APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 21-14257 & 23-13367

MICHAEL LAWRENCE CASSIDY,
Petitioner-Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

THERESA BATSON,
Petitioner-Appellant,

v.

FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

Filed: 10/28/2024

Before William Pryor, Chief Judge, and Luck and Hull, Circuit Judges.

William Pryor, Chief Judge:

These consolidated appeals require us to decide whether two state prisoners' federal petitions for writs of habeas corpus are timely. Theresa Batson and Michael Cassidy contend that their petitions are timely because the state courts amended their judgments and sentences after the vacatur of one count of their original judgments. *See* 28 U.S.C. § 2244(d). The district courts dismissed their petitions as untimely after deciding that the state courts issued those amended judgments and sentences *nunc pro tunc* to the date of their original judgments. We held, in *Osbourne v. Secretary, Florida Department of Corrections*, that we must defer to a state court's

designation of an amended sentence as *nunc pro tunc*. 968 F.3d 1261, 1266-67, 1266 n.4 (11th Cir. 2020). Because the state court in Batson's case designated her amended sentences as *nunc pro tunc*, her federal petition is untimely. And because the state court in Cassidy's case did not designate his amended judgment and sentence as *nunc pro tunc*, his federal petition is timely. We affirm the dismissal of Batson's petition, but we vacate Cassidy's dismissal and remand for further proceedings.

I. BACKGROUND

These consolidated appeals involve two state prisoners convicted of unrelated crimes: Theresa Batson and Michael Cassidy. Despite their separate factual and procedural histories, these appeals present overlapping questions about *nunc pro tunc* orders and when amended judgments and sentences restart the statute of limitations under the Antiterrorism and Effective Death Penalty Act. As background, we explain the facts that gave rise to Batson's appeal before doing the same for Cassidy's appeal.

A. Batson's Appeal

Theresa Batson challenges her state convictions for soliciting the murder of her boyfriend and his brother. On May 20, 2010, a jury convicted Batson on two counts of conspiracy to commit first-degree murder and two counts of soliciting first-degree murder. The state trial court entered a judgment and sentences against her on July 1, 2010. These documents adjudicated Batson guilty of all four counts and sentenced her to 30 years in prison on each count. Count one was a 30-year sentence; count two ran consecutive to count one; count three ran concurrent with count one;

and count four ran consecutive to count one but concurrent with count two. So Batson faced a total sentence of 60 years in prison. The state appellate court affirmed and issued its mandate on May 25, 2012.

Batson next sought state post-conviction relief. On June 7, 2013, Batson filed a *pro se* motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 and alleged 19 claims of ineffective assistance of counsel. The state post-conviction court—a different court than her original trial court—dismissed this motion and a later amended motion. On February 1, 2017, the state appellate court reversed the denial of Batson's claim that her trial counsel was ineffective for failing to raise a defense of double jeopardy and remanded.

The post-conviction court entered an amended judgment on August 10, 2017, that vacated the guilty verdict on count one. The amended judgment restated that Batson was adjudicated guilty of counts two, three, and four but did not mention the sentences. The post-conviction court instructed the clerk on May 29, 2018, to prepare amended sentencing documents so that "Counts 2 and 4 . . . run concurrently with each other but consecutive to the sentence imposed in Count 3." It entered the amended sentences on June 5, 2018, and designated them as *nunc pro tunc* to July 1, 2010. Clerical errors led to two additional rounds of amended sentencing forms on June 7, 2018, and June 14, 2018, and the court also marked these *nunc pro tunc* to July 1, 2010. The amended sentences state that "[t]he Defendant is hereby committed to the custody of the Department of Corrections."

The appellate court affirmed Batson's amended judgment and sentences and issued its mandate on November 30, 2018. The sentence for count two remained 30

years but now ran consecutive to count three and concurrent with count four; count three remained 30 years; and count four remained 30 years but now ran consecutive to count three and concurrent with count two.

Batson's later challenges to her amended judgment and sentences under state law were unsuccessful. The state appellate court issued its mandate affirming the denial of Batson's first post-amended-judgment motion on September 24, 2021, and rejected her motion to recall that mandate on November 15, 2021.

On October 10, 2022, Batson filed a *pro se* federal petition for a writ of habeas corpus that alleged ineffective assistance of appellate counsel. The state moved to dismiss the petition as untimely. It argued that more than a year of untolled time had passed since her original convictions became final and that the amended judgment and sentencing documents did not constitute a new judgment because they related back to the original judgment *nunc pro tunc*.

The district court dismissed Batson's petition as untimely. It ruled that Batson's amended judgment and sentences related back to her original judgment because the state post-conviction court resentenced Batson *nunc pro tunc* and her prison term remained unchanged. It issued a certificate of appealability on one issue: "Did Petitioner's Amended Judgment and Sentence restart the federal limitations period under AEDPA?"

B. Cassidy's Appeal

Michael Cassidy challenges his state convictions for molesting his family member. On May 30, 2012, a jury convicted Cassidy of three counts of sexual battery while in a position of familial or custodial authority. The trial court orally issued a

sentence of 25 years in prison for count one, and a consecutive sentence of 10 years in prison for count two, followed by 15 years of probation for count three. On August 8, 2012, the court entered a written judgment that adjudicated Cassidy guilty and that same document also contained the sentencing forms. The written sentence entered on August 8, 2012, however, misstated the count one sentence as 35 years. Cassidy appealed the substance of his conviction but did not yet challenge that clerical error. The state appellate court affirmed and issued its mandate on February 7, 2014.

Meanwhile, the trial court separately corrected the sentencing error. Cassidy filed a motion on March 10, 2014, under Florida Rule of Criminal Procedure 3.800(c), to clarify that his total prison sentence should last only for 35, not 45, years based on the oral sentence. The trial court entered an order on April 7, 2014, granting this motion and stating that it was "Nunc Pro Tunc." It then issued an amended sentence on May 16, 2014, that listed the correct sentence length of 25 years of imprisonment for count one and 10 years of imprisonment for count two to run consecutive to count one, followed by 15 years of probation for count three. Consistent with its *nunc pro tunc* nature, the amended sentence stated as follows: "DONE AND ORDERED in open court at Okaloosa County, Florida this 8th day of AUGUST 2012 and signed 16th day of May, 2014." August 8, 2012, is the date of the original sentences.

Cassidy later sought post-conviction relief in state court. He submitted a *pro se* motion for post-conviction relief on August 20, 2014, that alleged that his trial counsel had provided ineffective assistance. Following a limited evidentiary hearing, the state post-conviction court—the same trial court that had sentenced Cassidy—

granted his motion in part on August 7, 2017. It ruled that Cassidy's trial counsel had been ineffective in his defense of count three when he failed to check or introduce exculpatory evidence of Cassidy's military deployment that had been provided to counsel more than a year before trial. These records established that Cassidy was in New Mexico during the time of the alleged molestation in count three. The court vacated "[t]he judgment and sentence imposed on [c]ount [three]," but it rejected the rest of Cassidy's claims. In response, the state dismissed *nolle prosequi* count three on August 28, 2017.

The state post-conviction court next entered an amended judgment titled "AMENDED JUDGMENT." Page one of the amended judgment left counts one and two unchanged but removed count three. Page two then reads "DONE AND ORDERED in open court in Okaloosa County, this 8th day of AUGUST 2012," followed by the sentence of the court. The same document also contains the "2ND AMENDED" sentence forms as pages four through six. Notably, the final page concludes as follows: "DONE AND ORDERED in open court at Okaloosa County, Florida this 8th day of AUGUST 2012 and signed __ day of _____, 2014." Again, August 8, 2012, is the original sentencing date. Although the state post-conviction court left this signature date blank, it stamped page six with an e-signature dated October 10, 2017. The sentencing forms left the sentences on counts one and two unchanged but removed the probation sentence on count three. The state appellate court affirmed the denial of Cassidy's other claims and issued its mandate on March 7, 2019.

Cassidy filed a *pro se* federal petition for a writ of habeas corpus on March 6, 2020. The magistrate judge stayed this federal action while Cassidy exhausted his state post-conviction claims. Cassidy then filed an amended habeas petition on January 5, 2021. This petition raised a litany of constitutional objections to his conviction and detention—most of which overlapped with his original petition.

The state moved to dismiss the habeas petition as untimely. It argued that the operative judgment for the statute of limitations is Cassidy's original judgment from 2012, not his amended judgment from 2017. And it contended that the amended judgment was a *nunc pro tunc* order that relates back to the date of the original judgment. Cassidy responded that the amended judgment could not be a *nunc pro tunc* order because the state court did not so designate it and that this kind of order is permitted only for correcting mistakes. He also argued that that his amended judgment reset the start of the federal statute of limitations.

The magistrate judge recommended denying the state's motion. She concluded that "a judgment consists of a conviction and a sentence and even when an amended judgment alters only the sentence and not the underlying conviction, the amended judgment is a new judgment which restarts the AEDPA clock." She did not address the *nunc pro tunc* issue.

The district court dismissed the petition as untimely. It reasoned that the state trial court never vacated Cassidy's original sentences on counts one or two, nor did it hold a resentencing hearing or otherwise alter the state's authority to confine Cassidy. The district court concluded that the state trial court "made clear" that the amended judgment was *nunc pro tunc* and that orders so designated are not new

judgments. It later issued a two-question certificate of appealability: "(1) whether the state court's order dated October 10, 2017, was a *nunc pro tunc* order under state law; and (2) whether the state court's vacating of one count of a multi-count judgment created a new judgment under 2244(d) and 2254, thereby restarting the 1 year federal clock." We later consolidated Cassidy's appeal with Batson's appeal to address the timeliness issues raised by the amended judgments.

II. STANDARD OF REVIEW

We review *de novo* a petition's dismissal as untimely under section 2244(d). *Morris v. Sec'y, Fla. Dep't of Corr.*, 991 F.3d 1351, 1353 (11th Cir. 2021).

III. DISCUSSION

Under the Antiterrorism and Effective Death Penalty Act, the timeliness of a state prisoner's federal petition is governed by the following statute of limitations: "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." 28 U.S.C. § 2244(d)(1). For both Batson and Cassidy, as state prisoners, that limitation period runs 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." *Id.* § 2244(d)(1)(A).

These appeals turn on whether the state courts designated the prisoners' amended judgments and sentences as *nunc pro tunc*. When a state court issues an amended judgment or sentence *nunc pro tunc*, our precedent requires us to accept that designation and refrain from evaluating whether it was proper under state law. *See Osbourne*, 968 F.3d at 1266-67, 1266 n.4. In *Osbourne*, we held that an amended sentence that a state court issued *nunc pro tunc* did not constitute a new judgment

because it related back to the date of the original judgment. *Id.* at 1266-67. We did so without evaluating the validity of the *nunc pro tunc* designation under Florida law because that matter was "best left to the province of the state court." *Id.* at 1266 n.4.

Although *Osbourne* requires us to defer to a state court's designation of an amended judgment or sentence as *nunc pro tunc*, *id.* at 1266-67, 1266 n.4, the state court must have, in fact, classified the order as *nunc pro tunc* for this deference to apply, *see id.* at 1266 (explaining that the date of the original judgment controlled "[i]n light of *the trial court's* nunc pro tunc designation *when issuing* Osbourne's amended sentence" (emphasis added)). Because the state court unambiguously issued Batson's amended sentences *nunc pro tunc*, her petition is untimely. But because the state court did not enter Cassidy's amended judgment *nunc pro tunc*, his petition is timely.

We divide our discussion into two parts. First, we explain why Batson's amended judgment and sentences did not restart the statute of limitations. Second, we explain why Cassidy's amended judgment restarted the statute of limitations.

A. Batson's Amended Judgment and Sentences Did Not Reset the Statute of Limitations.

Resolution of the timeliness issue in Batson's appeal is straightforward under *Osbourne*. The state court checked the *nunc pro tunc* box on Batson's amended sentences but not on her amended judgment. Of those two documents, the amended sentences provided the authority to confine Batson when she filed her federal petition. *Osbourne* directs us to defer to the state court's designation of them as *nunc*

pro tunc. So Batson's amended sentences did not restart the federal statute of limitations.

As we held in *Patterson v. Secretary, Florida Department of Corrections*, "the only judgment that counts for purposes of section 2244 is the judgment 'pursuant to' which the prisoner is 'in custody.' " 849 F.3d 1321, 1326 (11th Cir. 2017) (en banc) (quoting 28 U.S.C. § 2254); *accord Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286, 1293 (11th Cir. 2007) ("[T]he writ and AEDPA, including its limitations provisions, are specifically focused on the judgment which holds the petitioner in confinement."). And the content of the state orders makes clear that the amended sentences—not the amended judgment—are what confined Batson when she filed her federal petition. The amended sentencing forms state that "[t]he Defendant is hereby committed to the custody of the Department of Corrections." The amended judgment, in contrast, removed a vacated count from the list of Batson's convictions without mentioning or affecting her custody. The amended sentences' *nunc pro tunc* designation relates back to Batson's original judgment, so the statute of limitations did not reset.

Osbourne requires us to defer to the state court's designation of Batson's amended sentences as *nunc pro tunc*. As discussed earlier, *Osbourne* held that an amended sentence marked *nunc pro tunc* did not constitute a new judgment. 968 F.3d at 1267. We stated that "*the determining factor* as to whether the state court judgment is a 'new judgment' for purposes of § 2244(b) turns on the nunc pro tunc *designation*." *Id.* at 1266 (emphasis added). Because the *nunc pro tunc* designation on Batson's amended sentences came from the state court, we must give it the dispositive weight that *Osbourne* did.

That the prisoner in *Osbourne* did not contest the validity of the state court's *nunc pro tunc* designation does not change that decision's binding effect. To be sure, *Osbourne* refrained from "opin[ing] as to whether the imposition of the amended sentence in his case was the proper or correct use of a nunc pro tunc designation under Florida law." *Id.* at 1266 n.4. But respect for state courts' primacy in interpreting state law—not the prisoner's forfeiture of the validity argument—compelled that restraint. *See id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). *Osbourne* deferred to the state court's *nunc pro tunc* classification because we recognized that "the propriety of labeling a Florida judgment 'nunc pro tunc' is a matter of state law." *Id.* Forfeiture did not change that this matter is "best left to the province of the state court." *Id.*

If Batson wanted to contest the validity of the state court's *nunc pro tunc* designation, she should have done so during her state appeal. *See id.* (noting that "Osbourne did not challenge the imposition of the amended sentence nunc pro tunc in state court, despite having the opportunity to do so"). We cannot second-guess the state court's *nunc pro tunc* designation, so the amended sentences that confine Batson *nunc pro tunc* to the date of her original judgment did not restart the federal statute of limitations.

B. Cassidy's Amended Judgment Reset the Statute of Limitations.

Resolution of the timeliness issue in Cassidy's appeal is more complicated than Batson's appeal. Because the state court did not issue Cassidy's amended judgment—which included his second amended sentence forms—*nunc pro tunc*, *Osbourne* does not limit the scope of our review as to whether the amended judgment restarted the

federal statute of limitations. Cassidy's amended judgment constitutes a new judgment that restarted the federal statute of limitations under section 2244(d)(1)(A).

The state court in Cassidy's case did not issue his amended judgment *nunc pro tunc*. The absence of the phrase "*nunc pro tunc*" from the amended judgment is significant because the state court previously included that language when it made a clerical correction to Cassidy's sentence. Its 2014 order granting Cassidy's motion to clarify his sentence stated as follows: "DONE AND ORDERED in chambers, Nunc Pro Tunc, this 4th day of April, 2014." This wording establishes that the state court knew how to designate an order *nunc pro tunc*—something that it did not do when it later issued Cassidy's amended judgment and second amended sentence. And it makes the district court's later conclusion that the state court intended to issue the amended judgment *nunc pro tunc* solely because it left the date of the original judgment on the amended sentencing forms untenable.

Because *the state court* did not designate Cassidy's amended judgment as *nunc pro tunc*, we are not bound to defer to the district court's classification of it as *nunc pro tunc*. The district court was the first court to classify Cassidy's amended judgment as a *nunc pro tunc* order. And our review of the district court's—instead of the state court's—understanding of whether an order was issued *nunc pro tunc* does not threaten the principles of comity that Osbourne sought to preserve. *See id.*

Our decision in *Ferreira v. Secretary, Department of Corrections* stated that the federal statute of limitations "focuse[s] on the judgment which holds the petitioner in confinement." 494 F.3d at 1293. We explained that there is only one judgment that confines a prisoner at any given time, and that judgment is made up of both the

sentence and the conviction. *Id.* at 1292-93. So the "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.

The Supreme Court also made clear in *Magwood v. Patterson* that courts must focus on the judgment that confines a prisoner when he files his federal petition. 561 U.S. 320, 332-33, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010). That decision involved a state prisoner whose petition was conditionally granted by the district court with instructions that he be released or resentenced. *Id.* at 326, 130 S.Ct. 2788. After a resentencing hearing, he was sentenced to death. *Id.* He filed a second petition, but the state argued that this petition was barred under section 2244(b). *Id.* at 331, 130 S.Ct. 2788. Focusing on the text, *Magwood* stressed that "[a] § 2254 petitioner is applying for something: His petition 'seeks *invalidation* (in whole or in part) *of the judgment* authorizing the prisoner's confinement.' " *Id.* at 332, 130 S.Ct. 2788 (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 83, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005)). After reasoning that "the existence of a new judgment is dispositive," the Court held that the prisoner's second petition was not barred because he had been resentenced and given a new, intervening judgment between his two petitions. *Id.* at 338-39, 130 S.Ct. 2788. But *Magwood* left unresolved whether a prisoner can challenge "not only his resulting, *new* sentence, but also his original, *undisturbed* conviction." *Id.* at 342, 130 S.Ct. 2788.

In *Insignares v. Secretary, Florida Department of Corrections*, we addressed the question that *Magwood* left open: whether it mattered that a prisoner contested

a conviction that did not change because of the amended judgment. 755 F.3d 1273, 1280 (11th Cir. 2014). The prisoner in *Insignares* was sentenced to 27 years in prison based on a mandatory-minimum sentence of 20 years for attempted murder and a five-year suspended sentence for discharging a firearm. *Id.* at 1276-77. He filed a federal petition, but it was dismissed as untimely. *Id.* at 1277. The state court later reduced his mandatory minimum from 20 years to 10 years but left his 27-year sentence for attempted murder intact. *Id.* The prisoner filed a new federal petition and argued that it was not second or successive because the reduction of his mandatory-minimum sentence resulted in a new judgment. *Id.* We held that "when a habeas petition is the first to challenge a new judgment, it is not 'second or successive,' regardless of whether its claims challenge the sentence or the underlying conviction." *Id.* at 1281. The "basic proposition" that "there is only one judgment, and it is comprised of both the sentence and the conviction" preordained *Insignares*'s result. *Id.* We also confirmed that *Ferreira* remained good law after *Magwood* because "resentencing results in a new judgment that restarts the statute of limitations." *Id.*

We later clarified that not every alteration to a sentence or conviction constitutes a new judgment. In *Patterson*, we held that an order that excused a prisoner from the chemical castration punishment outlined in his original sentence did not constitute a new judgment. 849 F.3d at 1326. This conclusion meant that his habeas petition was barred as "second or successive." *Id.* at 1328. Based on the text of section 2254, we explained that "the only judgment that counts for purposes of section 2244 is the judgment 'pursuant to' which the prisoner is 'in custody.' " *Id.* at

1326 (quoting 28 U.S.C. § 2254). The order prohibiting castration did not amend the prisoner's judgment of confinement; it stated only that he "shall not have to undergo chemical castration." *Id.* (alteration adopted) (internal quotation marks omitted). Patterson's original "commitment ha[d] never been vacated or replaced." *Id.* at 1325. We also explained that "Insignares had an intervening 'judgment authorizing [his] confinement,' but Patterson does not." *Id.* at 1326 (quoting *Insignares*, 755 F.3d at 1279).

To be sure, *Osbourne* made clear that "not every action that alters a sentence necessarily constitutes a new judgment for purposes of § 2244." 968 F.3d at 1265. No new judgment existed there because we treated the prisoner's amended sentence as relating back to the date of his original judgment and sentence. *Id.* at 1266. This decision was based on the state court issuing its changes to the original sentence *nunc pro tunc*. *See id.* at 1266-67, 1266 n.4. The lack of an "intervening new judgment" again proved dispositive. *Id.* at 1267.

Based on these precedents, Cassidy's amended judgment is a new judgment under section 2244(d) for two reasons. First, Cassidy's appeal is distinguishable from *Patterson* because the state court vacated portions of Cassidy's original judgment and entered an amended judgment. Even though the unaffected counts still imposed the same prison term, the amended judgment replaced the original judgment. As *Magwood* explained, "the existence of a new judgment is dispositive." 561 U.S. at 338, 130 S.Ct. 2788. Second, the most recent judgment controls the running of the limitations period. As we explained in *Insignares*, "there is only one judgment" that confines a prisoner. 755 F.3d at 1281. In the light of *Ferreira*'s explanation that the

"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," 494 F.3d at 1293, Cassidy's amended judgment was "the judgment" that he was "in custody pursuant to" when he filed his federal petition, 28 U.S.C. § 2244(d)(1). Because the vacated count no longer has any legal effect, it would be a strange outcome to hold that the original judgment that included that now-defunct count supersedes the amended judgment that includes only the remaining valid counts. After all, "the judgment to which AEDPA refers is the underlying conviction and *most recent* sentence that authorizes the petitioner's current detention." *Ferreira*, 494 F.3d at 1292 (emphasis added).

The Secretary contends that because Cassidy's amended judgment "left the sentences for [the remaining counts] unaffected," it "should not be considered to have reset the AEDPA limitations period." But we have rejected this approach as inconsistent with the statutory text. *See Insignares*, 755 F.3d at 1281 (explaining that in *Ferreira*, "we saw no reason to differentiate between a claim challenging a conviction and one challenging the sentence"). What matters is whether the state court vacated at least part of the original judgment and entered an amended judgment that confines the prisoner going forward. What does not matter is whether certain convictions in the amended judgment never changed.

IV. CONCLUSION

We **AFFIRM** the order dismissing Batson's petition. We **VACATE** the order dismissing Cassidy's petition and **REMAND** for further proceedings.

Hull, Circuit Judge, specially concurring:

I concur in full in the Court's opinion except for Part III.B regarding Cassidy's appeal. I concur only in the judgment for Part III.B for several reasons.

First, in my view, the clear intent of the state court was to enter Cassidy's final amended judgment and sentence *nunc pro tunc* because in two places the state court dated the final amended judgment and sentence as "DONE AND ORDERED" on August 8, 2012, the date of his original sentencing. The Court's opinion bases its ruling on the absence of the words *nunc pro tunc*. I concur in the judgment because I can appreciate the Court's reliance on that bright-line rule and reluctance to divine the intent of the state court on this matter. *See Osbourne v. Sec'y, Fla. Dep't of Corr.*, 968 F.3d 1261, 1266–67, 1266 n.4 (11th Cir. 2020).

Second, I see a principled basis for possibly distinguishing *Magwood v. Patterson*, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010), and *Insignares v. Secretary, Florida Department of Corrections*, 755 F.3d 1273 (11th Cir. 2014), but here again I respect the Court's disinclination to do so. Here is why I view those decisions as arguably different from this case. The death-sentenced petitioner in *Magwood* received a full resentencing hearing after the district court conditionally granted the writ of habeas corpus as to the death sentence and mandated that the petitioner either be released or resentenced. 561 U.S. at 323, 326, 130 S.Ct. 2788. After a new sentencing hearing, the district court resentenced the petitioner to death. *Id.* *Magwood* involved a truly new sentence and thus a truly new judgment as the result of a sentencing hearing and deliberation.

Similarly, *Insignares* involved a truly new prison sentence and judgment entered after the state court reduced the petitioner's mandatory-minimum sentence from 20 years to 10 years for his attempted murder conviction, which he sought to challenge in his subsequent federal habeas petition. 755 F.3d at 1276-77.

In contrast here, Cassidy is serving the same undisturbed sentences originally imposed in 2012 on his same undisturbed convictions on counts one and two. The convictions and sentences on counts one and two were never vacated and remain unchanged. Practically speaking, what has occurred is, in effect, merely an administrative or clerical restatement of the same original convictions and original sentences imposed in 2012. The prison sentences are the same in the amended judgment and not new sentences in a new judgment. Yet Cassidy may now file an otherwise untimely § 2254 petition challenging undisturbed convictions and sentences over a decade later, well beyond the one-year federal limitations period. *See* 28 U.S.C. § 2244(d)(1). Although § 2244(d)(1)'s purpose is to ensure finality of state and federal judgments, *see Duncan v. Walker*, 533 U.S. 167, 178, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001), this result does just the opposite.

Finally, because I view *Insignares* as potentially distinguishable, I am more inclined to follow the approach of the Seventh Circuit in *Turner v. Brown*, which rejected a habeas petitioner's argument that his resentencing on one count of a multi-count conviction "reset the clock for calculating [the] statute of limitations" because "the relief he was granted . . . was limited to his *robbery* conviction, whereas his habeas petition challenges his conviction and life sentence for *murder*," which had not changed. 845 F.3d 294, 297 (7th Cir. 2017) (emphasis added); *see also Romansky*

v. Superintendent Greene SCI, 933 F.3d 293, 300-01 (3d Cir. 2019) (holding that a petitioner's § 2254 petition was untimely because his "resentencing did not impose a new judgment as to the undisturbed counts of conviction" which he sought to challenge). Nevertheless, I recognize we do not write on a clean slate, and thus I concur in the judgment as to Part III.B.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 22-cv-14354-BLOOM/Reinhart

THERESA BATSON,
Petitioner,
v.

FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

Signed September 20, 2023

ORDER DISMISSING 28 U.S.C. § 2254 PETITION AS UNTIMELY

BETH BLOOM, UNITED STATES DISTRICT JUDGE

THIS CAUSE is before the Court on Petitioner Theresa Batson's ("Petitioner") *pro se* Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Petition"), ECF No. [1]. Petitioner challenges her state-court convictions and sentences on charges of conspiracy to commit first degree murder and solicitation to commit first degree murder in the Nineteenth Judicial Circuit for St. Lucie County, Florida. *See generally id.*

Respondent Florida Department of Corrections ("Respondent") filed a Response, ECF No. [7], an Index to Appendix, ECF No. [8], with exhibits, ECF Nos. [8-1]-[8-4], and a Notice of Filing Transcripts, ECF No. [9], with attached transcripts, ECF Nos. [9-4]-[9-4]. Petitioner did not file a Reply, and the time within which to do so has passed. *See* ECF No. [5] at 2. The Court has carefully considered the parties'

written submissions, the record, and the applicable law. For the following reasons, the Petition is dismissed as untimely.

I. BACKGROUND

On May 20, 2010, a St. Lucie County jury found Petitioner guilty of two counts of conspiracy to commit first degree murder (Counts I and II) and two counts of solicitation to commit first degree murder (Counts III and IV). *See* ECF No. [8-2] at 43.[1] The trial court sentenced Petitioner to a thirty-year term of imprisonment on Count I, a thirty-year term of imprisonment on Count II that would run consecutive to Count I, a thirty-year term of imprisonment on Count III that would run concurrently with Count I, and a thirty-year term of imprisonment on Count IV that would run concurrently with Count II but consecutive to Count I. *See id.* at 52-60.

Petitioner appealed her conviction and sentence to the Fourth District Court of Appeal ("Fourth District") on July 30, 2010. *See id.* at 69. The Fourth District affirmed Petitioner's conviction and sentence in an unelaborated opinion on March 28, 2012. *See id.* at 130. Petitioner filed a Motion for Rehearing concerning her direct appeal with the Fourth District on April 11, 2012. *See id.* at 132-138. The Fourth District denied Petitioner's Motion for Rehearing on May 7, 2012, *see id.* at 140, and issued its Mandate on May 25, 2012, *see id.* at 142.

Petitioner filed a Motion for Post-Conviction Relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure ("Rule 3.850 Motion") in the Nineteenth Judicial Circuit for St. Lucie County, Florida ("Post-Conviction Court") on June 7,

[1] The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

2013. *See id.* at 144-69. The Post-Conviction Court dismissed Petitioner's Rule 3.850 Motion without prejudice on the ground that it was legally insufficient but allowed Petitioner to file an amended Rule 3.850 Motion on or before September 23, 2013. *See id.* at 172-76. Petitioner filed an Amended Rule 3.850 Motion on September 20, 2013. *See id.* at 178-209. The Post-Conviction Court denied Petitioner's Amended Rule 3.850 Motion on May 18, 2015. *See* ECF No. [8-3] at 124-38. On July 7, 2015, Petitioner appealed the Post-Conviction Court's denial of her Amended Rule 3.850 Motion. *See id.* at 144. On February 1, 2017, the Fourth District reversed the Post-Conviction Court's denial of one of the claims raised in the Amended Rule 3.850 Motion and remanded the case for an evidentiary hearing on that issue alone, *see id.* at 251-53. The Fourth District issued its Mandate on February 17, 2017. *See id.* at 255. Following the evidentiary hearing ordered by the Fourth District, on November 13, 2013, the Post-Conviction Court entered an amended judgment on November 30, 2013 that vacated the adjudication of guilt on Count I but left the adjudication of guilt on Counts II, III, and IV undisturbed. *See id.* at 258-60.

Petitioner appealed the Post-Conviction Court's amended judgment to the Fourth District on September 7, 2017. *See id.* at 267-68. On March 6, 2018, the State filed a Motion to Relinquish Jurisdiction in response, arguing that the Fourth District should relinquish jurisdiction to the Post-Conviction Court for purposes of issuing a written order vacating the sentence on Count I. *See id.* at 283-86. The Fourth District granted the State's Motion to Relinquish Jurisdiction on March 26, 2018. *See* ECF No. [8-4] at 2. On March 29, 2018, the Post-Conviction Court entered a written order, clarifying that Petitioner's judgment and sentence on Count I were vacated and

amending the sentencing documents for Counts II and IV to reflect that they run concurrently with each other but consecutive to the sentence on Count III. *See id.* at 4. After finding that the Post-Conviction Court exceeded the scope of its jurisdiction by amending the sentences on Counts II, III, and IV, the Fourth District, on May 21, 2018, *sua sponte* relinquished jurisdiction to allow the Post-Conviction Court to properly amend the sentences on those counts. *See id.* at 61-62. In the Post-Conviction Court, the State, on May 23, 2018, filed a Motion to Vacate the Amended Sentence ("State's Motion") on Counts II, III, and IV, and Reissue Sentence on Counts II, III, and IV. *See id.* at 64-66. On May 29, 2018, the Post-Conviction Court granted the State's Motion, vacating and reissuing the amended sentence on Counts II, III, and IV. In its order, the Post-Conviction Court ordered the sentences for Counts II and IV to run concurrently with each other but consecutive to the sentence imposed in Count III and Count I to remain vacated. *See id.* at 68. The vacatur of Count I left Petitioner's term of imprisonment unaffected. *See* ECF No. [8-3] at 285. The Fourth District affirmed the Post-Conviction Court in an unelaborated opinion on November 1, 2018, *see* ECF No. [8-4] at 97, and issued its Mandate on November 30, 2018. *See id.* at 99.

On November 19, 2018, Petitioner filed a Motion to Correct Illegal Sentence. *See id.* at 101-05. The Post-Conviction Court denied Petitioner's Motion to Correct Illegal Sentence on January 4, 2021. *See id.* at 129-30. Petitioner appealed the denial of her Motion to Correct Illegal Sentence to the Fourth District on January 26, 2021. *See id.* at 135-36. The Fourth District affirmed the denial of Petitioner's Motion to Correct Illegal Sentence in an unelaborated opinion on August 26, 2021, *see id.* at

150, and issued its Mandate on September 24, 2021, *see id.* at 152. On September 22, 2021, Petitioner filed a Motion for Rehearing. *See id.* at 154-58. The Fourth District denied the Motion for Rehearing on October 20, 2021. *See id.* at 159. Petitioner then filed a Motion to Recall Mandate and Consider Motion for Rehearing on October 15, 2021. *See id.* at 161-62. The Fourth District denied the Motion on November 15, 2021. *See id.* at 164.

On August 22, 2022, Petitioner filed a state-court Petition for Writ of Habeas Corpus ("State Petition"). *See id.* at 168-185. On September 27, 2022, the Fourth District dismissed the State Petition as untimely under Rule 9.141(d)(5) under the Florida Rules of Appellate Procedure. *See id.* at 187.

Petitioner filed the instant Petition on October 10, 2022. ECF No. [1]. Respondent filed a Response in opposition. ECF No. [7]. Petitioner did not file a reply. Accordingly, the Petition is ripe for review.

II. DISCUSSION

A. Timeliness

Respondent argues that the Petition is time-barred. *See* ECF No. [7] at 13-26. Petitioner does not comment on the timeliness of her Petition. *See generally* Petition. After reviewing the procedural history and relevant law, the Court agrees with Respondent that the Petition is untimely.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides a "[one]-year period of limitation . . . [for] an 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) (alterations added). The limitations period runs 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.

Id. The limitations period is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review" is pending. *Id.* § 2244(d)(2) (alteration added).

Petitioner does not assert that an unconstitutional state-created impediment to filing her federal habeas Petition existed. Petitioner also does not base her claims on a right newly recognized by the United States Supreme Court or allege that the facts supporting Petitioner's claims could not have been discovered through the exercise of due diligence. *See generally* Petition. Accordingly, the statute of limitations is measured from the remaining trigger, the date Petitioner's "judgment" became final. 28 U.S.C. § 2244(d)(1)(A).

The federal limitations period in Petitioner's case remained tolled from the time the trial court entered Petitioner's conviction and sentence until the Fourth District denied Petitioner's Motion for Rehearing on the Fourth District's affirmance

of Petitioner's Judgment and Sentence on May 7, 2022. Following the Fourth District's denial of Petitioner's Motion for Rehearing, Petitioner had an additional ninety tolled days to seek *certiorari* review with the United States Supreme Court of the Fourth District's affirmance. *See Nix v. Sec'y for Dep't of Corr.*, 393 F.3d 1235, 1236-37 (11th Cir. 2004). Petitioner did not seek *certiorari* review during these ninety days, and the clock on the federal limitations period started to run on August 6, 2012. *See* Fed. R. Civ. P 6(a)(1) ("When the period is stated in days or a longer unit of time . . . exclude the day of the event that triggers the period . . . ." (alterations added)).

305 untolled days later, Petitioner filed a Rule 3.850 Motion on June 7, 2013. The federal limitations period remained tolled during the pendency of proceedings on the Rule 3.850 Motion. The Post-Conviction Court issued an Amended Judgment and Sentence, vacating Count I over double jeopardy concerns. *See* ECF No. [8-3] at 258-60. Petitioner's Amended Judgment and Sentence present a question as to whether the federal limitations period should restart on November 30, 2018—the date Petitioner's Amended Judgment and Sentence became final. The Eleventh Circuit has yet to answer this question. *See McMeans v. Alabama*, 2022 WL 2911803, at *4 n.6 (M.D. Ala. July 11, 2022) (Coody, Mag. J.) ("Chief Judge Carnes noted that, in the Eleventh Circuit, open questions remain as to whether a 'non-detrimental change' in a sentence allows a prisoner to file a federal habeas petition challenging his original, undisturbed conviction as though the conviction had occurred at the date of the change in the sentence." (citing *Patterson v. Sec'y, Fla. Dep't of Corr.*, 849 F.3d 1321, 1328-29 (11th Cir. 2017) (Carnes, C.J., concurring))), *report and recommendation adopted*, 2022 WL 2913002 (M.D. Ala. July 22, 2022) (Albritton, J.), but other circuits

have—although their answers are decidedly "split." *Cassidy v. Dixon*, 2021 WL 6808302, at *2 (N.D. Fla. Dec. 22, 2021) (Cannon, Mag. J.), *report and recommendation adopted*, 2022 WL 356038 (N.D. Fla. Feb. 7, 2022) (Stafford, J.); *see also Cox v. Sec'y Fla. Dep't of Corr.*, 837 F.3d 1114, 1118 (11th Cir. 2016) (recognizing the circuit split).

The Second and Ninth Circuits have held that a new judgment as to one count creates an entirely new judgment as to all other counts for purposes of § 2244. *See Johnson v. United States*, 623 F.3d 41, 46 (2d Cir. 2010) ("A different result is not warranted by the fact that . . . [Johnson] effectively challenges an unamended component of the judgment." (alterations added)); *Wentzell v. Neven*, 674 F.3d 1124, 1127-28 (9th Cir. 2012) ("In the context of finality, we treat the judgment of conviction as one unit, rather than separately considering the judgment's components, *i.e.*, treating the conviction and sentence for each count separately.").

However, the Third, Fifth, and Seventh Circuits have come to the opposite conclusion. *See In re Lampton*, 667 F.3d 585, 590 (5th Cir. 2012) ("The less fundamental change made to Lampton's judgment of conviction is not enough to allow him to bypass AEDPA's restrictions on piecemeal habeas litigation." (footnote call number omitted)); *Turner v. Brown*, 845 F.3d 294, 298 (7th Cir. 2017) ("Under the same reasoning, although a challenge to Turner's robbery conviction may be timely, the challenge to his sentence for murder is not. His murder conviction and life sentence were unaffected by the 2013 resentencing and thus remained final."); *Romansky v. Superintendent Greene SCI*, 933 F.3d 293, 300-01 (3d Cir. 2019) ("In summary, we conclude that Romansky's habeas petition was not timely as to the

conspiracy conviction at his 1987 trial because the petition was not filed within one year of the conclusion of his state post-conviction process and because the 2000 resentencing did not impose a new judgment as to the undisturbed counts of conviction (including the conspiracy charge).").

The Court agrees with the latter three circuits. The Third Circuit's opinion in *Romansky* is particularly instructive. The petitioner in that case had been convicted in 1987 of, among other things, conspiring to steal cars, receiving stolen property, and dealing in stolen property, convictions all stemming from his role in "an auto theft ring in northeastern Pennsylvania." *Romansky*, 933 F.3d at 295-96. For these crimes, the state trial judge sentenced him to "9 to 18 years' total incarceration, including 2 to 4 years on the conspiracy charge." *Id.* at 296. But, ten years later, a state appellate court vacated Romansky's convictions as to one of the stolen vehicles, finding that "the Commonwealth had unlawfully used false testimony." *Id.* "Romansky was retried on the vacated charges in January 2000, again resulting in conviction on all of those counts." *Id.* Two months later, "he received the same sentence on each of the counts as in 1987 — 9 to 18 years in total, including 2 to 4 years on the conspiracy charge." *Id.* Ultimately, the Third Circuit found that "where some but not all counts of conviction are disturbed on appeal or in post-conviction proceedings, the defendant's eventual resentencing is [not] a new judgment as to the undisturbed counts of conviction." *Id.* at 300 (alteration added).

Eleventh Circuit precedent supports reaching the same conclusion. The Eleventh Circuit has stated, "there is only one judgment, and it is comprised of both the sentence and the conviction." *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d

1273, 1281 (11th Cir. 2014) "The limitations provisions of AEDPA 'are specifically focused on the judgment which holds the petitioner in confinement,' and resentencing results in a new judgment that restarts the statute of limitations." *Id.* (quoting *Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286, 1292-93 (11th Cir. 2007)). Furthermore, "not every action that alters a sentence necessarily constitutes a new judgment for purposes of § 2244." *Osbourne v. Sec'y, Fla. Dep't of Corr.*, 968 F.3d 1261, 1265 (11th Cir. 2020).

In the instant case, the only apparent reason the Post-Conviction Court entered an amended judgment on Counts II, III, and IV was to vacate Petitioner's guilty verdict on Count I. Under Rule 3.986 of the Florida Rules of Criminal Procedure, judgment forms used by Florida courts must indicate the counts and crimes an individual faces in each case. The Post-Conviction Court accordingly could not vacate Count I in an amended judgment without also referencing Counts II, III, and IV. Moreover, because the Post-Conviction Court issued an amended judgment, it was required to enter an amended sentence. However, in issuing that amended sentence, the Court indicated that Petitioner was resentenced on Counts II, III, and IV *nunc pro tunc* to July 1, 2010—the date of Petitioner's initial sentencing. *See* ECF No. [8-4] at 95.

The Court finds that the judgment authorizing Petitioner's incarceration relates back to the date Petitioner was originally sentenced on July 1, 2010. *See Insignar*es, 755 F.3d at 1281; *Romansky*, 933 F.3d at 300. That conclusion is supported by the following facts: (1) the Post-Conviction Court resentenced Petitioner on Counts II, III, and IV *nunc pro tunc* to July 1, 2010, a resentencing that was the

unavoidable consequence of the Amended Judgment on Counts II, III, and IV; and (2) Petitioner's term of imprisonment remained unchanged. *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." (alteration added; citations omitted)). In short, Petitioner was serving a sixty-year term of imprisonment before and after the post-conviction court vacated Count I. Petitioner's Amended Judgment accordingly did not restart the federal limitations period.

As such, the federal limitations period remained tolled in Petitioner's case from the date Petitioner filed her initial Rule 3.850 Motion until the Fourth District issued its Mandate on November 30, 2018, affirming Petitioner's Amended Judgment and the Post-Conviction Court's denial of the Amended Rule 3.850 Motion. *See Green v. McDonough*, No. 8:07CV90T30MAP, 2008 WL 5274320, at *2 (M.D. Fla. Dec. 18, 2008) ("Petitioner's Rule 3.850 motion . . . tolled the limitation period . . . until the appellate court affirmed the denial of the Rule 3.850 motion, and issued its mandate . . . ." (alterations added)).

Before the Fourth District issued its Mandate, Petitioner filed a Motion to Correct Illegal Sentence on November 19, 2018. Petition at 7. Proceedings on this motion tolled the federal limitations period until November 15, 2021, when the Fourth District denied Petitioner's Motion for Rehearing of its affirmance of the post-conviction court's denial of the Motion to Correct Illegal Sentence. *Id.* at 8.

The next time Petitioner filed a pleading that would toll the federal limitations period was on August 22, 2022, when she filed the State Petition. But by the time

Petitioner filed her State Petition, the federal limitations period had expired and, thus, it did not toll the federal limitations period.[2] *See Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) ("A state-court [pleading] . . . that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled." (alterations added)). In any event, the Fourth District dismissed the State Petition as untimely, which means it would not have tolled the federal limitations period even if the State Petition had been filed before the expiration of the limitations period. *See Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005) (holding that a state court post-conviction petition is not "properly filed" within the meaning of § 2244(d)(2) if it is dismissed by the state court as untimely).

On October 10, 2022, Petitioner filed the instant Petition—268 days after the federal limitations period expired. The Petition is, therefore, untimely. Petitioner could overcome this procedural bar by qualifying for either of the equitable exceptions available under 28 U.S.C. § 2254: equitable tolling and actual innocence. While Petitioner does not argue that she is entitled to equitable tolling, she does claim in passing that she is innocent. *See generally* Petition. However, Petitioner fails to present any new evidence establishing her innocence, thus, failing to show actual innocence. *See Schlup v. Delo*, 513 U.S. 298, 316 (1995) ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas

[2] Specifically, the federal limitations period expired on January 15, 2022—the date on which she accumulated 365 days of untolled time. Any filings made after January 15, 2022, would not toll the federal limitations period.

court to reach the merits of a barred claim."). The Petition is, thus, properly dismissed as untimely.

B. Evidentiary Hearing

In a habeas corpus proceeding, the burden is on the petitioner to establish the need for an evidentiary hearing. *See Chavez v. Sec'y, Fla. Dep't of Corrs.*, 647 F.3d 1057, 1060 (11th Cir. 2011). "[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (alteration added). Here, the pertinent facts of the case are fully developed in the record. As explained, Petitioner is time-barred, and thus precluded, from obtaining federal habeas relief. Because the Court can "adequately assess [Petitioner]'s claim[s] without further factual development[,]" Petitioner is not entitled to an evidentiary hearing. *Turner v. Crosby*, 339 F.3d 1247, 1275 (11th Cir. 2003) (alterations added).

C. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying her petition for a writ of habeas corpus has no absolute entitlement to appeal and must obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009). A certificate of appealability shall issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, a district court dismisses a petition based on procedural grounds, a petitioner must further demonstrate that reasonable jurists "would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Given the circuit split identified in this Order, the Court finds that jurists of reason might find the Court's procedural ruling in this case "debatable[.]" *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001) (alteration added). The Court will therefore grant a certificate of appealability on one issue: Did Petitioner's Amended Judgment and Sentence restart the federal limitations period under AEDPA?

III. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. The Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody **ECF No. [1]** is **DISMISSED** as time-barred;

2. A *certificate of appealability* is **GRANTED** on the issue articulated above; and

3. The Clerk of Court is directed to **CLOSE** this case.

DONE AND ORDERED in Chambers at Miami, Florida, on September 20, 2023.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-13367

THERESA BATSON,
Petitioner-Appellant,

v.

FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 2:22-cv-14354-BB

Order of the Court

Before WILLIAM PRYOR, Chief Judge, and LUCK and HULL, Circuit Judges.

PER CURIAM:

Petitioner-Appellant's administrative motion to deem petition for panel rehearing properly filed is DENIED AS MOOT.

The Petition for Panel Rehearing filed by Theresa Batson is DENIED.

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 2244 provides:

§ 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.

(b)(1) A claim presented in a second or successive habeas corpus application under section 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 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.

2. 28 U.S.C. § 2254 provides:

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

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

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim 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.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.