appealability when the petition was denied on procedural grounds, the prisoner must show that reasonable jurists would find debatable both (1) that the prisoner has stated a valid claim of the denial of a constitutional right, and (2) the correctness of the district court's procedural ruling. *Id.* § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, the district court dismissed Petitioner's habeas petition as time-barred, and the court of appeals denied his request for a certificate of appealability on the ground that reasonable jurists would not debate the district court's timeliness determination. The question presented is whether the court of appeals correctly denied the request for a certificate of appealability.

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The opinion from which Petitioner seeks certiorari review is the order of the Eleventh Circuit Court of Appeals denying his construed motion for a certificate of appealability, which appears as *Heiser v. Secretary, Florida Department of Corrections*, No. 21-14406, 2022 WL 18402586 (11th Cir. Aug. 10, 2022).

JURISDICTION

The Eleventh Circuit's order denying Petitioner's construed motion for a certificate of appealability was entered on August 10, 2022. A motion for rehearing was denied on September 23, 2022. The petition for writ of certiorari was timely filed 90 days later on December 22, 2022. S. Ct. Rs. 13.1, 13.3.

Petitioner states that this Court has jurisdiction to review the Eleventh Circuit's decision under 28 U.S.C. § 1254(1). The record demonstrates, however, that although the court of appeals entered an order denying Petitioner's construed motion for a certificate of appealability, Petitioner's notice of appeal from the district court to the circuit court was untimely, and the district court denied his motion for an extension of time to file the notice of appeal. *Heiser v. Sec'y, Dep't of Corr.*, No. 8:18-cv-1365, DE26 (M.D. Fla. Apr. 11, 2022). As a result, the court of appeals was without jurisdiction to address whether Petitioner was entitled to a certificate of appealability. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) ("[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement."). In turn, this Court lacks jurisdiction

to order the court of appeals to grant any relief on the merits. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("[When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.") (alterations in original) (quoting *United States v. Corrick*, 298 U.S. 435, 440 (1936)).

In his certiorari petition, Petitioner indicates that he is also attempting to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a) to review the decision of a state court. He specifically refers to a *per curiam* affirmance without written opinion that was entered by the Florida Second District Court of Appeal on November 15, 2017, and to the mandate in that appeal that was entered on March 5, 2018. *Heiser v. State*, 239 So. 3d 669 (Fla. Dist. Ct. App. 2017). The Florida Supreme Court does not have jurisdiction to review a *per curiam* affirmance without written opinion issued by a Florida district court of appeal. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 139 n.4 (1987); *Jackson v. State*, 926 So. 2d 1262, 1265 (Fla. 2006). Any petition for a writ of certiorari in this Court to review the district court of appeal's decision was therefore due no later than 90 days from the date of the affirmance without written opinion, *i.e.*, by February 13, 2018. S. Ct. Rs. 13.1, 13.3; *Bates v. Sec'y, Dep't of Corr.*, 964 F.3d 1326, 1329 (11th Cir. 2020). Because the certiorari petition was filed long after that date, this Court does not have jurisdiction to review the referenced state court decision.

STATEMENT OF THE CASE

1. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) sets a "1-year period of limitation" for any "application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). For a state prisoner whose "conviction became final before AEDPA took effect, the federal limitations period began running on AEDPA's effective date, April 24, 1996, giving [the prisoner] one year from that date (in the absence of tolling) to file a federal habeas petition." *Carey v. Saffold*, 536 U.S. 214, 217 (2002). For all other state prisoners, the limitations period begins to run from the latest of four 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). In either case, the limitations period is tolled during the pendency of any "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim . . . ." *Id.* § 2244(d)(2).

For purposes of AEDPA's statute of limitations, "[t]he sentence is the judgment." *Burton v. Stewart*, 549 U.S. 147, 156 (2007). Therefore, the limitations period does not begin until both the conviction and the sentence are final. *Id.* at 156–57. In some instances, when a defendant has been resentenced after a successful collateral challenge to his original sentence, the time to file a federal habeas petition will run from the date of the judgment entered upon resentencing. *See* Brian R. Means, *Federal Habeas Manual* § 9A:18 (2022) (collecting cases). However, "an amended judgment that only corrects a clerical error in the original

judgment or is merely ministerial does not begin the one-year limitations period anew." *Id.*

2. Petitioner, Steven C. Heiser, was convicted in 1992 of Robbery with a Firearm following a jury trial in Manatee County, Florida. *Heiser v. Sec'y, Dep't of Corr.*, No. 8:18-cv-1365, DE10-2:591 (M.D. Fla. Dec. 10, 2018). The evidence that was presented at trial showed that Petitioner, along with two associates, committed the robbery on the morning of September 9, 1991. According to multiple witnesses, three men wearing ski masks, sweatsuits, and gloves entered a bank in Bradenton that morning armed with long guns. They shouted at the bank's patrons to get down and robbed the bank's employees at gunpoint. DE10-2:627–29. Petitioner's friend and former lover, Lisa Davis, testified that the day before the robbery, Petitioner asked her to pick up a gun for him and offered to pay her $500 if she would lend him her car and report it stolen. She testified that Petitioner visited her the next morning, about two hours before the robbery, and that she asked him what he was going to do with the car. He replied, "[S]omething big. Watch the news." Davis then asked him if he was "going to rob a bank again." He smiled and said "yeah," but he told her that he was "going to do it right this time." Davis then gave Petitioner her car and falsely reported it stolen. Davis's car, a 1967 Camaro, was subsequently used in the robbery. DE10-2:630–31.

At a sentencing hearing after the jury trial, the State introduced copies of Petitioner's prior convictions for robbery, burglary, grand theft, battery on a law enforcement officer, attempted escape, and resisting arrest with violence. The trial judge also found

that the felony for which Petitioner was being sentenced was committed within five years of his release from prison on a prior robbery charge. DE10-2:603–06. At the end of the hearing, the trial judge orally sentenced Petitioner to life in prison. DE10-2:615–17. A written Judgment and Sentence was entered on August 27, 1992. DE10-2:594–99.

Petitioner appealed his conviction to the Florida Second District Court of Appeal, which affirmed without written opinion. DE10-2:620–62; *Heiser v. State*, 638 So. 2d 947 (Fla. Dist. Ct. App. 1994). Petitioner next filed a motion for postconviction relief in the trial court. That motion was denied, and the denial of relief was likewise affirmed on appeal without written opinion. DE10-2:664–730; *Heiser v. State*, 681 So. 2d 1145 (Fla. Dist. Ct. App. 1996). Over the nearly two decades that followed, Petitioner filed numerous successive collateral challenges to his conviction in state court, all of which were unsuccessful. DE10-2:731–865; *Heiser v. Sec'y, Dep't of Corr.*, No. 8:18-cv-1365, DE10-3:1–269 (M.D. Fla. Dec. 10, 2018).

3. In 2015, Petitioner filed a motion to correct an illegal sentence in the trial court. Petitioner argued in the motion that his sentence was illegal because it did not include a three-year minimum term of imprisonment that was required under section 775.087(2), Florida Statutes (1991), for anyone who possessed a firearm while committing certain specified offenses, including robbery. On that basis, he asked the trial court to enter an amended sentencing order that reflected the imposition of the three-year minimum term. DE10-3:271–74. The trial court, while observing that Petitioner did not stand to benefit from the

correction, found that his argument appeared to have merit and directed the State to respond. DE10-3:276–77. The State agreed in its response that the sentence should be corrected. DE10-3:281–82.

At a hearing on the motion, Petitioner advised the court that he initially filed the motion because he believed that if it was granted, it would "restart the one-year statute of limitations" and allow him to "continue to litigate [his] judgment and conviction in the federal court under a new one-year clock." He further argued, however, that he had since come to believe that an order granting the motion entitled him to a *de novo* resentencing. He also took the opportunity to apologize to the victims in his case "who suffered through the fear and terror [he] brought into their lives on September 9, 1991." DE10-3:295. The court rejected Petitioner's argument that he was entitled to a *de novo* resentencing and said that it did not have any discretion to do anything other than correct the sentence to include the three-year minimum mandatory term that should have been imposed at the time of sentencing. The court ruled that it would amend the judgment and sentence "solely for th[at] purpose," and that "in all other respects, the original sentence and judgment shall stand." DE10-3:305–06.

A corrected Judgment and Sentence was thereafter entered on December 12, 2016. The trial court added the three-year minimum to the sentence, but the document was otherwise unchanged from the original version. The sentence stated that it was corrected per court order *nunc pro tunc* to August 27, 1992. DE10-3:312–18. Petitioner appealed, arguing that

the trial court erred by failing to grant a *de novo* resentencing. The state appellate court affirmed without written opinion. DE10-3:320–75; *Heiser*, 239 So. 3d at 669.

4. About three months after the mandate was issued in that appeal, Petitioner filed a petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254. *Heiser v. Sec'y, Dep't of Corr.*, No. 8:18-cv-1365, DE1 (M.D. Fla. June 6, 2018). Petitioner asserted that the petition was timely because the entry of the new sentence restarted the AEDPA limitations period. In support, he cited the Eleventh Circuit's decision in *Ferreira v. Secretary, Department of Corrections*, 494 F.3d 1286 (11th Cir. 2007). DE1:23–24. The district court ordered Respondent to respond to the petition. *Heiser v. Sec'y, Dep't of Corr.*, No. 8:18-cv-1365, DE6 (M.D. Fla. Aug. 7, 2018). In its response, Respondent—while noting that Petitioner's conviction "became final more than twenty years ago" and that the addition of the three-year minimum to his life sentence had "no effect on the amount of time he will serve in prison"—agreed, citing *Ferreira*, that "the controlling case law appears to require that Heiser now be permitted to challenge his 1992 armed robbery conviction." On that basis, Respondent stated that the petition "appears to be timely" based on the corrected sentence. *Heiser v. Sec'y, Dep't of Corr.*, No. 8:18-cv-1365, DE10:4–5 (M.D. Fla. Dec. 10, 2018). Respondent proceeded to argue, however, that the petition should be denied on the merits. DE10:6–22.

The district court, upon consideration of the petition, the response, and Petitioner's reply, entered an order dismissing the petition as time-barred. *Heiser*

v. Sec'y, Dep't of Corr., No. 8:18-cv-1365, DE17 (M.D. Fla. Sept. 21, 2021). The district court acknowledged Respondent's statement that the petition "appear[ed] to be timely" but explained that it was not bound by Respondent's position. DE17:4–5. It then cited more recent Eleventh Circuit case law clarifying that not every change to a state prisoner's sentence constitutes a new judgment that resets the AEDPA limitations period. For purposes of "determining whether a new judgment has been entered, '[t]he relevant question is not the magnitude of the change, but the issuance of a new judgment *authorizing* the prisoner's confinement." DE17:5–6 (original alteration and emphasis) (quoting *Patterson v. Sec'y, Fla. Dep't of Corr.*, 849 F.3d 1321, 1326–27 (11th Cir. 2017)). On one hand, "a new judgment may be entered when the state court takes action such as conducting a 'new' sentencing hearing, changing the term of imprisonment, or entering a 'new' judgment and sentence committing the applicant to the custody of prison officials." DE17:6. (citing *Patterson*, 849 F.3d at 1325–26). In *Patterson*, by contrast, the Eleventh Circuit held that the state court's removal of a term of Patterson's sentence requiring him to undergo chemical castration did not constitute a new judgment where the state court did not vacate the sentence and replace it with a new one, direct state authorities to perform any affirmative act, or issue a new judgment authorizing Patterson's confinement. DE17:6 (citing *Patterson*, 849 F.3d at 1324–27). The district court cited other Eleventh Circuit cases holding that orders making ministerial corrections to a prisoner's sentence or awarding jail credit do not result in a new judgment for purposes of the AEDPA statute of limitations. DE17:6–7 (citing *Booth*

v. Sec'y, Fla. Dep't of Corr., 729 F. App'x 861 (11th Cir. 2018), and *Mosier v. Sec'y, Fla. Dep't of Corr.*, 719 F. App'x 906 (11th Cir. 2017)).

In its case, the district court found that the state court only amended Petitioner's sentence to address the omission of the three-year mandatory minimum term and left the sentence unaltered in all other respects. It pointed out that the state court did not vacate Petitioner's sentence and impose a new one, alter the overall term of imprisonment, or alter Respondent's preexisting authority to confine Petitioner. DE17:7–8. In addition, it observed that the amended sentencing document was entered *nunc pro tunc* to the date of the original sentence. That "designation is important because 'under Florida law . . . when a legal order or judgment is imposed nunc pro tunc it refers, not to a new or de novo decision, but to the judicial act previously taken, concerning which the record was absent or defective.'" DE17:8–9 (quoting *Osbourne v. Sec'y, Fla. Dep't of Corr.*, 968 F.3d 1261, 1266 (11th Cir. 2020) (quoting *Colon v. State*, 909 So. 2d 484, 487 (Fla. Dist. Ct. App. 2005))). In *Osbourne*, the Eleventh Circuit held that "because the correction to the sentence was imposed nunc pro tunc, under Florida law the . . . amended sentence related back to the date of the initial judgment and was not a 'new judgment' for purposes of § 2244.'" 968 F.3d at 1267. For the same reason, the district court determined that the 2016 correction to Petitioner's sentence did not restart the AEDPA limitations period. DE17:9.

Therefore, the district court concluded that the petition must be dismissed as time-barred. The district court advised Petitioner that if he disagreed with its

timeliness determination, he had 28 days to file a motion to alter or amend the judgment under Rule 59(e), Federal Rules of Civil Procedure. DE17:9–10. Petitioner did not timely file a Rule 59(e) motion. Instead, he filed a motion for an extension of time to file such a motion. The district court denied that motion, explaining that the time to file a Rule 59(e) motion cannot be extended. *Heiser v. Sec'y, Dep't of Corr.*, No. 8:18-cv-1365, DE20 (M.D. Fla. Oct. 20, 2021).

5. Almost two months later, Petitioner filed a motion for an extension of time to file a notice of appeal. *Heiser v. Sec'y, Dep't of Corr.*, No. 8:18-cv-1365, DE21 (M.D. Fla. Dec. 17, 2021). On the same date, he filed an out-of-time notice of appeal. *Heiser v. Sec'y, Dep't of Corr.*, No. 8:18-cv-1365, DE22 (M.D. Fla. Dec. 17, 2021). The district court did not initially rule on the extension motion. Nevertheless, the notice of appeal was transmitted to the Eleventh Circuit, which docketed the appeal. *Heiser v. Sec'y, Fla. Dep't of Corr.*, No. 21-14406, DE1 (11th Cir. Dec. 20, 2021). The Eleventh Circuit dismissed the appeal a few weeks later for failure to pay the filing fee, but it thereafter reinstated the appeal on Petitioner's motion. *Heiser v. Sec'y, Fla. Dep't of Corr.*, No. 21-14406, DE5 (11th Cir. Feb. 3, 2022); *Heiser v. Sec'y, Fla. Dep't of Corr.*, No. 21-14406, DE9 (11th Cir. Apr. 5, 2022).

Six days after the appeal was reinstated by the Eleventh Circuit, the district court entered an order denying Petitioner's motion for extension of time to file a notice of appeal. The district court explained in its order that it did not have authority to grant such relief because under Rule 4(a)(5), Federal Rules of Appellate Procedure, any such motion was due no later

than November 22, 2021, whereas Petitioner did not file his extension motion until December 15, 2021. DE26:1–2. The district court further held that it could not reopen the time to file the notice of appeal under Rule 4(a)(6) because that subsection applies only when, among other requirements, the party did not receive the judgment or order sought to be appealed within 21 days of its entry, and Petitioner had conceded that he received the order dismissing the habeas petition as untimely on September 27, 2021, six days after it was entered. DE26:3. The district court's order was transmitted to the Eleventh Circuit, which docketed the order but did not take any other action on it. *Heiser v. Sec'y, Fla. Dep't of Corr.*, No. 21-14406, DE10 (11th Cir. Apr. 13, 2022).

Petitioner subsequently filed a motion in the Eleventh Circuit for an extension of time to file a motion for certificate of appealability. *Heiser v. Sec'y, Fla. Dep't of Corr.*, No. 21-14406, DE11 (11th Cir. May 9, 2022). The Eleventh Circuit rejected that extension motion as untimely. *Heiser v. Sec'y, Fla. Dep't of Corr.*, No. 21-14406, DE12 (11th Cir. May 12, 2022). However, the Eleventh Circuit re-docketed the notice of appeal as a construed motion for certificate of appealability. *Heiser v. Sec'y, Fla. Dep't of Corr.*, No. 21-14406, DE13 (11th Cir. May 12, 2022).

On August 10, 2022, the Eleventh Circuit denied the construed motion for certificate of appealability. In its order, the Eleventh Circuit stated that "reasonable jurists would not debate the district court's conclusion that Heiser's petition was untimely . . . ." *Heiser*, 2022 WL 18402586 at *1. Petitioner filed a timely motion for reconsideration, which was denied.

Heiser v. Sec'y, Fla. Dep't of Corr., No. 21-14406, DE16 (11th Cir. Sept. 23, 2022). Petitioner then filed a motion for rehearing *en banc*, which was rejected on the ground that successive motions for rehearing are not permitted. *Heiser v. Sec'y, Fla. Dep't of Corr.*, No. 21-14406, DE18 (11th Cir. Oct. 19, 2022).

REASONS FOR DENYING THE PETITION

In his certiorari petition, Petitioner seeks review in this Court based on two purported errors by the district court. Specifically, he contends that the district court erred by dismissing his federal habeas petition as time-barred because (1) Respondent waived the timeliness issue, and (2) the district court did not give him an opportunity to respond prior to dismissing the petition. He further argues that because reasonable jurists would debate whether the district court erred on those grounds, the Eleventh Circuit should have granted him a certificate of appealability.

For multiple reasons, certiorari review of the Eleventh Circuit's decision is unwarranted.

I. The Eleventh Circuit Lacked Jurisdiction Due to the Untimely Notice of Appeal.

As an initial matter, the record demonstrates that the Eleventh Circuit did not have jurisdiction because Petitioner failed to timely file a notice of appeal, and his request for an extension of time to do so was denied by the district court. The district court's order denying the extension motion was transmitted to the Eleventh Circuit on April 13, 2022, but the Eleventh Circuit does not appear to have taken notice of it. In-

stead, on August 10, 2022, the Eleventh Circuit entered an order denying Petitioner's construed motion for a certificate of appealability.

In order to timely appeal from the district court's order dismissing his federal habeas petition as untimely, Petitioner was required to file a notice of appeal within 30 days after entry of the order. Fed. R. App. P. 4(a)(1)(A). Here, because the dismissal order was entered on September 21, 2021, the notice of appeal was due no later than October 21, 2021. While the deadline to file the notice would have been tolled by a timely motion to alter or amend the judgment under Rule 59(e), *see* Fed. R. App. P. 4(a)(4)(A)(iv), Petitioner did not file such a motion. Rather, he only filed a motion for an extension of time to file a Rule 59(e) motion, which the district court lacked authority to grant. Fed. R. Civ. P. 6(b)(2). Therefore, Petitioner's notice of appeal, which was mailed on December 15, 2021, was untimely. *Cf.* Fed. R. App. P. 4(c)(1) (stating that an inmate's notice of appeal "is timely if it is deposited in the institution's internal mail system on or before the last day for filing").

Petitioner also failed to timely seek an extension of time to file the notice of appeal. A district court may extend the time to file a notice of appeal, but only if the extension motion is filed no later than 30 days from the deadline to file the notice of appeal. Fed. R. App. P. 4(a)(5)(A)(i). Thus, as the district court correctly recognized, any such extension motion in this case was due no later than November 22, 2021, making Petitioner's motion, which was also mailed on December 15, 2021, untimely. And while a district court may also reopen the time to file the notice of appeal,

it may do so only if "the moving party did not receive notice . . . of the entry of the judgment or order sought to be appealed within 21 days after entry." Fed. R. App. P. 4(a)(6)(A). But in his motion for an extension of time to file the notice of appeal, Petitioner advised the district court that he received the order dismissing his habeas petition as time-barred six days after the order was entered. Therefore, the district court correctly found that it did not have authority to extend or reopen the time to file the notice of appeal.

Because the Eleventh Circuit's jurisdiction was not timely invoked, it did not have the authority to grant a certificate of appealability, even if one had otherwise been warranted. *Bowles*, 551 U.S. at 214; *see also Cooper v. Sec'y, Fla. Dep't of Corr.*, No. 17-13303, 2017 WL 4863102, at *1 (11th Cir. Oct. 3, 2017) ("The untimely notice of appeal deprives this Court of jurisdiction."). As a consequence, Petitioner was not entitled to any relief in the Eleventh Circuit from the district court's dismissal of his habeas petition as time-barred. This Court, likewise, cannot grant Petitioner any such relief. *Bender*, 475 U.S. at 541. On that basis alone, certiorari review should be denied.

II. The Eleventh Circuit's Order Is Not Binding Precedent and Does Not Conflict With Any Other Circuit Court Decision.

Further, the Eleventh Circuit's order presents no issue that warrants this Court's attention. The order is unpublished and therefore lacks any binding precedential authority. *See* 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."). Nor does

the order conflict with a decision by any other federal circuit. It merely states that "[b]ecause reasonable jurists would not debate the district court's conclusion that Heiser's petition was untimely, his construed motion for a [certificate of appealability] is DENIED and his motion to proceed *in forma pauperis* is DENIED as moot." *Heiser*, 2022 WL 18402586 at *1.

Notably, Petitioner does not appear to dispute that under binding Eleventh Circuit precedent, his federal habeas petition was in fact untimely. The state trial court simply made a ministerial correction to the sentencing document that had no effect on Petitioner's actual term of imprisonment, and the correction was entered *nunc pro tunc* to the date of the original sentence. *See Osbourne*, 968 F.3d at 1267 ("[B]ecause the correction to the sentence was imposed nunc pro tunc, under Florida law the 2014 amended sentence related back to the date of the initial judgment and was not a 'new judgment' for purposes of § 2244."). Petitioner also does not contend that the Eleventh Circuit's precedent on that point is wrong, or that it conflicts with the decisional law of any other federal circuit. Respondent, as well, is unaware of any conflict between *Osbourne* and any other circuit court decision.

Petitioner does argue that a certificate of appealability should have been granted because reasonable jurists could debate whether Respondent waived any timeliness argument, or whether the district court erred by not giving him the opportunity to respond before it denied the habeas petition. But those arguments were never presented to the Eleventh Circuit

before it made its decision. Petitioner's motion for an extension of time to file a motion for a certificate of appealability was denied as untimely, and the Eleventh Circuit instead construed his notice of appeal, which did not contain any legal argument, as the motion for a certificate of appealability. Therefore, the sole question that was before the Eleventh Circuit when it made its decision was whether reasonable jurists would debate both (1) that Petitioner had been denied a constitutional right, and (2) the correctness of the district court's timeliness determination. *Slack*, 529 U.S. at 484. And because binding circuit precedent made it clear that the habeas petition was, in fact, untimely, the Eleventh Circuit properly declined to issue a certificate of appealability.

On its face, the Eleventh Circuit's order does not contain any legal error, conflict with the decision of another federal circuit, or raise any disputed question of federal law that would justify review in this Court. The fact that the order is unpublished, and is not binding precedent even within the Eleventh Circuit, further weighs against any argument that certiorari review is warranted. For those reasons as well, the certiorari petition should be denied.

III. There Was No Error by the District Court That Warrants Review by This Court.

Finally, although Petitioner's current arguments in opposition to the district court's ruling were never timely presented to the Eleventh Circuit, and therefore could not provide a basis for the Eleventh Circuit

to grant a certificate of appealability, his arguments are nonetheless without merit.

Petitioner first argues that the district court erred under *Day v. McDonough*, 547 U.S. 198, 202 (2006), by overriding Respondent's "deliberate waiver" of the AEDPA time-bar. In *Day*, this Court held that district courts are not bound by a State's erroneous determination that a habeas petition is timely. The Court explained that while "a district court is not required to doublecheck the State's math . . . if a judge does detect a clear computation error, no Rule, statute, or constitutional provision commands the judge to suppress that knowledge." *Id.* at 209–10. The Court clarified, however, that its holding applied only to an inadvertent error by the State and not to "a State's deliberate waiver of a limitations defense." *Id.* at 202.

In this case, Respondent did not deliberately waive a limitations defense. Rather, Respondent advised the district court that it believed the timeliness issue was controlled by the Eleventh Circuit's 2007 decision in *Ferreira*. In *Ferreira*, the Eleventh Circuit held that a state prisoner's habeas petition was timely when it was filed within one year from the entry of an amended sentence in 2003, even though the petition was only challenging the prisoner's original 1997 conviction. 494 F.3d at 1292–93. Citing *Burton*, the Eleventh Circuit stated that "AEDPA's statute of limitations begins to run from the date both the conviction *and* the sentence the petitioner is serving at the time he files his application become final because judgment is based on both the conviction and the sentence." *Id.* at 1293 (original emphasis). On that basis, Respond-

ent wrote that because Petitioner's sentence was corrected in 2016, and the habeas petition was filed less than one year from the date the corrected sentence became final, "the controlling case law appears to require that [Petitioner] now be permitted to challenge his 1992 armed robbery conviction." DE10:4–5.

The district court properly rejected that analysis as incorrect based on more recent Eleventh Circuit case law. In its 2017 decision in *Patterson*, the Eleventh Circuit had observed that "not all changes to a sentence create a new judgment" under AEDPA. 849 F.3d at 1326. And in its 2020 decision in *Osbourne*, the Eleventh Circuit held that an amended sentence that was entered by a Florida court *nunc pro tunc* to the date of the original sentence "was not a 'new judgment' for purposes of § 2244." 968 F.3d at 1267. Thus, the district court concluded that the 2016 correction to Petitioner's sentence did not result in a new judgment, and that the judgment for AEDPA purposes was the original judgment and sentence that was entered in 1992, for which the one-year limitations period had long since expired. DE17:2–9.

Consequently, the record shows that Respondent's statement that the habeas petition "appear[ed] to be timely" was based on a calculation error. Respondent believed, based on an earlier Eleventh Circuit decision, that the one-year period had to be determined from the date of the 2016 corrected sentence. The district court found that according to more recent Eleventh Circuit case law, including one case (*Osbourne*) that was issued after Respondent filed its response, the corrected sentence did not restart the AEDPA limitations period, and the relevant judgment for AEDPA

purposes was the original 1992 judgment and sentence. Thus, this case involved an inadvertent error, rather than a deliberate waiver of the limitations issue. The district court was therefore free under *Day* to reject Respondent's analysis and conclude that the habeas petition was time-barred. *Cf. Wood v. Milyard*, 566 U.S. 463, 474 (2012) (holding that AEDPA statute of limitations defense was waived where the State expressly acknowledged that there were arguments it could make in support of the defense but deliberately chose not to make them). There was no error under these facts that would have warranted a certificate of appealability from the Eleventh Circuit, let alone justify certiorari review by this Court.

Petitioner also argues that the district court erred by not giving him notice and an opportunity to address the timeliness issue before it dismissed the habeas petition as time-barred. In support, Petitioner relies on this Court's statement in *Day* that "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." 547 U.S. at 210. Petitioner, however, had already presented his position in his habeas petition, which was that the petition was timely under *Ferreira* based on the 2016 corrected sentence. And to the extent that there were any additional arguments Petitioner could have presented relevant to the timeliness issue, the district court gave him the opportunity present them in a Rule 59(e) motion, which he failed to file.

Regardless, even if Petitioner were correct that the district court should have directed him to file an additional response before issuing its ruling, the matter ultimately had no impact on the outcome of the case.

There could be no reasonable dispute that under controlling circuit precedent, the 2016 corrected sentence did not restart the limitations period. Moreover, Petitioner's sole argument directed to the merits of the district court's decision—that Respondent deliberately waived the limitations issue—was plainly incorrect on the face of the record. In short, because reasonable jurists would not have debated the district court's dismissal of the habeas petition as time-barred, there was no basis for the Eleventh Circuit to issue a certificate of appealability. And for the same reason, among others, there was no error here that warrants further review by this Court.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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