APPENDIX A

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-11094

DANIEL D. STRADER,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:12-cv-01327-MSS-SPF

ORDER:

Daniel Strader moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2254 habeas corpus petition and leave to exceed the page limit in his motion for a COA. Strader's motion for leave to exceed the page limit is GRANTED. This Court has considered the entirety of his motion. His motion for a COA is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Andrew L. Brasher

UNITED STATES CIRCUIT JUDGE

APPENDIX B

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-11094

DANIEL D. STRADER,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:12-cv-01327-MSS-SPF

Before GRANT and BRASHER, Circuit Judges.

BY THE COURT:

Daniel Strader has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 10, 2024, order denying a certificate of appealability in his underlying habeas corpus petition. Upon review, Strader's motion for reconsideration is DENIED. His request to hold the appeal in abeyance for him to exhaust state remedies is likewise DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DANIEL D. STRADER,

Petitioner,

v. **Case No. 8:12-cv-1327-MSS-SPF**

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER

Strader moves, under Rule 59(e), Federal Rules of Civil Procedure, to alter or amend an order dismissing this action as moot. (Doc. 81) Also, he moves for a ruling on his Rule 59(e) motion. (Doc. 83) The Court denied Strader's petition for a writ of habeas corpus challenging the Florida Department of Corrections' cancellation of gain time. (Doc. 14) Strader appealed (Doc. 16), and the court of appeals vacated the order pursuant to *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992), and directed this Court to address whether the prison violated Strader's federal right to due process by retroactively cancelling his gain time. (Doc. 19 at 5)

On remand, this Court stayed and administratively closed this case because Strader returned to state court to seek relief. (Doc. 46) The Court lifted the stay after the state post-conviction proceedings concluded (Doc. 59), and Strader notified the Court that he was released from prison. (Docs. 61 and 63) The Court directed the parties to submit supplemental briefing addressing whether the action was moot. (Doc. 66)

After the parties submitted supplemental briefing, the Court dismissed the action as moot because reinstatement of cancelled gain time would not reduce the length of Strader's confinement. (Doc. 80 at 3–4) Strader, who began serving a probationary sentence, contended that this Court's ruling on the federal due process claim could impact a sentence in the future if he violates the conditions of his probation. (Doc. 78 at 4–5) The Court determined that Strader's speculative allegation of future injury failed to establish a "live" case or controversary that supported subject matter jurisdiction. (Doc. 80 at 5–6)

In his motion to alter or amend, Strader asserts that the action did not become moot because he suffers collateral consequences from the denial of gain time. (Doc. 81 at 6) He contends that the state court violated his federal right to due process by denying him fifteen years of gain time, that the denial of gain time caused him to serve an additional ten years in prison, and that he could have moved to terminate his probation in 2021 if the prison had properly awarded him gain time. (Doc. 81 at 7–8)

"'The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact.'" *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)). "'[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.'" *Arthur*, 500 F.3d at 1343 (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)). For the following reasons, the Court **GRANTS** Strader's Rule 59(e) motion (Doc. 81) and determines that, even if this action is not moot, his federal due process claim fails.

PROCEDURAL HISTORY

A jury found Strader guilty of racketeering, conspiracy to commit racketeering, forty-nine counts of grand theft, fifty-eight counts of sale of unregistered securities, sixty counts of sale of securities by an unregistered dealer, and sixty-one counts of securities fraud. (Doc. 7-1 at 56–57) On August 9, 1995, the trial court sentenced Strader as follows (Doc. 7-1 at 84–85):

Count 1 [Rackteering]	Thirty years Florida State Prison
Count 2 [Racketeering Conspiracy]	Fifteen years Florida State Prison consecutive to Count 1
Count 126 [Grand Theft]	Thirty years Florida State Prison concurrent with Count 1
Count 123 [Sale of Securities by an Unregistered Dealer]	Five years Florida State Prison concurrent with the first five years of the sentence on Count 2
Count 124 [Sale of Unregistered Securities]	Five years Florida State Prison concurrent with Count 2 and consecutive to Count 123
Count 125 [Securities Fraud]	Five years Florida State Prison concurrent with Count 2 and consecutive to Count 124

The foregoing sentences are not co-terminus.

On all other first-degree felony grand theft counts (Counts 6, 74, 138, 146, 226, and 242), twenty-five years of probation consecutive to the last period of incarceration served under Counts 1, 2, 123, 124, 125, and 126.

> On all second-degree felony grand theft [counts], fifteen years of probation concurrent with the probation on the first-degree felony grand theft [counts].
>
> On all third-degree felony grand theft [counts], five years of probation concurrent with [the probation on] the first five years of the first-degree felony grand theft [counts].
>
> On all remaining sales of securities by an unregistered dealer [counts], five years of probation concurrent with the probation on the first-degree felony grand theft [counts] but consecutive to the probation on the third-degree felony grand theft [counts].
>
> On all remaining sales of unregistered securities [counts], five years of probation concurrent with the probation on the first-degree felony grand theft [counts] but consecutive to the probation on the sales of securities by an unregistered dealer [counts].
>
> On all remaining securities fraud counts, five years of probation concurrent with the probation on the first-degree felony grand theft [counts] but consecutive to [the probation on] the sales of unregistered securities [counts].

On September 16, 2005, after conducting an audit, the prison cancelled gain time for the sentences for racketeering and racketeering conspiracy because Strader committed the offenses after January 1, 1994. (Doc. 7-1 at 48–49) Strader petitioned for a writ of mandamus and challenged the prison's cancellation of gain time. The post-conviction court denied Strader's petition as follows (Doc. 7-1 at 109–11) (state record citations omitted):

> [Strader] is an inmate currently in the custody of the Department of Corrections serving an overall term of forty-five years for offenses committed between June 3, 1989, and April 13, 1994. On count one for RICO, he received a thirty-year sentence, less 148 days of jail credit, and on count two for conspiracy to commit RICO, he received a consecutive fifteen-year sentence. The Department received custody of [Strader] on August 22, 1995. The Department initially determined that the offense date for [Strader's] sentences was the date the criminal activity commenced (June 3, 1989) and applied basic gain time to [Strader's] sentences. However, in 1995, the legislature enacted the "Stop Turning Out Prisoners Act" which eliminated the

grant of basic gain time to inmates who committed their offenses after January 1, 1994. See § 944.275(6)(a), Fla. Stat. (1995).[1] On September 16, 2005, the Department re-audited [Strader's] sentence pursuant to the Florida Supreme Court's holding in *Young v. Moore*, 820 So. 2d 901 (Fla. 2002), that the offense date for continuing offenses is the date the criminal activity ceased. Accordingly, the Department determined the offense date for [Strader's] offenses was April 13, 1994, when the criminal activity ceased, and forfeited all basic gain time previously awarded to [Strader]. [Strader] challenges this forfeiture arguing the Department has retroactively cancelled previously earned gain time credits in violation of the Ex Post Facto Clause.

In order to be entitled to a writ of mandamus, the petitioner must have a clear legal right to the performance of the act requested, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available at law. *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000). Therefore, relief cannot be granted unless the Department has a clear legal duty to restore fifteen years of forfeited gain time to [Strader's] sentence. The court finds that [Strader] is not entitled to mandamus relief because the Department properly forfeited his gain time.

In *Young v. Moore*, the Florida Supreme Court determined that for continuing offenses, the offense date is the day the criminal activity ceases completely. The record reflects, and [Strader] does not dispute, that [Strader] ceased his criminal activity on April 13, 1994. At the time of [Strader's] offense, section 944.275(6)(a), Florida Statutes, provided that only inmates whose offenses were committed after July 1, 1978, and before January 1, 1994, were eligible to receive basic gain time. Accordingly, [Strader] was not eligible for basic gain time at the time the Department mistakenly awarded gain time credits because he consummated his crime after the date of eligibility.

[Strader] contends, however, that because the Department is retroactively canceling pre-awarded gain time credits it is

[1] The post-conviction court did not accurately describe the Stop Turning Out Prisoners Act. The act "'added language curtailing the Department of Corrections' discretion to award incentive gain time to prisoners serving sentences imposed for offenses committed on or after October 1, 1995.'" *Young v. Moore*, 820 So. 2d 901, 903 (Fla. 2002) (citation omitted). Effective June 17, 1993, the Safe Streets Initiative of 1994 amended Section 944.275, Florida Statutes, to prohibit basic gain time for an offense committed after January 1, 1994. Ch. 93-406, § 26, Laws of Fla.

> committing an act in violation of the Ex Post Facto Clause. The Florida Supreme Court dealt with a similar situation in *Winkler v. Moore*, 831 So. 2d 63 (Fla. 2002). There, inmate Winkler contested the retroactive cancellation of his already awarded early release credits as a violation of the Ex Post Facto and Due Process Clauses. The Court determined that inmate Winkler had no real entitlement to such credits under the Ex Post Facto Clause and therefore was not entitled to restoration of the forfeited gain time credits. The Court stated:
>
> > [T]he appropriate "event" for ex post facto purposes is the commission of the offense and the rights the offender had on the date he or she committed the offense. That means, for example, that if at the time of the criminal offense, inmate A had a right to receive twenty days per month of gain time and then later the Legislature changed the gain time to five days per month and applied that change retrospectively to inmate A's earlier occurring offense (the relevant "event"), then there would be an ex post facto violation. That did not occur here. . . . [E]ven though he lost credits after receiving them, there is no constitutional violation because he lost something he had no right to receive at the time of his offense — and that is the relevant time-frame for ex post facto purposes.
>
> *Id.* at. 68. (emphasis in original). Therefore, because [Strader] was never entitled to basic gain time at the time of his offense, the Department's cancellation of his already awarded basic gain time credits is not a violation of the Ex Post Facto Clause. *See also Meola v. Dep't Corrs.*, 732 So. 2d 1029, 1033 (Fla. 1998) (explaining that ex post facto entitlement still depends upon what an inmate was eligible for or could have contemplated at the time of the offense).

Strader appealed the order denying relief (Doc. 7-2), and the state appellate court affirmed in a decision without a written opinion. (Doc. 7-6)

After the court of appeals reversed this Court's order and remanded for a ruling on the federal due process claim, Strader returned to state court to challenge the prison's failure to award gain time for his sentences for grand theft (Count 126), sale of unregistered securities

(Count 123), sale of securities by an unregistered dealer (Count 124), and securities fraud (Count 125). The post-conviction court granted Strader relief as follows (Doc. 37-1 at 2–5) (state court record citations omitted):

> [Strader] is an inmate in the custody of the Florida Department of Corrections. On August 9, 1995, [Strader] was sentenced to a term of thirty years for racketeering committed between June 3, 1989 and April 13, 1994 (Count l); fifteen years for conspiracy to commit racketeering committed between June 3, 1989 and April 13, 1994 (Count 2); five years for sale of a security by an unregistered dealer committed at some time between December 6, 1993 and April 13, 1994 (Count 123); five years for sale of unregistered securities committed at some time between December 6, 1993 and April 13, 1994 (Count 124); five years for securities fraud committed at some time between December 6, 1993 and April 13, 1994 (Count 125); and thirty years for grand theft committed at some time between December 6, 1993 and April 13, 1994 (Count 126). The Department originally applied basic gain time to each of the counts. However, the Department later determined that [Strader's] offenses were committed after January 1, 1994, and as a result that [Strader] was not entitled to basic gain time; as such the basic gain time was removed.[1] [Strader] alleges that there is no evidence which shows that the offenses for Counts 123 through 126 were committed after the cut-off date for the award of basic gain time.[2] [Strader], therefore, argues that he is entitled to an award of basic gain time for Counts 123, 124, 125, and 126.
>
> [1] [Strader] has previously litigated his entitlement to basic gain time for Counts 1 and 2, and those counts are not at issue here.
>
> [2] The cut-off date for the award of basic gain time is January 1, 1994. Fla. Stat. § 944.275(6)(a).
>
> In order to be entitled to mandamus relief, the plaintiff must have a clear legal right to the performance of the act requested, the defendant must have an indisputable legal duty to perform the requested action, and the plaintiff must have no other adequate remedy available at law. *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000); *Turner v. Singletary*, 623 So. 2d 537, 538 (Fla. 1st DCA 1993). The legal right asserted must be both clear and certain. *See Fla. League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992). Mandamus may not be used to establish legal rights, but only to

enforce a right already clearly and certainly established. *Id.* at 401.

Gain time entitlement is determined by the laws in effect at the time the offenses were committed. *State v. Lancaster*, 731 So. 2d 1227, 1229 (Fla. 1998); *see Winkler v. Moore*, 831 So. 2d 63, 66 (Fla. 2002). There are two definitions of the offense date. The first definition is when all the elements are completed, and applies to all crimes because a crime is not committed until each element has been completed. The second definition is for a continuing offense, which is committed when the criminal activity ceases. "An offense is committed either when every element has occurred or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed." Fla. Stat. § 775.15(3) (2017). Basic gain time is available only for offenses committed between July 1, 1978 and January 1, 1994. Fla. Stat. § 944.275(6)(a).

The applicable sentencing guideline is also determined by the date of the offense. *See Logan v. State*, 921 So. 2d 556 (Fla. 2005).

When no specific finding is made as to the offense date of a non-continuing felony and sentencing laws change, the defendant should be sentenced under the more lenient version of the guidelines. *Cairl v. State*, 833 So. 2d 312 (Fla. 2d DCA 2003) ("when sentencing laws change during a period in which a defendant is alleged to have committed an offense, the defendant should be sentenced under the more lenient version of the guidelines"); *State v. Griffith*, 675 So. 2d 911 (Fla. 1996). Similarly, when the offense date cannot be determined the more lenient version of the gain time statutes will be applied.

None of the counts now before the court involve a continuing offense. Count 123 is the sale of a security by an unregistered dealer as prohibited by Fla. Stat. § 517.021, and concerns [Strader's] sale or offer to sell an investment contract to a specific individual. Count 124 is the sale of an unregistered security as prohibited by Fla. Stat. § 517.07, and concerns [Strader's] sale or offer to sell an investment contract to a specific individual. Count 125 is securities fraud as prohibited by Fla. Stat. § 517.301, and concerns [Strader's] untrue statement of a material fact or an omission to state a necessary material fact in connection with an offer to sell a security to a specific individual. *Id.* Count 126 is grand theft as prohibited by Fla. Stat. § 812.014, and concerns

> [Strader's] unlawful receipt of property from a specific individual.
>
> [The Department] contends that the sentencing order from the sentencing court supports its position that Counts 123 to 126 were committed after January 1, 1994. However, this Court has not been presented with any evidence which definitively establishes the date of offense for Counts 123 to 126. The sentencing court expressly chose to sentence Counts 123 through 126 under the pre-1994 sentencing guidelines. The sentencing court had the option to sentence [Strader] under the 1994 sentencing guidelines, but specifically chose to apply the pre-1994 sentencing guidelines to Counts 123 to 126. Furthermore, when given the option to designate Counts 123 to 126 as a continuing criminal enterprise along with Count 1 (racketeering), the sentencing court chose not to do so. While [the Department] has persuasively argued that [Strader] engaged in an escalating pattern of criminal behavior, no evidence was presented to this Court which demonstrates that the specific offenses alleged in Counts 123, 124, 125, and 126 were committed after January 1, 1994. Therefore, because the sentencing court chose to apply the pre-1994 sentencing guidelines and chose not to designate Counts 123 to 126 as a continuing criminal enterprise, this Court finds that there is no persuasive evidence to believe that these offenses occurred after January 1, 1994.
>
> This Court finds that [Strader] is entitled to mandamus relief to compel the [the Department] to apply basic gain time, Fla. Stat. § 944.275(6)(a) (2017), to Counts 123, 124, 125, and 126 of [Strader's] sentence. [Strader] has demonstrated a clear legal right to the application of basic gain time to his sentences for Counts 123, 124, 125, and 126. [The Department] has not demonstrated that the statute in question provides any discretion to the [the Department] in the determination of which gain time statute to apply.

This Court directed the Respondent to advise whether the post-conviction court's order granting relief caused this action to become moot. (Doc. 38) The Respondent advised that this action did not become moot because the order granting relief did not impact the cancellation of gain time for the racketeering and racketeering conspiracy convictions. (Doc. 42 at 4) Because Strader served the sentences for grand theft, sale of unregistered securities,

sale of securities by an unregistered dealer, and securities fraud concurrently with the sentences for racketeering and racketeering conspiracy (Doc. 7-1 at 84), the order granting relief did not impact Strader's release date. (Doc. 42 at 4–5)

Because Strader notified the Court that he sought additional relief in state court for the sentences for racketeering and racketeering conspiracy, the Court stayed and administratively closed this case until the state court proceedings concluded. (Doc. 46) The post-conviction court denied additional relief as follows (Doc. 60-2 at 130–33) (state court record citations omitted):

> The general principle behind the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated, issue. *Gordon v. Gordon*, 59 So. 2d 40, 43 (Fla. 1952); *Faverbo v. Cochran*, 128 So. 2d 884 (Fla. 1961); *Moat v. Mayo*, 82 So. 2d 591 (Fla. 1955).
>
> To trigger the doctrine of res judicata, several conditions must occur simultaneously: (a) identity of the thing sued for; (b) identity of the cause of action; (c) identity of parties; and (d) identity of the quality in the person for or against whom the claim is made. *See Donahue v. Davis*, 68 So. 2d 163, 169 (Fla. 1953); *Caron v. Systematic Air Servs.*, 576 So. 2d 372 (Fla. 1st DCA 1991). The determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions. *Gordon*, 59 So. 2d at 43–44.
>
> The principle of collateral estoppel prevents raising the same issue in a successive proceeding. *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003). Further, the doctrine prohibits not only re-litigation of claims raised but also claims that could have been raised in a prior action. *Id.* Raising issues that have already been heard, considered, and rejected constitutes an abuse of process. *Isley v. State*, 652 So. 2d 409, 410–11 (Fla. 5th DCA 1995); *Thompson v. State*, 865 So. 2d 687 (Fla. 5th DCA 2004). Successive petitions seeking the same relief previously considered and rejected are not properly entertained by the courts and are subject to summary denial. *Phillips v. State*, 894 So. 2d 28, 42 (Fla. 2004) ("Successive habeas corpus petitions seeking the same relief are not permitted nor can new claims be

raised in a second petition when the circumstances upon which they are based were known or should have been known at the time the prior petition was filed.") (internal citations omitted); *Card v. Dugger*, 512 So. 2d 829 (Fla. 1987); *see Francois v. Wainwright*, 470 So. 2d 685 (Fla. 1985). Dismissal of successive petitions is necessary to protect the judiciary and public from litigants who abuse the process by attempting to re-litigate identical claims in successive proceedings.

Here, [Strader's] claim is successive and barred by the doctrines of res judicata and collateral estoppel and should be dismissed. In Leon County Case No. 2010-CA-2753, [Strader] claimed he was eligible for basic gain time on Counts 1 and 2. The Court denied the claim on the merits, and the First DCA denied it on review. In the present case, [Strader] is again claiming that he is eligible for basic gain time on Counts 1 and 2 based on the offense date.

Res judicata and collateral estoppel bar successive litigation of the same claims. *See Topps v. State*, 865 So. 2d 1253 (Fla. 2004).

> Res judicata (or claim preclusion) . . . bars re-litigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised. The idea underlying res judicata is that if a matter has already been decided, the petitioner has already had his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined again in any court (except, of course, for appeals by right). The doctrine of res judicata applies when four identities are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made.
>
> . . .
>
> [A] ruling must be "on the merits" for an issue to have truly been "decided" and thus preclude the consideration of an issue on the basis of res judicata.

Topps, 865 So. 2d at 1255 (internal citations omitted).

The more limited doctrine of collateral estoppel (or issue preclusion) bars re-litigation of "the same issues between the same parties in connection with a different cause of action." *Topps*, 865 So. 2d at 1255; *Card v. Dugger*, 512 So. 2d 829, 830–31 (Fla. 1987) (finding successive habeas corpus petitions for the same relief are not cognizable and may be summarily dismissed).

Based on the identity of the parties, the claim raised, and the relief sought in both the 2010 case and the present case, res judicata and collateral estoppel operate to bar the issue as raised in the instant petition. There has been no newly discovered evidence or case law that would entitle [Strader] to re-litigate this issue.

While the Court need not reach the merits of this claim, it should be noted that [Strader's] effort to overcome res judicata by piecing together bits of a 2016 order from Leon County Case No. 2016-CA-704 with bits of RICO law does not logically or legally establish a claim for relief.

First, the 2016 order only addresses Counts 123 to 126 and expressly states that Counts 1 and 2 were previously litigated in the 2010 case. Therefore, nothing in the 2016 order disrupts the 2010 ruling denying the gain time claim as to Counts 1 and 2.

Second, [Strader's] sentences for Counts 123 to 126 are non-continuing offenses that had to be charged over a span of time due to uncertainty about the actual dates the crimes were committed. Because that span covered more than one version of the gain time statute and there was no evidence to determine the actual dates, the rule of lenity was invoked to establish his offense date as being within the range that allows the most advantageous version of the gain time statute to apply. The rule does not purport to find an actual offense date based on facts. To the contrary, it is a remedy relied upon in the absence of facts.

By contrast, RICO offenses are, by definition, continuing, on-going criminal enterprises charged over a span of time beginning with the date the criminal activity commenced and ending on the date the criminal activity ceased. The law is clear that the offense date in a RICO case is the ending date. Accordingly, the offense dates in [Strader's] RICO cases are not in doubt for purposes of gain time applicability. In the 2016 case, the rule of lenity had to be invoked as to Counts 123 to 126 in order to resolve an ambiguity due to an absence of facts on the

> non-continuing offenses. That case did not establish an actual offense date or find any new facts that cross over to the continuing offenses for which an offense date is certain.
>
> [Strader's] attempt to use the 2016 order that established the offense date on the non-continuing offenses to conclude that the same goes for Counts 1 and 2 is unavailing. [Strader's] petition is procedurally barred by the legal principles of res judicata and collateral estoppel.

Strader appealed the order denying relief (Doc. 60-3 at 38–74), and the state appellate court affirmed in a decision without a written opinion. (Doc. 60-3 at 119) This Court lifted the stay for this action to proceed. (Doc. 59)

STANDARD OF REVIEW

AEDPA

Because Strader filed his federal petition after the enactment of the Antiterrorism and Effective Death Penalty Act, AEDPA governs his claims. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). AEDPA amended 28 U.S.C. § 2254(d) to require:

> 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.

A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the U.S. Supreme Court] on a question of law

or if the state court decides a case differently than [the U.S. Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). A decision involves an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [the U.S. Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. Clearly established federal law refers to the holding of an opinion by the U.S. Supreme Court at the time of the relevant state court decision. *Williams*, 529 U.S. at 412.

"[AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). A federal petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

The state appellate court denied Strader relief in a decision without a written opinion. (Docs. 7-6 and 60-3 at 119) A federal court "'look[s] through' the unexplained decision to the last related state-court decision that does provide a relevant rationale [and] presume[s] that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

Exhaustion and Procedural Default

A petitioner must exhaust the remedies available in state court before a federal court can grant relief on habeas. 28 U.S.C. § 2254(b)(1)(A). The petitioner must

(1) alert the state court to the federal nature of his claim and (2) give the state court one full opportunity to resolve the federal claim by invoking one complete round of the state's established appellate review process. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Picard v. Connor*, 404 U.S. 270, 278 (1971). The state court must have the first opportunity to review and correct any alleged violation of a federal right. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

A federal court may stay — or dismiss without prejudice — a habeas case to allow a petitioner to return to state court to exhaust a claim. *Rhines v. Weber*, 544 U.S. 269 (2005); *Rose v. Lundy*, 455 U.S. 509 (1982). If the state court would deny the claim on a state procedural ground, the federal court instead denies the claim as procedurally defaulted. *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998) (citing *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991)).

To excuse a procedural default on federal habeas, a petitioner must demonstrate either (1) cause for the default and actual prejudice from the alleged violation of federal law or (2) a miscarriage of justice. *Maples v. Thomas*, 565 U.S. 266, 280 (2012); *House v. Bell*, 547 U.S. 518, 536–37 (2006).

MERITS

Due Process Claim

Strader asserts that the Florida Department of Corrections violated his federal rights by "forfeit[ing]" or "retroactively cancell[ing]" basic gain time during the "re-audit." (Doc. 1 at 8) In his petition, Strader contends that he held a "liberty interest" in the cancelled basic gain time credit (Doc. 1 at 9):

> [I]t should go without saying that Strader had a "liberty interest" in all of his gain time — including the basic gain time credits he was correctly awarded back in 1995 pursuant to the Department's then-long-standing internal policy with regard to

> gain time for "continuing offenses" — under the Fourteenth Amendment to the U.S. Constitution and *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

The court of appeals construed this paragraph in Strader's petition as raising a federal due process claim (Doc. 19 at 7):

> Here, we conclude that the district court violated *Clisby* by failing to address [Strader's] claim that the FDOC's cancellation of his basic gain time credit violated his due process rights. In his § 2254 petition, [Strader] stated that he had a "liberty interest" in his basic gain time credit under the Fourteenth Amendment and the Supreme Court's decision in *Wolff*. Although [Strader] did not explicitly state that he was raising a due process claim — as he did with his claims under the Equal Protection and Ex Post Facto Clauses — construing his petition liberally, his statement adequately presented a claim that the cancellation of his basic gain time credits violated his due process rights. *See Dupree*, 715 F.3d at 1299; *see also Wolff*, 418 U.S. at 542–43, 553–58 (considering a due process challenge to prison disciplinary proceedings for loss of gain time credit raised in a 42 U.S.C. § 1983 complaint); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (referring to the "liberty" language of the Fourteenth Amendment's Due Process Clause).

Wolff, 418 U.S. at 543, addressed whether prison disciplinary proceedings complied with procedural due process under the Fourteenth Amendment. *Wolff*, 418 U.S. at 557, held that a prisoner is entitled to the protection of procedural due process in prison disciplinary proceedings because the state legislature created a right to gain time and authorized the deprivation of gain time as a sanction for misconduct:

> [T]he State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Wolff, 418 U.S. at 563–69, identified procedures that a prison must follow to afford a prisoner who faces disciplinary proceedings adequate process.

Because *Wolff* addresses the right to procedural due process and Strader contends that he held a "liberty interest" in his gain time under *Wolff* and the Fourteenth Amendment, the Court construes Strader's petition as asserting that the prison violated his federal right to procedural due process by cancelling his gain time. (Doc. 23 at 14–18)

The Respondent does not address whether Strader exhausted the claim. (Doc. 29) In his state petition and brief on post-conviction appeal, Strader presented the same argument based on *Wolff* and the Fourteenth Amendment. (Docs. 7-1 at 13 and 7-2 at 13) Consequently, Strader fairly presented the federal due process claim to the state court. *Boerckel*, 526 U.S. at 845; *Picard*, 404 U.S. at 278.

However, the post-conviction court failed to address the claim. (Doc. 7-1 at 109–11) "When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits — but that presumption can in some limited circumstances be rebutted." *Johnson v. Williams*, 568 U.S. 289, 301 (2013). The Respondent did not address the federal due process claim in its response to Strader's state petition (Doc. 7-1 at 30–46) or in its brief on post-conviction appeal. (Doc. 7-4) When reviewing a nearly identical claim based on *Wolff* and the Fourteenth Amendment, this Court overlooked the federal due process claim. Consequently, the Court determines that the post-conviction court and the state appellate court overlooked the claim and that Strader is entitled to *de novo* review of the claim. *Bester v. Warden*, 836 F.3d 1331, 1337 (11th Cir. 2016) ("In the terms of the *Johnson* decision, the state trial court 'inadvertently overlooked' the actual claim, failing to rule on the merits of it. We therefore must decide the claim *de novo*.") (citing

Johnson, 568 U.S. at 301–02). *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) ("Courts can [ ] deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review.").

However, even under *de novo* review, Strader's federal due process claim fails. "[A court] examine[s] procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't Corrs. v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted). "[A]n individual claiming a protected interest must have a legitimate claim of entitlement to it." *Thompson*, 490 U.S. at 460. "Protected liberty interests 'may arise from two sources — the Due Process Clause itself and the laws of the States.'" *Thompson*, 490 U.S. at 460.

The post-conviction court determined that "the record reflect[ed], and [Strader] did not dispute, that [Strader] ceased his criminal activity on April 13, 1994," and "[a]t the time of [Strader's] offense, section 944.275(6)(a), Florida Statutes, provided that only inmates whose offenses were committed after July 1, 1978, and before January 1, 1994, were eligible to receive basic gain time." (Doc. 7-1 at 110) Whether a state statute granted the award of gain time for racketeering and racketeering conspiracy offenses is an issue of state law, and a state court's interpretation of state law receives deference in federal court. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Branan v. Booth*, 861 F.2d 1507, 1508

(11th Cir. 1988) ("[F]ederal courts cannot review a state's alleged failure to adhere to its own sentencing procedures.").

The information charged Strader with engaging in racketeering and conspiring to engage in racketeering between June 3, 1989, and April 13, 1994. (Doc. 87-1 at 23, 27–28) The jury found Strader guilty of both counts. (Doc. 87-2 at 2) Under Florida law, because racketeering and racketeering conspiracy are continuing offenses, the statute in effect when the criminal activity ceases controls. *Shurman v. Moore*, 783 So. 2d 1086, 1087 (Fla. 1st DCA 2001); *Jenkins v. State*, 444 So. 2d 1108, 1109 (Fla. 1st DCA 1984). Effective June 17, 1993, the Florida legislature amended Section 944.275, Florida Statutes, to prohibit the award of gain time for an offense committed after January 1, 1994. *See* Ch. 93-406, § 26, Laws of Fla.; § 944.275(6)(a), Fla. Stat. (1994) ("Basic gain time under this section shall be computed on and applied to all sentences imposed for offenses committed on or after July 1, 1978, and before January 1, 1994."). Because the criminal activity for the racketeering and racketeering conspiracy counts ceased on April 13, 1994, Strader was not entitled to basic gain time.

Because the prison initially erroneously awarded Strader gain time, Strader lacked a liberty interest in the gain time that could be protected by the Fourteenth Amendment's due process clause. Consequently, the prison did not violate Strader's federal right to procedural due process by cancelling the improvidently awarded gain time without notice, a hearing, and other process. *Stephens v. Thomas*, 19 F.3d 498, 501 (10th Cir. 1994) ("A state inmate's due process rights are implicated only when a state's actions impinge on a protected liberty interest. At the time of Mr. Stephens' conviction, a prisoner serving a life term possessed no such interest in good time credits during the first ten years of his sentence. The state's previous practice of misapplying the law does not change this.") (citing *Vitek v. Jones*, 445 U.S. 480,

488–90 (1980) and *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981)). *Rhodes v. Thaler*, 713 F.3d 264, 267 (5th Cir. 2013) ("Rhodes is entitled to federal habeas relief only if he was deprived of street-time credit without due process. Because he had no protected liberty interest in the street-time credit that he claims to have accrued, his due-process right was not violated.").

Strader argues that the prison violated his federal rights by retroactively applying *Young* to deny him gain time. (Doc. 1 at 8–9) However, as the Court's earlier order explained, because Strader's continuing offenses did not cease until after the enactment of the statute prohibiting gain time, the prison did not retroactively apply the statute (Doc. 14 at 8–10):

> When he was imprisoned in August, 1995, Strader was accruing basic gain time because the [the prison] was erroneously interpreting the basic gain time statute as permitting the accrual of gain time based on when the continuing offense commenced rather than when it concluded. Seven years later *Young v. Moore*, 820 So. 2d 901, 903 n.4 (Fla. 2002), instructed the [prison] that, if a continuing offense is involved, the "last overt act committed in furtherance of the scheme to defraud [is the] date [that] should be considered the date the offense was finally consummated or committed." *See also State v. Reyan*, 145 So. 3d 133, 139–40 (Fla. 3d DCA 2014) ("In a RICO conspiracy, therefore, the limitations period does not commence until the objectives of the conspiracy are accomplished or abandoned."), and Section 775.15(3), Florida Statutes[2] (establishing the commencement of the statute of limitation "when the course of conduct or the defendant's complicity therein is terminated"). As a consequence of Young, the [prison] began reviewing thousands of inmate records to rescind basic gain time that the [prison] had awarded erroneously, and, as a result of that review process, the [prison] rescinded Strader's basic gain time on September 15, 2005.[3]
>
> [2]Re-numbered as § 775.15(4), by Chapter 2004-94, eff. July 1, 2004.
>
> [3] The [prison] explained this laborious process in the response (Doc. 7 at 2 n.3):

> All inmates with continuing offenses are being re-audited to comply with the Florida Supreme Court's decision in *Young v. Moore*, 820 So. 2d 901 (Fla. 2002) (the offense date for continuing offenses is the date the criminal activity ceased). In order to determine proper gain time awards for continuing offenses with dates that span more than one version/year of the gain time statutes, the Department must often obtain the transcripts of the criminal proceedings and carefully review all information. This type of review is labor-intensive and the Department has yet to complete review of all inmates in its custody. Thus, re-auditing of inmates' sentence structures continues, and changes to gain time awards can come at any time. Inmates are not "singled out" to be reviewed, but rather, all inmates are being reviewed, one after another and changes are made when errors are found. Nonetheless, not all errors are found at the same time and thus, inmates subject to change are not all advised at the same time.
>
> . . .
>
> Under *Young*, the controlling date is when the "last overt act is committed." Because his "continuing offense" did not cease until after the basic gain time statute was changed, the revised statute is not being applied retroactively to Strader. *Lynce v. Mathis*, 519 U.S. 433 (1997), [ ] is the Supreme Court decision that governs this action. Strader, like Kenneth Lynce, has no legal entitlement to accrue basic gain time, and the only reason a gain time issue exists is because the [the prison] erroneously credited him basic gain time that he was not legally entitled to accrue. Strader acquires no legally enforceable right based on a [prison] error. *See, e.g., Little v. Holder*, 396 F. 3d 1319 (11th Cir. 2005) (denying credit toward a prison sentence for time erroneously spent at liberty due to the U.S. Marshal's negligent failure to lodge a detainer with state officials).

Strader cites *Cairl v. State*, 833 So. 2d 312 (Fla. 2d DCA 2003), to argue that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), required that a jury find beyond a reasonable doubt the date when the criminal activity of the racketeering and racketeering conspiracy offenses

ceased. (Doc. 23 at 26–30) The state appellate court affirmed Strader's convictions and sentences on October 18, 1996 (Doc. 7-1 at 84–86), and *Apprendi* issued in 2000. *Strader v. State*, 684 So. 2d 1364 (Fla. 2d DCA 1996). *Apprendi* does not retroactively apply to Strader's case. *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001) ("[T]he new constitutional rule of criminal procedure announced in *Apprendi* does not apply retroactively on collateral review."). Also, because the denial of gain time does not increase the statutory maximum of a sentence for an offense, *Apprendi* does not entitle Strader to relief. *Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

Lastly, in *Cairl*, a jury found the defendant guilty of fondling a child under the age of sixteen and committing a lewd and lascivious act in the presence of a child under the age of sixteen. *Cairl*, 833 So. 2d at 312. The information charged the defendant with committing the offenses between 1991 and 1997, when three different sentencing guideline regimes applied. *Cairl*, 833 So. 2d at 313. *Cairl*, 833 So. 2d at 314, held that the rule of lenity required the application of the most lenient sentencing guideline regime because neither offense was a "true continuing offense," and the jury did not determine when either offense occurred. Because racketeering and racketeering conspiracy are continuing offenses, *Cairl* does not apply. *Gross v. State*, 820 So. 2d 1043, 1045–46 (Fla. 4th DCA 2002).

Even if Strader had a protected liberty interest in the gain time, the prison afforded Strader sufficient process. After the prison cancelled Strader's gain time, Strader filed an administrative grievance with the prison. (Doc. 7-1 at 15) A prison official denied the grievance with an explanation and advised Strader that he could appeal (Doc. 7-1 at 16),

Strader appealed, (Doc. 7-1 at 17), and another prison official affirmed with additional reasons for the denial. (Doc. 7-1 at 18) Strader petitioned the post-conviction court for relief (Doc. 7-1 at 7–14), the post-conviction court denied relief after reviewing the relevant record (Doc. 7-1 at 109–12), Strader appealed (Doc. 7-2), and the state appellate court affirmed. (Doc. 7-6) Twice more, Strader sought relief from the prison and the state courts. (Docs. 44-1 at 5–19, 20–24) The post-conviction court granted Strader's second petition for relief. (Doc. 44-1 at 20–24) Because both the prison and state court afforded Strader an adequate and fair review of the merits of his claims, Strader fails to demonstrate a violation of his right to procedural due process.

Strader cites *Wolff* and *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445 (1985), to argue that the prison should have provided advanced written notice, an opportunity to present evidence, and a written statement by a factfinder identifying evidence that supports the cancellation of gain time and providing reasons for the cancellation. (Doc. 23 at 14–18) Unlike the prisoners in *Wolff* and *Hill*, Strader did not suffer the loss of properly awarded gain time as a sanction for misconduct. Here, the prison miscalculated the award of gain time and corrected the miscalculation during an audit. Consequently, neither *Wolff* nor *Hill* applies.

When Strader was released from prison, he was finished serving his sentences for racketeering and racketeering conspiracy. (Doc. 7-1 at 84) The sentences for racketeering and racketeering conspiracy do not include a term of probation. (Doc. 7-1 at 84) Strader is presently serving sentences of probation for forty-eight counts of grand theft, fifty-seven counts of sale of unregistered securities, fifty-nine counts of sale of securities by an unregistered dealer, and sixty counts of securities fraud. (Doc. 7-1 at 84) If Strader violates a condition of his probation and the trial court revokes his probation, the trial court may

"impose any sentence which it might have originally imposed before placing [Strader] on probation." § 948.06(2)(b), (e), Fla. Stat. If Strader returns to prison, a prison official will determine whether Strader should receive gain time for the new sentences. If the prison determines that Strader is not entitled to gain time for the new sentences, Strader may exhaust his remedies with prison officials and seek relief in state and federal court.

Accordingly, Strader's motion (Doc. 81) to alter or amend is **GRANTED**, and the federal due process claim (Doc. 1 at 9) is **DENIED**. A certificate of appealability and leave to appeal *in forma pauperis* are **DENIED**. 28 U.S.C. § 2253(c)(2). *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

DONE AND ORDERED in Tampa, Florida on March 11, 2024.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

DANIEL STRADER,
Defendant,

v. Case No.: CF94-02235A1-XX

STATE OF FLORIDA,
Plaintiff,

_____/

MOTION FOR CLARIFICATION

COMES NOW the Defendant, Daniel Strader, through undersigned counsel, and as a result of a pending Certificate of Appealability being filed in the Eleventh Circuit Court of Appeal, hereby files this motion seeking clarification as to the "last overt acts" committed in furtherance of Count One (1) Rico and Count Two (2) Rico Conspiracy in the above case. In support of this Motion, the Defendant would show as follows:

1. On August 9, 1995, the Defendant was sentenced in the above case by this Court, which consisted of forty-five (45) years Florida Department of Corrections followed by a consecutive twenty-five (25) years of probation.
2. During the August 9, 1995 sentencing hearing, this Court stated that it anticipated that the Defendant would serve "At least 40% of his sentence for pre-1994 crimes" which encompassed Counts One (1) and Two (2) and which were sentenced under the pre-1994 guidelines. See (Exhibit 1 – August 9, 1995 Sentencing Order).
3. Upon intake into the Florida Department of Corrections, the Defendant was awarded basic gain time for Count Once (1) Rico and Count Two (2) Rico Conspiracy as these offenses were pre-1994 offenses and sentenced as such. The significance of Basic Gain Time is outlined within *Singletary v. Jones*, 681 So. 2d 836, 837 (Fla. 1st DCA 1996) ("[I]nmates receive a lump sum award of all basic gain time to which they may be

entitled throughout the full term of their sentences upon entering the prison system.")

4. Both offenses of RICO and RICO Conspiracy are deemed to be "continuing offenses" as a matter of law as they consist of a "systematic ongoing course of conduct". See *Young v. Moore*, 820 So. 2d 901 [Fn. 4] (Fla. 2002) ("The language of that criminal statute describes the offense as a "systematic ongoing course of conduct" and thus, this explicit language satisfies the Toussie requirement that the statute describe the nature of the crime such that it is clear that the Legislature intended that it be treated as a continuing one.") citing *Toussie v. United States*, 397 U.S. 112, 25 L. Ed. 2d 156, 90 S. Ct. 858 (1970):

> The "continuing offense" is hardly a stranger to American jurisprudence. The concept has been extended to embrace such crimes as embezzlement, conspiracy, bigamy, nuisance, failure to provide support, repeated failure to file reports, failure to register under the Alien Registration Act, failure to notify the local board of a change in address, and, until today, failure to register for the draft.

See also *Gross v. State*, 820 So. 2d 1043 (Fla. 4th DCA 2002) (affirming trial court's decision, in case involving ongoing criminal enterprise under RICO, to apply sentencing guidelines in effect at the beginning, rather than the end, of the continuing criminal activity).

5. During the Defendant's prison sentence, the Florida Supreme Court issued their decision in *Young v. Moore*, 820 So. 2d 901 (Fla. 2002). The Court ruled that the "last overt acts committed in furtherance of" a continuing offense "should be considered the date the offense was finally consummated or committed". Id. at [Fn. 4].

6. As a result of the Florida Department of Corrections analysis of *Young v. Moore*, 820 So. 2d 901 (Fla. 2002) the Department audited the Defendant's sentence and found that since the Charging Information reflects an end date of April of 1994, this must be the

date the offenses were committed and therefore the Defendant was not entitled to basic gain time revoking fifteen (15) years of basic gain time. Florida Statute 944.275(6)(a), provides that only inmates whose offenses were committed after July 1, 1978, and before January 1, 1994, were eligible to receive basic gain time and since the Information reflected an end date of April 1994, Defendant was not entitled to basic gain time.

7. The Defendant was never given notification by FDOC that his gain time was revoked and therefore filed a grievance when he discovered this fact. Pertinent to the issue pending in the Federal Court's the Defendant argued that he was denied due process of law when FDOC revoked the fifteen (15) years of basic gain time without advising him or giving Defendant an opportunity to contest FDOC's analysis of *Young v. Moore*, 820 So. 2d 901 (Fla. 2002).

8. The litigation began in 2010 with the FDOC grievance process and was pursued via Writ of Habeas Corpus all the way to the United States District Court, Middle District of Tampa. See *Strader v. Secretary, Sec'y, Department of Corrections,* 8:12-cv-1327-MSS-SPF. The Middle District of Florida denied the Defendant's Habeas Corpus petition on September 25, 2014. See *Strader v. Secretary, Sec'y, Department of Corrections,* 8:12-cv-1327-MSS-SPF. The Defendant Appealed the Denial to the Eleventh Circuit Court of Appeals who ultimately reversed the Middle District's denial with directions to answer the Defendant's claim regarding a due process violation. See *Strader v. Sec'y, Fla. Dep't of Corr.*, 634 Fed. Appx. 270 (11th Cir. 2015) ("Here, we conclude that the district court violated Clisby by failing to address Petitioner's claim that the FDOC's cancellation of his basic gain-time violated his due process rights.... Because the district court did not resolve this claim, it erred under Clisby. See Clisby, 960 F.2d at 936.

Accordingly, we vacate the judgment without prejudice and remand the case to the district court to consider Petitioner's due process claim.")

9. The Defendant filed supplemental briefing in the United States Middle District and asserted due process violations including the fact that the dates reflected within the Charging Information were not definitive as to what the "last overt act in furtherance of the crime" was, as required by *Young v. Moore*, 820 So. 2d 901 (Fla. 2002). The United States Middle District dismissed the Defendant's pleadings as moot when the Defendant was released from the Florida Department of Corrections rendering a writ of habeas corpus no longer required as Defendant was no longer in custody. See *Strader v. Sec'y, Dep't of Corr.*, 2023 U.S. Dist. LEXIS 102805 (M.D. Fla., June 13, 2023).
10. On June 22, 2023, the Defendant filed a Motion to Alter and Amend Judgment (Rehearing) and outlined the fact that since the Defendant was still serving twenty-five (25) years of probation and the basic gain time question resolved favorably to him would have caused Defendant to be released (10) years earlier, to begin his probationary term, the petition cannot be considered moot.
11. On March 11, 2024, the United States Middle District granted the Defendant's Motion to Alter or Amend Judgment (Rehearing), vacated the previous dismissal and entered an order on the merits of the Defendant's due process claim. See *Strader v. Sec'y, Dep't of Corr.*, 2023 U.S. Dist. LEXIS 102805 (M.D. Fla., March 11, 2024). The District Court in denying the Motion to Alter or Amend failed to answer the question as to what the "last overt act in furtherance of the crime" was as required by *Young v. Moore,* 820 So. 2d 901 (Fla. 2002) and per mandate from the Eleventh Circuit Court of Appeal. See *Strader v. Sec'y, Fla. Dep't of Corr.*, 634 Fed. Appx. 270 (11th Cir. 2015) ("Whether

the district court committed error in violation of *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (en banc), by failing to address [Petitioner's] claim that the [FDOC] violated the Due Process Clause of the U.S. Constitution when it retroactively cancelled his basic gain-time based on the Florida Supreme Court opinion *Young v. Moore*, 820 So. 2d 901, 903 [Fn.4] (Fla. 2002)).

12. The Defendant is currently seeking a Certificate of Appealability from the Eleventh Circuit Court of Appeal based on the 2024 opinion from the United States District Court, Middle District of Tampa in *Strader v. Secretary, Department of Corrections*, Case No. 8:12-cv-1327-MSS-SPF issued March 11, 2024.

13. The ruling of this Court on the issue being presented within this Clarification Motion is germane to a factual issue that will be asserted on appeal to the Eleventh Circuit Court of Appeal and therefore this Court should resolve issues of fact as such is within its purview. Appellate Courts at both the State and Federal level defer to the factual findings made by the trial court regarding the facts of a case. See *Melton v. State*, 193 So. 3d 881 (Fla. 2016) ("An appellate court defers to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence...") *Carrier v. Sec'y, Dep't of Corr.*, 2023 U.S. Dist. LEXIS 225333 (M.D. Fla. 2023) ("The factual findings of the state court, including the credibility findings, are presumed to be correct.") citing *Rolling v. Crosby*, 438 F.3d 1296, 1301 (11th Cir. 2006).

14. The Defendant is therefore requesting this Court to make a factual determination and clarification as to which Counts in the Defendant's case are deemed to be the "last overt acts" in furtherance of Count One (1) Rico and Count Two (2) Rico Conspiracy. The Defendant contends that Counts (123-126) are the last overt acts in furtherance of Count

One (1) Rico and Count Two (2) Rico Conspiracy. The United States Supreme Court has found that it is proper to give the state court the initial opportunity to pass on a defendant's allegations. See *Mabry v. Klimas* 448 U.S. 444, 100 S. Ct. 2755, 65 L. Ed. 2d 897, 1980 U.S. LEXIS 149 (1980) ("Thus, the court held that the district court was correct in "staying its hand" to give the state court the initial opportunity to pass on defendant's allegations.")

CLAIM:

COUNTS 123-126 ARE THE LAST OVERT ACTS IN FURTHERANCE OF COUNTS (1) AND (2)

As the Defendant outlined above, both the offenses of RICO and RICO Conspiracy are deemed to be "continuing offenses" as a matter of law as they consist of a "systematic ongoing course of conduct" i.e., criminal enterprise. See *Young v. Moore*, 820 So. 2d 901 [Fn. 4] (Fla. 2002). The Defendant now must call on this Court to clarify which of the Defendant's underlying offenses were the last overt acts in furtherance of RICO and RICO Conspiracy. The Defendant contends that Counts 123-126 were the last overt acts in furtherance of RICO and RICO Conspiracy as these were the last offenses charged by the State.

In this case, a jury found the Defendant guilty of racketeering, conspiracy to commit racketeering, forty-nine (49) counts of grand theft, fifty-eight (58) counts of sale of unregistered securities, sixty counts (60) of sale of securities by an unregistered dealer, and sixty-one (61) counts of securities fraud. Specifically, as to Count One Hundred and Twenty-Three (123) Sale of Securities by an Unregistered Dealer, Count One Hundred and Twenty-Four (124) Sale of Unregistered Securities, Count One Hundred and Twenty-Five (125) Securities Fraud, and Count One Hundred Twenty-Six (126) Grand Theft, the State alleged these offenses occurred between the "*6th day of December, 1993*, and the 13th day of April, 1994". See (Exhibit 2 – Second

Amended Charging Information)(emphasis added). None of the remaining counts for which the jury found the Defendant guilty were alleged to have occurred after the *6th day of December, 1993*. See (Exhibit 2 – Second Amended Charging Information)(emphasis added).

In light of the above facts, the Defendant contends that the only counts that could factually be considered the "last overt acts in furtherance of" RICO and RICO Conspiracy are Counts (123) - (126). The jury in this case was never asked to determine when the criminal enterprise ceased nor were they ever asked to determine which predicate offenses of RICO and RICO Conspiracy were the last overt acts in furtherance of the crime. The Florida Supreme Court held in *State v. Overfelt*, 457 So. 2d 1385, (Fla. 1984) that "Although a trial judge may make certain finding on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode." Id at 1387. Florida Courts have held that only a jury may make the determination as to the *actual date* of offense. See *Cairl v. State*, 833 So. 2d 312, 313 (Fla. 2d DCA 2003), relying upon State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984)(emphasis added). In light of these decisions, the Defendant does not seek the Court's determination as to any exact date of offense, as such was never determined by a jury and not within the province of the Court, the Defendant only seeks this Court to determine which of the underlying predicate offenses charged in the Second Amended Information were the "last overt acts in furtherance of" RICO and RICO Conspiracy as charged in Counts One (1) and Two (2) based on *Young v. Moore*, 820 So. 2d 901 [Fn. 4] (Fla. 2002).

WHEREFORE the Defendant, through undersigned counsel, requests this Honorable Court enter an Order to clarify which of the Defendant's underlying offenses were the last overt acts in furtherance of Count One (1) RICO and Count Two (2) RICO Conspiracy as this Court's finding of fact has a direct bearing on pending litigation in the Eleventh Circuit Court of Appeal

as outlined herein.

Respectfully Submitted,

//S// Dan Ripley
Dan Ripley, Esq., FBN 0070423
Attorney for the Defendant
Ripley Whisenhunt, PLLC
8130 66th St. N Suite 3
Pinellas Park, FL 33781
(813) 812-5294
efile@rightingwrongsflorida.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was emailed via the State of Florida E-filing portal to the Polk County Office of the State Attorney and the Polk County Clerk of Court on this the 29th day of March 2024.

Respectfully Submitted,

//S// Dan Ripley
Dan Ripley, Esq., FBN 0070423
Attorney for the Defendant
Ripley Whisenhunt, PLLC
8130 66th St. N Suite 3
Pinellas Park, FL 33781
(813) 812-5294
efile@rightingwrongsflorida.com

APPENDIX E

IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO.: 1994-CF-002235-A1XX-XX

DANIEL DAVID STRADER,

Defendant.
_____/

***** AMENDED *****
ORDER ON DEFENDANT'S
MOTION FOR CLARIFICATION
(Amended as to filing under correct case number)

THIS MATTER came before the Court upon Defendant's motion, filed March 29, 2024, asking the Court to clarify which charges were the "last overt acts" in this case. After review of the motion, the court file, and applicable law, the Court finds the following:

Defendant was charged with hundreds of counts of various types of theft and fraud in a scheme to defraud which began in 1987 and continued until Defendant's arrest in 1994. None of the charges alleged in the information in this case alleged a crime beginning after December 6, 1993.

In a "true continuing offense, the date of [defendant's] last overt act is considered to be the date of offense." *Williamson v. State*, 852 So. 2d 880, 881 (Fla. 2d DCA 2003).

Since all the crimes charged in this case were alleged in the information to have continued until April of 1994, the date of the "last overt acts" would correspond with the counts charged which have the latest beginning dates. According to the second amended information in this case, counts 123 through 126, involving victim Ross Layton, began

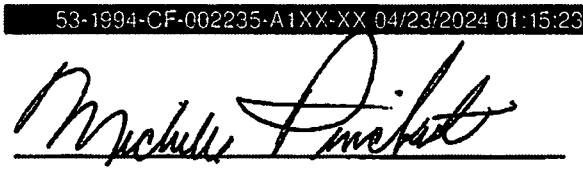
December 6, 1993. No other charges in this case alleged offense dates later than December 6, 1993; and all but the four crimes involving Mr. Layton as the victim were alleged to have started before December 6, 1993.

Therefore, based on the records of this case, the last overt acts in this case are those charged in counts 123, 124, 125, and 126, of the second amended information, the offense dates of which are all December 16, 1993.

ACCORDINGLY, it is **ORDERED AND ADJUDGED** that to the extent that this order satisfies Defendant's request for clarification, Defendant's motion for clarification is **GRANTED**. Defendant's last overt acts with regard to this case are those which were alleged in the second amended information to have begun on December 6, 1993.

DONE AND ORDERED in Bartow, Polk County, Florida Tuesday, April 23, 2024.

53-1994-CF-002235-A1XX-XX 04/23/2024 01:15:23 PM



Michelle Pincket, Circuit Judge
53-1994-CF-002235-A1XX-XX 04/23/2024 01:15:23 PM

Victoria Jacquelyn Avalon
vavalon@sao10.com
appeals.felonypolk@sao10.com
mlasater@sao10.com

Dan Ripley, Esq.
efile@rightingwrongsflorida.com

MP/dgb