

Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

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

v.

ANTHONY FERREIRA, Respondent

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

PETITION FOR WRIT OF CERTIORARI
and
APPENDIX

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QUESTION PRESENTED

Whether a new one-year statute of limitations, applicable to the filing of a State prisoner's 28 U.S.C. §2254 petition, is created whenever a State prisoner is resentenced, even when the one year limitation period for his original conviction and sentence has already expired, thereby allowing the prisoner to raise only claims challenging his original conviction, which were previously time-barred?

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OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals is reported at *Ferreira v. Secretary for the Dept. of Corr.*, 494 F.3d 1286 (11th Cir. 2007) (*Ferreira II*) and is included as Appendix A. (App. A).

JURISDICTION

Petitioner is seeking review of a final decision of the Eleventh Circuit Court of Appeals, which interpreted 28 U.S.C. §2244(d) and this Court's opinion in *Burton v. Stewart*, 127 S.Ct. 793 (2007), to provide a State prisoner a new one year limitation period to challenge his original conviction whenever his sentence is amended or changed, even if the prisoner challenges only his original conviction. The circuit courts are in disagreement as to how to interpret the statute of limitations provision of §2244 when the one year limitation period has already expired and a State prisoner is resentenced. The Eleventh Circuit Court of Appeals' decision in *Ferreira II* conflicts with the Sixth Circuit Court of Appeals' decision in *Bachman v. Bagley*, 487 F.3d 979 (6th Cir. 2007) and the Third Circuit Court of Appeals' decision in *Fielder v. Varner*, 379 F.3d 113 (3d Cir. 2004) on the same legal matter. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

The decision of the appellate court was issued on August 7, 2007. (App. A). Petitioner filed a timely motion for rehearing *en banc*, which was denied on November 1, 2007. (App. B, App. C).

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

This petition involves the interpretation of the one year limitation provisions of 28 U.S.C. § 2244(d)

and 28 U.S.C. § 2254. (App. E).

STATEMENT OF THE CASE

Ferreira was indicted on one count of first degree murder and one count of attempted armed robbery with a deadly weapon. (App. D-2). He was convicted on both counts after a jury trial, and sentenced to life in prison on the murder count and thirty years on the attempted armed robbery count, to run consecutively. (App. D-2).

Ferreira's judgment and sentence were affirmed on direct appeal. (App. D-2). He sought discretionary review in the Florida Supreme Court, but the court denied review on September 11, 1997. (App. D-2). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Ferreira had 90 days - until December 10, 1997 - to seek review of his judgment of conviction in this Court, which he failed to do. (App. D-3). Ferreira's conviction became final on December 10, 1997. (App. A-3).

After 251 days had passed, Ferreira filed a post-conviction motion under Fla.R.Crim.P. 3.850, raising eight claims. (App. A-3, App. D-2). The State trial court summarily denied seven of the claims, and denied the eighth claim after an evidentiary hearing. (App. D-2). Ferreira appealed the denial of post-conviction relief, but the State appellate court affirmed the order and issued mandate on February 8, 2002. (App. A-3, App. D-3). By that time, Ferreira had 114 days remaining on his one year limitation period - until June

2, 2002. (App. A-3).

On June 24, 2002, twenty-two days after the one year period expired, Ferreira filed a motion to correct an illegal sentence under Fla.R.Crim.P. 3.800, claiming that it was illegal under Florida law to impose the 30 year sentence for the robbery consecutive to the life sentence for the murder. (App. A-3, App. D-3). Since the 3.800 motion was filed after the one year limitation period expired, it could not act to toll the statute of limitations. (App. A-4).

The State trial court agreed with Ferreira's 3.800 sentencing claim, and summarily "ordered that [Ferreira's] two sentences should run concurrently rather than consecutively." (App. D-3). The State appealed the order granting 3.800 relief, but the appellate court affirmed and issued mandate on April 14, 2003. (App. D-3).

On June 24, 2003, Ferreira filed his federal habeas corpus petition. All of the claims raised by Ferreira challenged his "original convictions and proceedings". (App. D-6). There were no challenges to the amendment of his sentence in 2002. (App. D-6). In a footnote, the district court stated:

All of [Ferreira's] claims concern his original convictions and proceedings. He has not raised any challenge to the amendment of his sentence in 2002. Therefore, the one year period runs from the date the original direct appeal

became final, rather than the date the sentence amendment became final. *See Walker v. Crosby*, 341 F. 3d 1240 (11th Cir. 2003)(holding that the date on which the statute of limitations runs will be determined by the claim with the latest triggering date, regardless of the triggering dates of the other claims within the application).

(App. D-6,7). Because all of Ferreira's claims addressed his judgment of conviction, the District Court found that the petition was filed after the one year period had expired and denied the petition as time barred. (App. D-8).¹

The Eleventh Circuit Court of Appeals apparently focused on the above-quoted footnote regarding the triggering date, and issued a certificate of appealability as to one issue: "Whether the district court properly found that a habeas corpus petitioner who was resentenced and who only challenged the original trial proceedings without raising any

¹In his federal habeas petition, Ferreira conceded that his petition was untimely. (App. D-6). Because of the time bar, he raised a claim of actual innocence as an "exception" to the one year limitation period. (App. D-6,7). Based on Ferreira's concession and his claim of actual innocence, the district court conducted an "actual innocence" analysis. (App. D-7). The court found that Ferreira failed to make the necessary showing of "actual innocence" which might have allowed him to overcome the one year limitation. Ferreira abandoned the "actual innocence" claim on appeal.

challenge based on resentencing procedures is not entitled to the benefit of a new statute of limitations period commencing from the date the resentencing judgment became final?” (App. A-2). While the appeal was pending, the Eleventh Circuit issued its decision in *Rainey v. Sec’y for the Dep’t of Corr.*, 443 F. 3d 1323 (11th Cir. 2006). In *Rainey*, the Eleventh Circuit found that the district court correctly applied the time limitation provision of the AEDPA and held:

In this case, §2244(d)(1)(A) statutorily prescribes the limitations period to run from the latest of “the date[s] on which the judgment became final”. 28 U.S.C. §2244(d)(1)(A). This language compels a conclusion that the latest possible triggering date for a petition challenging only the original judgment of conviction is the date on which that judgment became final. Thus under the plain reading of the AEDPA, the limitations period on Appellant’s petition began when the original judgment of conviction became final on December 27, 1999.

Id. at 1328 (emphasis added).

The Eleventh Circuit issued its *Rainey* decision while Ferreira’s appeal was pending. Since the facts of *Rainey* and Ferreira’s appeal were almost identical, the Eleventh Circuit found *Rainey* to be dispositive of the matter. (App. A-3). The Eleventh

Circuit affirmed the district court's order denying the petition as time barred. (App. A-4).

Ferreira petitioned this Court for certiorari in order for this Court to "address the calculation of AEDPA's limitation period for habeas corpus petitioners who, like [Ferreira], undergo resentencing in the State court system and subsequently raise, in their federal §2254 petitions, challenges only to their original trial proceedings." This court ordered a response by the State of Florida.

After Ferreira filed his petition for writ of certiorari, this Court decided *Burton v. Stewart*, 127 S.Ct. 793 (2007). In its response to Ferreira's petition, the State of Florida cited to *Burton*, and argued that *Burton* clearly delineated that a State prisoner's conviction becomes final at the conclusion of one full round of direct review of the conviction and sentence. The State further argued that this Court need not entertain again the question of finality of a State prisoner's judgment, since *Burton* plainly identified when the one year limitation period begins to run.

This Court issued a ruling on February 20, 2007, remanding the case to the Eleventh Circuit Court of Appeals "for further consideration in light of *Burton*." *Ferreira v. McDonough*, 127 S.Ct. 1256 (2005). The Eleventh Circuit ordered the parties to file letter briefs, and the Eleventh Circuit Court of Appeals issued *Ferreira v. Secretary for the Dept. of Corr.*, 494 F.3d 1286 (11th Cir. 2007) - *Ferreira II* - on

August 7, 2007.

In *Ferreira II*, the circuit court interpreted *Burton* to require reversal of its earlier decision in *Ferreira I* (*Ferreira v. Sec'y, Dep't of Corr.*, 183 Fed. Appx. 885 (11th Cir. 2006)). The circuit court also reversed *Rainey v. Sec'y for Dept. of Corr.*, 443 F.3d 1323 (11th Cir. 2006), which had been decided by a different panel of the Eleventh Circuit. The court held that a State prisoner's one year limitation period begins to run from the date his most recent "judgment" becomes final. The circuit court further found that anytime a State court issues a document which can be described as a "judgment", that becomes the "judgment" under which the prisoner is in State custody. Therefore, all claims arising from the "judgment" can be raised in a federal habeas petition, even if those claims had previously been time barred under § 2244(d).

Applying its ruling to *Ferreira*, the Eleventh Circuit Court of Appeals held that *Ferreira's* amended sentencing documents created a new one year limitation period which allows *Ferreira* to challenge his original 1996 conviction, even though he raised **no** claims challenging the amended sentence. *See Ferreira II*. Since *Ferreira's* petition for federal habeas relief was filed within one year of the amended sentence, the circuit court found his petition challenging only his 1996 conviction timely. The circuit court's ruling allows *Ferreira* to raise previously time-barred challenges to a conviction which became final in 1997 after a full and complete

round of direct review of the conviction and sentence. The circuit court remanded the case to the District Court for review of Ferreira's petition as timely filed.

The State filed a petition for rehearing *en banc*. The court denied the petition for rehearing *en banc* on November 1, 2007. (App. C).

REASONS FOR GRANTING THE WRIT

Whether a new one-year statute of limitations, applicable to the filing of a State prisoner's 28 U.S.C. § 2254 petition, is created whenever a State prisoner is resentenced, even when the one year limitation period for his original conviction and sentence has already expired, thereby allowing the prisoner to raise only claims challenging his original conviction, which were previously time-barred.

This Court should grant certiorari to resolve the conflict which exists among federal circuit courts of appeals regarding the interpretation and application of the one year statute of limitations contained in 28 U.S.C. § 2244(d) as it pertains to a State prisoner who has received a new or amended sentence. The conflict arises when a State prisoner files a federal habeas petition and seeks to challenge his underlying conviction, for which the one year statute of limitations has previously run. Unless this Court accepts review, federal appellate courts will continue to issue conflicting holdings on the same legal issue.

With increased frequency, federal courts are facing the common situation in which a State prisoner receives a new or amended sentence, and then attempts to use that to trigger a new one year limitation period so he can attack his underlying conviction. In some cases, the underlying conviction

might have been final for years, and the one year limitation period long expired. State prisoners are pointing to their recent re-sentencing proceedings and arguing that § 2244(d) allows them to resurrect previously time-barred claims attacking their underlying conviction. The federal appellate courts are in conflict on this issue. *See Bachman v. Bagley*, 487 F.3d 979 (6th Cir. 2007). The facts in both *Bachman* and *Ferreira* are almost identical, but the Eleventh Circuit's decision in *Ferreira II* is in direct conflict with the Sixth Circuit's *Bachman* decision. This conflict must be resolved.

In the instant case, the Eleventh Circuit Court of Appeals has held that a State prisoner, whose conviction became final and the one year limitation period expired before he received an amended sentence, has a new one year limitation period after a new or amended sentence, even if he only challenges his underlying conviction. In *Ferreira II*, the court held that a State prisoner who receives a new or amended sentence - thereby creating a new "judgment" - has a new one year limitation period within which to challenge any and all claims arising from his trial-based conviction, regardless of whether he also challenges his new sentence. *Id.*

The court reached its decision by interpreting and applying this Court's *Burton* decision to the language of § 2244 and § 2254. Based on the court's interpretation of those provisions, the court found that a "new judgment" is created by a new sentencing, and the State prisoner is in custody

pursuant to that “new judgment”. Therefore, the court reasoned, the prisoner can challenge any aspect of the “new judgment” under § 2254.

At the time the Eleventh Circuit issued its decision in *Ferreira II*, it was in direct conflict with the Sixth Circuit’s decision in *Bachman*. In *Bachman*, the defendant’s one year statute of limitation had expired before he was resentenced. The defendant filed a federal habeas petition in which he challenged only his conviction. The Sixth Circuit rejected the defendant’s argument that his resentencing opened a new one year period for claims unrelated to the new sentence. *Id.*

In reaching its decision, the *Bachman* court relied upon, and adopted, the reasoning of then-Judge Alito in *Fielder v. Varner*, 379 F.3d 113 (3d Cir. 2004). In *Fielder*, the defendant challenged both his previously-expired conviction claims and his new sentencing. The defendant argued that the Eleventh Circuit’s interpretation of § 2244(d)(1) in *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003) allows a defendant to bring both expired and new claims in one petition. Judge Alito stated that “the *Walker* interpretation has the strange effect of permitting a late-accruing federal habeas claim to open the door for the assertion of other claims that had become time-barred years earlier.” *Fielder* at 120. The Third Circuit concluded that “We cannot think of any reason why Congress would have wanted to produce such a result.”

Both the Third Circuit and the Sixth Circuit have consistently held that the one year limitation provision of § 2244 must be applied like every other statute of limitation. Each claim must be assessed to determine whether it has been plead within the limitation period. Only the Eleventh Circuit interprets § 2244 differently. Over the course of the last five years, the Eleventh Circuit has appeared to be unsure of how to apply the provision, even overturning itself. *See Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003); *Rainey v. Secretary for the Dept. of Corr.*, 443 F.3d 1323 (11th Cir. 2007); *Ferreira I. Ferreira II*.

With the issuance of *Ferreira II*, the Eleventh Circuit now stands in conflict with the Third Circuit and Sixth Circuit on the same point of law. Unless this Court takes review, the circuits will continue issuing conflicting decisions on a matter which is crucial to the proper administration of the one year statute of limitation provisions of § 2244(d).

The AEDPA was enacted “to advance the finality of criminal convictions”. *Rhines v. Weber*, 544 U.S. 269 (2005). In order to assure finality, Congress “adopted a tight time line” for State prisoners’ federal habeas corpus petitions. *Mayle v. Felix*, 545 U.S. 644 (2005). The limitation period set out in § 2244 serves the well-recognized interest in the finality of State court judgments. *Duncan v. Walker*, 533 U.S. 167 (2001). The one year limitation period “reduces the potential for delay on the road to finality by restricting the time that a prospective

federal habeas petition has in which to seek federal habeas review.” *Id.* The Eleventh Circuits’ interpretation of §§ 2244(d) and 2254, applied in *Ferreira II*, dismantles the structure and purpose of the AEDPA’s “tight time line” by allowing State prisoners to start the one year over and over.

In *Ferreira v. McDonough*, 127 S.Ct. 1256 (2007), this Court granted certiorari and remanded the case to the Eleventh Circuit for “consideration in light of *Burton v. Stewart*, 127 S.Ct. 793 (2007). The Eleventh Circuit subsequently issued *Ferreira II*, which misinterpreted and misapplied *Burton*.

The *Burton* decision did not create any new law. It merely applied longstanding legal parameters to a specific factual setting. In *Burton*, the defendant was convicted and sentenced. He appealed. While his direct appeal was pending, the State court modified (or corrected) the defendant’s sentence. State law allowed a sentence to be modified or changed during direct appeal. Although the original sentence was **changed** during the direct appeal process, it was still the sentence under direct review.

The State appellate court affirmed *Burton*’s conviction, but sent the sentence - the original sentence as modified - back to the trial court for further review. The trial court re-imposed the same sentence, and *Burton* appealed the sentence again.

In *Burton*, this Court pointed out that, procedurally, *Burton*’s appeal from the re-imposed

sentence was still part of Burton's direct appeal. Since the re-imposed sentence was still on direct appeal, Burton's conviction was not final until the sentence also had received one full round of direct review also.

To emphasize this point, the Court stated:

“Final judgment in a criminal case means sentence. The sentence is the judgment.” *Berman v. United States*, 302 U.S. 211, 212 (1937). Accordingly, Burton's limitations period did not begin until both his conviction and his sentence “became final by the conclusion of direct review or the expiration of the time for seeking such review” - which occurred well after Burton filed his 1998 petition.

(emphasis in original) *Id.* The Court determined that the AEDPA's one year never began to run, because the sentence was part of the original judgment which was still on direct review.

The Eleventh Circuit's *Ferreira II* decision misinterpreted the holding in *Burton*. The court also misapplied the language used in *Burton* to find that any time a State court alters, amends, or changes a defendant's sentence, a new “judgment” is created. When that defendant files a federal habeas petition, he is in custody under that new “judgment”, and the issuance of the new “judgment” creates a new one

year limitation period. The Eleventh Circuit based its *Ferreira II* decision completely on the language in *Burton* which stated that the judgment is the sentence.

However, it is clear that the language in *Burton* regarding the judgment and sentence was used in a totally different context. The Court was not addressing re-sentencing or other subsequent sentencing proceedings which occur after the conviction becomes final. The Court was only assessing the legal posture of Burton's case for the purpose of determining when his conviction became final. After determining that Burton's sentence never became final until a full round of direct review was complete, the Court held that his conviction did not become final until **both** the conviction and sentence concluded one full round of direct review. *Id.*

Since *Burton* dealt with a different series of events procedurally, it addressed distinctly different aspects of "conviction", "final", and "judgment". Therefore, it could not properly form the legal basis for *Ferreira II*.

Moreover, the *Ferreira II* holding contravenes *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), in which this Court recognized calculation of the statute of limitations may implicate claim-by-claim basis. As this Court noted in *Pace*, "[Section] 2244(d)(1) provides that a '1-year period of limitation shall apply to an *application* for a writ of habeas corpus.' (Emphasis added.) The subsection then provides one

means of calculating the limitation with regard to the 'application' as a whole, § 2244(d)(1)(A) (date of final judgment), but three others that require claim-by-claim consideration, § 2244(d)(1)(B) (governmental interference); § 2244(d)(1)(C) (new right made retroactive); § 2244(d)(1)(D) (new factual predicate)." *Id.* at 416 n.6. Thus, pursuant to *Pace*, proper calculation of a state's prisoner AEDPA start date must take into account the judgment challenged in federal habeas corpus petition, thereby implicating claim-by-claim consideration. Where a state prisoner brings in a federal habeas corpus petition a claim challenging a final judgment -- whether solely or in union with grounds attacking a later judgment -- his AEDPA time clock for bringing a challenge to the former is not reset by the mere securing of the later judgment, such as in *Ferreira's* case, a resentencing obtained collaterally.

The Eleventh Circuit's interpretation of the AEDPA's statute of limitations completely eviscerates the Legislative intent underlying the AEDPA. In Florida, and in other States, a defendant can move to correct his sentence **at any time**. *See* Florida Rules of Criminal Procedure 3.800. A defendant serving a life sentence could at any time move to add credit for time served which was miscalculated at his original sentencing 15 years before. Under *Ferreira II*, if the State trial court granted that motion and added just one day to the defendant's time served, he could file a federal habeas corpus petition challenging his conviction 15 years earlier. Such a result is contrary to the intent

underlying the AEDPA. Allowing such an interpretation to stand as legal precedent would completely extinguish any and all time limitations for review under § 2254, and will certainly open the floodgates of federal habeas litigation by State prisoners.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant the petition for certiorari.

Respectfully submitted,

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