Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JULIE L. JONES, SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
Ace Patterson,
Respondent.

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

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QUESTION PRESENTED FOR REVIEW

This court should exercise its certiorari jurisdiction to resolve a conflict among the circuit courts on the issue of whether an order that affects the judgment under which a state prisoner is held in custody, but does not vacate that judgment, constitutes a new judgment that removes a second-in-time petition for writ of habeas corpus from the AEDPA's bar on second or successive petitions.

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QUESTION PRESENTED

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CITATION TO OPINION BELOW

The opinion below is cited as Patterson v. Secretary, Florida Department of Corrections, 812 F.3d 885 (11th Cir. 2016)(published)

STATEMENT OF JURISDICTION

Jurisdiction exists pursuant to 28 U.S.C. § 1254(1). See also Wright & Moore, Federal Practice & Procedure § 4034, 4036 (noting the "appellate jurisdiction of the Supreme Court extends to virtually every case that comes into a federal court" and observing that "once a case has come to be in a court of appeals, the Supreme Court may grant certiorari to review interlocutory decisions or procedural rulings, and may even grant review before the court of appeals has taken any action at all."); Pure Oil Co. v. Suarez, 384 U.S. 202 (1966)(certiorari granted to determine whether decision below was inconsistent with a decision of this Court and to resolve a conflict among the circuit courts); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)(one of traditional functions of this Court is to resolve and accommodate diversities and conflicts occurring among courts of the eleven federal circuits); Sup.Ct.R. 10

(explaining that a conflict among the circuits or with a state court of last resort may be a basis for granting certiorari review).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. Section 2244 provides, as relevant:

(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) (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.

Title 28 U.S.C. Section 2254 provides, as relevant:

(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.

Title 28 U.S.C. Section 2255 provides, as relevant:

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

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

PROCEDURAL HISTORY AND STATEMENT OF THE CASE AND FACTS

Patterson was charged by Information with committing on July 31, 1997, burglary with battery (Count I), aggravated kidnapping of a child (Count II), and two counts of capital sexual battery on a child less than twelve years of age (Counts III and IV). On May 13, 1998, Patterson was found guilty by jury on all counts, as charged. Patterson was sentenced on July 14, 1998 to 311 months incarceration on Counts I and II and to life incarceration on Counts III and IV with requirement that he undergo mexdroxypragestrone acetate (MPA) injection; Count IV was ordered to be served consecutive to Count III, with Counts I

and II concurrent to each other, but consecutive to Count IV.

As relevant, Section 794.0235, Florida Statutes, provides that "[i]n all cases involving defendants sentenced to a period of incarceration, the administration of treatment with mexdroxypragestrone acetate (MPA) shall commence no later than one week prior to the defendant's release from prison or other institution." § 794.0235(2)(b), Fla.Stat. (1997).

Patterson took a direct appeal of judgment and sentence and the Florida First District Court of Appeal affirmed *per curiam* without opinion on June 28, 1999. Patterson v. State, 736 So.2d 1185 (Fla. 1st DCA 1999)(table). On March 16, 2006, Patterson filed a *pro se* petition for writ of habeas corpus in U.S. District Court, Northern District of Florida, pursuant to 28 U.S.C. § 2254. On November 20, 2006, the State filed a motion to dismiss this § 2254 petition as untimely under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). On January 22, 2007, the Magistrate Judge issued a report and recommendation that the State's motion to dismiss be granted and the petition be dismissed as untimely. On May 31, 2007, the District Court adopted the report and recommendation, granted the State's motion to dismiss, and dismissed Patterson's § 2254 petition as untimely; judgment was entered that same day. Patterson v. McDonough, 2007 WL 1577859, Case No. 4:06-cv-138 (N.D. Fla. May 31, 2007).

Patterson then filed a "Request for Information and Forms" in the District Court which was construed as a notice of appeal the request for certificate of appealability (COA) and denied. Patterson then filed "Notice of Appeal and Request for Certificate of Appealability" in the Eleventh Circuit Court of Appeals which was denied by order on September 7, 2007. Patterson's motion to reconsider the denial of COA was denied by order on October 24, 2007.

On August 12, 2008, Patterson filed a *pro se* motion in the state circuit court pursuant to Rule 3.800(a), Florida Rules of Criminal Procedure, alleging that the portion of his sentence on Counts III and IV requiring that he undergo MPA injection was not imposed in compliance with Florida law. The State filed a response in which it conceded the facial sufficiency of Patterson's motion and requested a hearing. Although a hearing was scheduled, the circuit court granted Patterson's Rule 3.800(a) motion without a hearing by order rendered December 14, 2009, stating, as follows:

> ORDER GRANTING DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE
>
> THIS MATTER, having come on to be heard before the Court on the Defendant's Motion to Correct Illegal Sentence, the State having

acknowledged the Factual Sufficiency of Same the Court being otherwise fully informed in the premises, finds as follows:

1. The Defendant is currently serving a sentence of 311.7 months for Count 1 Burglary of a Dwelling Person Assaulted and a concurrent 311.7 months for Count 2 Kidnapping and Count 3 and 4 Capital Sexual Battery, the Defendant is serving Life sentences with Count 4 consecutive to Count 3. The Defendant was also ordered to undergo Mexdroxypragestrone Acetate (MPA) injection also known as chemical castration.

2. The Defendant filed a Motion to Correct Illegal Sentence alleging that the Court did not comply with requirements of law when it sentenced him to be "Chemically Castrated" as the Court did not appoint a medical expert to determine whether the defendant was an appropriate candidate for said "Chemical Castration" within 60 days required by Florida Statute 794.0235. Nor did the

Court specify the duration of said treatment as required by Florida Statute 794.0135 [(sic)].

3. The State has conceded that the Defendant's motion is "Factually Sufficient" and stipulates to the Defendant's motion in light of the Defendant's consecutive Life sentences in the above styled matter.

4. Guardian-Ad-Litem Linda Daggat, Circuit Director of the Guardian-Ad-Litem's office in Live Oak, Florida, has been contacted by the State and she agrees with the State's Stipulation to the Defendant's motion as it is a moot issue in light of the Defendant's consecutive Life sentences. Further, the Guardian-Ad-Litem on behalf of the victim, does not want to expose the victim to the painful remembrance of the Defendant's actions against her by having a contested hearing on an issue that is a "moot point".

IT IS THEREFORE,

> ORDERED AND ADJUDGED, the Defendant's Motion to Correct Illegal Sentence is GRANTED and the Defendant shall not have to undergo Medroxypragestrone Acetate (MPA) injection, also known as "Chemical Castration" as previously ordered by the Court at his sentencing in the above styled matter.
>
> DONE AND ORDERED in chambers at Madison, Madison County, Florida this 14th Day of December, 2009.

(Appendix D).

On January 6, 2011, Patterson filed a *pro se* petition for writ of habeas corpus in U.S. District Court, Northern District of Florida, pursuant to 28 U.S.C. § 2254 seeking relief in Madison County, Florida, circuit court case number 97-171-CF. Patterson then filed an amended *pro se* § 2254 petition on April 26, 2011 with an accompanying "Memorandum of Law on AEDPA Time Limitations" in which he contended that his amended petition was timely in light of him having been resentenced by way of the state circuit court's December 14, 2009 order granting postconviction relief. The State filed a motion to dismiss this January 6, 2011 amended § 2254 petition as untimely under the AEDPA. However, adopting the

report and recommendation of the Magistrate Judge as its own, the District Court dismissed this amended § 2254 petition as an unauthorized "second or successive" petition. (Appendix B and C). In so dismissing Patterson's amended § 2254 petition, the District Court issued a COA on the question of "whether the state-court order deleting from the petitioner's sentence the term requiring administration of mexdroxypragestrone acetate constitutes a new judgment, so that the current petition is not second or successive." (Appendix B).

After the completion of briefing, on February 5, 2013, after concluding that the COA was defective, the Eleventh Circuit "remand[ed] this case to the district court for the limited purpose of amending the COA to specify which one or more of Patterson's nine claims debatably state a valid claim of the denial of a constitutional right." On limited remand, the District Court was "unable to conclude that Mr. Patterson has asserted any claim warranting issuance of a certificate of appealability." (Doc. 38). Again before the Eleventh Circuit, upon finding that "at least one of the underlying claims from Patterson's § 2254 petition has arguable merit," The Eleventh Circuit granted COA directing that "this appeal will proceed on the previously-certified issue[.]"

On January 29, 2016, the Eleventh Circuit Court of Appeals reversed the decision of the District Court, concluding that under this Court's holding in Magwood v. Patterson, 561 U.S. 320, 130

S.Ct. 2788, 177 L.Ed.2d 592 (2010) and its own precedent in Insignares v. Secretary, Florida Department of Corrections, 755 F.3d 1273 (11th Cir. 2014), that the state circuit court's December 14, 2009 order deleting the requirement that Patterson undergo MPA injection, together with his 1998 judgment and sentence, constitute a new judgment and sentence so that his April 26, 2011 amended § 2254 petition is not "second or successive" under 28 U.S.C. § 2244. (Appendix A).

REASONS FOR GRANTING THE WRIT

> This Court should exercise its certiorari jurisdiction to resolve a conflict among the circuit courts on the issue of whether an order that affects the judgment under which a state prisoner is held in custody, but does not vacate that judgment, constitutes a new intervening judgment that removes it from the AEDPA's bar on second or successive petitions for writ of habeas corpus.

In Patterson v. Secretary, Florida Department of Corrections, 812 F.3d 885 (11th Cir. 2016), the Eleventh Circuit erred in holding that the state trial court's 2009 order barring the Florida Department of Corrections from administering

MPA injection that was imposed as part of Patterson's sentence in 1998, but which left the 1998 judgment otherwise intact, constituted a resentencing that resulted in a "new judgment" such that, under Magwood v. Patterson, 561 U.S. 320 (2010), his second-in-time petition for writ of habeas corpus was not "second or successive" under the AEDPA. The Eleventh Circuit's decision is in conflict with the decisions of the Fifth and Seventh Circuits in which they held that an order which alters a prisoner's sentence, but does not invalidate the original judgment, does not result in a "new judgment" allowing the prisoner to bypass the AEDPA's bar on "second or successive" petitions. This Court should grant review to resolve this conflict among circuits. See Sup.Ct.R. 10 (explaining that a conflict among the circuits or with a state court of last resort may be a basis for granting certiorari review).

As amended by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(b) provides, as relevant:

> (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.

Thus, before a habeas petitioner may file a second or successive petition in a district court, he must apply to the appropriate court of appeals for an order authorizing the district court to consider the application. See Burton v. Stewart, 549 U.S. 147, 152-153 (2007), citing 28 U.S.C. § 2244(b)(3)(A). This provision "creates a 'gatekeeping' mechanism for the consideration of second or successive applications in district court." See Felker v. Turpin, 518 U.S. 651, 657 (1996).

In Magwood, this Court considered "whether Magwood's [§ 2254] application challenging his 1986 death sentence, imposed as part of resentencing in response to a conditional writ from the District Court [affirming his 1981 conviction but vacating his death sentence], is subject to the

constraints that § 2244(b) imposes on the review of 'second or successive' habeas applications." Id. at 330, 130 S.Ct. at 2795. Although he had previously sought relief by § 2254 petition from his same conviction, in rejecting the State's "statutory purpose" claims-based approach, this Court concluded that Magwood's second-in-time § 2254 petition was not "second or successive" because, interpreting this phrase "with respect to the judgment challenged[,]" it was his first challenge to his new judgment imposed as part of resentencing. Id., 561 U.S. at 332-333. This Court explained:

> This is Magwood's *first* application challenging that intervening judgment. The errors he alleges are *new*. It is obvious to us — and the State does not dispute — that his claim of ineffective assistance at resentencing turns upon new errors. But, according to the State, his fair-warning claim does not, because the state court made the same mistake before. We disagree. An error made a second time is still a new error. That is especially clear here, where the state court conducted a full resentencing and reviewed the aggravating evidence afresh. *See* Sentencing Tr., R. Tab 1, at R-25 ("The Court in f[or]mulating the present

> judgment has *considered* the original record of the trial and sentence .... The present judgment and sentence has been the result of a *complete and new assessment* of all of the evidence, arguments of counsel, and law" (emphasis added)).13
>
> FN13. *Cf. Walker v. Roth*, 133 F.3d 454, 455 (C.A.7 1997) ("None of these new claims were raised in his first petition, nor could they have been; [the petitioner] is attempting to challenge the constitutionality of a proceeding which obviously occurred after he filed, and obtained relief, in his first habeas petition").

Id., 561 U.S. at 339.

Thus, this Court held that when "there is a 'new judgment intervening between the two habeas petitions,' [a petition] challenging the resulting new judgment is not 'second or successive' at all." Id. at 341-342 (citation omitted). In this circumstance, "the existence of a new judgment is dispositive." Id. at 338, 130 S.Ct. at 2800; see Burton, 549 U.S. at 156-157 (within the meaning of § 2244(d)(1)(A): "Final judgment in a criminal case means sentence. The sentence is the judgment.")(citation omitted).

Although its existence is dispositive, a critical question this Court was not asked to address in Magwood and on which the Circuit Courts are in conflict, is whether an alteration of a sentence from that originally imposed, but which leaves the original judgment intact, is a resentencing that produces a "new judgment" so as to remove a second-in-time petition from the AEDPA's bar against "second or successive" petitions.

As this Court observed in Magwood: Where a § 2254 "petition results in a district court's granting of the writ, 'the State may seek a *new* judgment (through a new trial or a new sentencing proceeding).'" Magwood, 561 U.S. at 332, quoting Wilkinson v. Dotson, 544 U.S. 84, 83 (2005) (quoted emphasis by italics in original; underscore added). Although the "new judgment" in Magwood was the product of a full resentencing proceeding after Magwood's original sentence of death had been vacated, the majority in Patterson held that the trial court's December 19, 2009 order that "the Defendant's Motion to Correct Illegal Sentence is GRANTED and the Defendant shall not have to undergo Medroxypragestrone Acetate (MPA) injection, also known as 'Chemical Castration' as previously ordered by the Court at his sentencing in the above styled matter[,]" could not be "considered anything but a resentencing." Id. at 889-890. The panel majority reasoned:

Where a state court corrects a legal error in an initial sentence, and imposes a new sentence that is substantively different than the one originally imposed, there is a new judgment under *Magwood* and *Insignares* [*v. Sec'y, Fla. Dept. of Corr.*, 755 F.3d 1273 (11th Cir. 2014)]. Here, the initial imposition of the punishment of chemical castration was erroneous under Florida law, and the subsequent removal of that punishment substantively altered the punitive terms of Mr. Patterson's custody. So the original 1998 judgment, standing alone, no longer accounts for the authority of the Department of Corrections to detain and exert control over Mr. Patterson. Instead, as the State admits, one must now look to the original 1998 judgment, together with the 2009 order removing the punishment of chemical castration, in order to determine Mr. Patterson's present and legally authorized sentence. *See Magwood*, 561 U.S. at 332, 130 S.Ct. 2788 ("A § 2254 petitioner is applying for something: His petition 'seeks invalidation (in whole or in part) of the judgment authorizing the prisoner's confinement.'"). *Cf.* B. Garner, Garner's Dictionary of Legal Usage 495 (3d ed.2011) (defining an American

> judgment as "the final decisive act of a court in defining the rights of the parties"). Because this is Mr. Patterson's first § 2254 petition challenging this new judgment, we conclude that it is not "second or successive" under § 2244(b).

Id. at 891-892.

By contrast, as Judge Pryor observed in his dissent, "[t]he Fifth Circuit [in *In re* Lampton, 667 F.3d 585 (5th Cir. 2012)] has held that an order partially vacating a sentence is not a new judgment for purposes of the bar on second or successive petitions." Patterson, 812 F.3d at 900 (Pryor, W., dissenting). Among other crimes, Lampton was sentenced in August of 1997 to concurrent life terms upon conviction for conspiracy and engaging in a continuing-criminal-enterprise (CCE). Lampton, 667 F.3d at 587. With his conviction and sentence affirmed on direct appeal, Lampton's first § 2255 petition was granted in part upon the district court's determination that his "convictions for both conspiracy and CCE violated the constitutional prohibition against double jeopardy." Id. (footnote omitted). "In March of 2001, the district court entered a judgment vacating Lampton's conspiracy conviction and denying the balance of Lampton's claims for relief." Id. Later, relying on Magwood, Lampton filed another § 2255 petition contending that "because the district court granted his first § 2255 petition in part, he is now

in custody pursuant to a new, amended judgment and that he has never filed a § 2255 petition challenging this new, amended judgment." Id. However, the district court found this second § 2255 petition to be successive. Lampton, 667 F.3d at 587.

The Fifth Circuit agreed, "conclud[ing] that Lampton's petition is 'second or successive' within the meaning of 28 U.S.C. § 2255(h)." Id. The Court observed: "Whether a new judgment has intervened between two habeas petitions, such that the second petition can be filed without this Court's permission, *depends on whether a new sentence has been imposed*." Id. at 588 (emphasis added), citing Burton, 549 U.S. at 157 (other citation omitted). The court in Lampton found that, unlike Magwood where "the prior petition yielded a new sentence, and hence a new judgment. ... Lampton's sentence on the CCE conviction remained intact after the initial § 2255 proceeding was completed." Lampton at 589 (footnote omitted). On this basis, the Fifth Circuit "conclude[d] that there is no new, intervening judgment to trigger the operation of Magwood and hold that Lampton's instant petition is 'second or successive' within the meaning of § 2255(h)." Id.; contra Wentzell v. Neven, 674 F.3d 1124, 1127 (9th Cir. 2012) ("Recognizing the tension between *Johnson* [*v. United States*, 623 F.3d 41 (2d Cir. 2010)] and *Lampton*, we agree with the Second Circuit's reasoning in *Johnson*.").

Also, opposite the panel majority's reasoning in Patterson, the Seventh Circuit in White v. United States, 745 F.3d 834 (7th Cir. 2014) held that the reduction of White's original 2006 sentence from 360 months to 292 after a prior § 2255 petition and pursuant to the Sentencing Commission's adoption of a provision "which retroactively cut the offense levels for crack-cocaine offenses," was not a resentencing. Id. at 835-836. The court in White observed that while "[t]he penalty goes down, the judgment is not declared invalid." Id. at 836. Further, because White "was not sentenced anew[,]" unlike Magwood, "[t]he judge accordingly did not commit — could not have committed, if he tried — any repetition of an error supposedly rooted in 2006." White at 836-837. The Seventh Circuit concluded that "Magwood does not reset the clock or the count, for purposes of § 2244 or § 2255, when a prisoner's sentence is reduced as a result of a retroactive change to the Sentencing Guidelines." Id. at 837.

As in both Lampton and White, the 2009 order of the state circuit court barring the Department of Corrections from administering MPA injection that was imposed as part of Patterson's sentence in 1998 did not invalidate the original 1998 judgment. As in both Lampton and White, but opposite Magwood, there was no full resentencing hearing in Patterson where any error that occurred in 1998 could have recurred anew.

In Lampton, an entire count of conviction and its accompanying sentence were vacated, yet no "new judgment" within the meaning of Magwood was rendered. In White, the only sentence being served was reduced by 68 months, yet no "new judgment" within the meaning of Magwood was rendered. On the other hand, in Patterson, the Eleventh Circuit held that because the 2009 order of the state circuit court removed the possibility of MPA injection (to commence one week before his release) on each of his two consecutive sentences of life imprisonment with no possibility of release, Patterson was resentenced and this resentencing produced a "new judgment" within the meaning of Magwood.

The Eleventh Circuit in Patterson has interpreted Magwood in a manner which conflicts with those of the Fifth and Seventh Circuits. The issue raised herein is of critical importance to the States because it impacts the finality of state criminal convictions. It undermines comity for Congress to specify limits on second or successive petitions and then have the federal courts undo these procedural bars. As this Court has acknowledged, the stated purpose of the one-year statute of limitations "quite plainly serves the well-recognized interest in the finality of state court judgements." Duncan v. Walker, 533 U.S. 167, 179 (2001). The AEDPA's limitation on second or successive petitions serves much the same purpose. The Eleventh Circuit's position in Patterson

essentially means that a state court conviction can never truly be considered final so long as the possibility exists that the defendant's sentence may be altered.

This Court should grant review of this important issue.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-12653

D.C. Docket No. 4:11-cv-00010-RHB-CAS

ACE PATTERSON,

Petitioner-Appellant,

Versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(January 29, 2016)

Before WILLIAM PRYOR, and JORDAN, Circuit Judges, and HAIKALA, District Judge.*

---

* Honorable Madeline Hughes Haikala, United States District Judge for the Northern District of Alabama, sitting by designation.

JORDAN, Circuit Judge.

Ace Patterson, a Florida prisoner, appeals the district court's dismissal of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, as second or successive under 28 U.S.C. § 2244(b). As we explain, under our prior decision in *Insignares v. Secretary*, 755 F.3d 1273 (11th Cir. 2014), Mr. Patterson's § 2254 petition is not second or successive within the meaning of § 2244(b). We therefore reverse.

I

In 1998, a Florida jury convicted Mr. Patterson of burglary, aggravated kidnapping of a child, and two counts of capital sexual battery. The trial court sentenced Mr. Patterson to 311 months of imprisonment for the burglary and aggravated kidnapping offenses, and consecutive terms of life imprisonment plus chemical castration for the sexual battery offense. His convictions and sentences were affirmed on direct appeal.

Approximately nine years later, in 2007, Mr. Patterson filed a habeas corpus petition pursuant to § 2254. The district court dismissed it as untimely that same year.

After that dismissal, Mr. Patterson filed a motion to correct an illegal sentence with the state trial court under Florida Rule of Criminal Procedure 3.800(a). Mr. Patterson argued in his motion that his sentence of chemical castration was illegal because the trial court had not complied with the statutory requirements of the chemical castration statute, Fla. Stat. § 794.0235. According

to Mr. Patterson, the trial court failed to consult a medical expert to determine whether he was an appropriate candidate for chemical castration and failed to specify the duration of the treatment. *See Houston v. State*, 852 So. 2d 425, 428 (Fla. 5th DCA 2003) (explaining that appointing an expert and specifying the duration of treatment are "mandatory requirements" of the chemical castration statute).

In its response, the State conceded the facial sufficiency of the motion and did not oppose Mr. Patterson's request to correct the illegal sentence given the consecutive life terms that had been imposed. On December 14, 2009, the state trial court entered an order granting Mr. Patterson's Rule 3.800 motion. The order repeated all of the sentences initially imposed on Mr. Patterson, and stated that Mr. Patterson would "not have to undergo [m]edroxyprogesterone [a]cetate (MPA) injection, also known as 'Chemical Castration' as previously ordered by the Court at his sentencing in the above styled matter."

Following entry of the new order, Mr. Patterson filed a new § 2254 habeas corpus petition. The district court dismissed this petition as "second or successive" under § 2244(b)(1) because Mr. Patterson had previously filed a habeas corpus petition that had been dismissed as untimely. We granted Mr. Patterson a certificate of appealability to determine whether the state court order deleting chemical castration from his sentence resulted in a new judgment, such that his current habeas corpus petition is not second or successive.

II

Whether a petition for a writ of habeas corpus is second or successive is a question we consider *de novo*. *See Stewart v. United States*, 646 F.3d 856, 858 (11th Cir. 2011). Generally, subject to exceptions not relevant here, claims presented in a second or successive § 2254 petition are subject to dismissal. *See Insignares*, 755 F.3d at 1278 n.4 ("Subject to two exceptions, § 2244(b) provides that '[a] claim presented in a second or successive habeas corpus application under section 2254 . . . shall be dismissed.'"). Unfortunately, § 2244(b) does not explain what constitutes a second or successive habeas petition. *See id.* at 1278.

The Supreme Court stepped into the statutory void in *Magwood v. Patterson*, 561 U.S. 320, 332–33 (2010), and held that "the phrase 'second or successive' must be interpreted with respect to the judgment challenged." The Court ruled that "where . . . there is a new judgment intervening between two habeas petitions, an application challenging the resulting new judgment is not second or successive." *Id.* at 341. Put more simply, "the existence of a new judgment is dispositive." *Id.* at 338. And the judgment is what "authorizes the prisoner's confinement." *Id.* at 332.

Mr. Patterson contends that his current § 2254 petition is not second or successive because it is his first petition challenging the new judgment generated by the order deleting chemical castration from his original sentence. He argues that because the state trial court substantively amended his sentence to remove the punishment of chemical

castration, he is now in custody pursuant to a new judgment. He contends, therefore, that his current habeas corpus petition challenging this new judgment is not second or successive under *Magwood*. Based on our prior decision in *Insignares*, we agree with Mr. Patterson.

A

A Florida jury convicted Mr. Insignares of attempted first-degree murder with a firearm, resulting in a sentence of 40 years of imprisonment, including a 20- year mandatory minimum; criminal mischief, resulting in a concurrent sentence of five years of imprisonment; and discharging a firearm in public, resulting in a concurrent sentence of one year of imprisonment. *See Insignares*, 755 F.3d at 1276. The trial court later reduced Mr. Insignares' sentence for attempted firstdegree murder from 40 years to 27 years, and a state appellate court set aside the criminal mischief conviction. That left Mr. Insignares with a 27-year sentence (including a 20-year mandatory minimum) for his attempted murder conviction, and a concurrent one-year sentence for his discharge of a firearm conviction. *See id.*

In 2007, following state post-conviction proceedings, Mr. Insignares filed his first § 2254 habeas petition. That petition was dismissed by the district court as untimely, and we dismissed Mr. Insignares' appeal from that dismissal for failure to prosecute. *See id.* at 1277. After that dismissal, Mr. Insignares—like Mr. Patterson here—filed a motion with the state trial court to correct an illegal sentence under Rule 3.800. *See id.* In 2009,

the state trial court granted that motion and issued a new judgment reducing Mr. Insignares' mandatory-minimum sentence for the attempted-murder conviction from 20 years to 10 years, and otherwise leaving his convictions and remaining sentences intact. *See id.* As a result of the state trial court's Rule 3.800 order Mr. Insignares had a shorter mandatory minimum sentence, but his total custodial sentence of 27 years remained the same. In 2011, following the entry of a corrected sentence and new judgment by the state trial court, Mr. Insignares—like Mr. Patterson here—filed another § 2254 habeas petition in the district court. *See id.* Mr. Insignares—like Mr. Patterson here—asserted claims related to his initial convictions, and did not contend that there was anything wrong with the new judgment itself. *See id.* ("Notably, [Mr. Insignares] alleged the same errors in his 2007 [first habeas] petition as he has in his second habeas petition.").

Applying the Supreme Court's decision in *Magwood,* the district court determined that Mr. Insignares' new habeas corpus petition was not second or successive, and denied the petition on the merits. *See id.* On appeal, the State argued that, "[b]ecause [Mr.] Insignares had filed a federal habeas petition in 2007 challenging his conviction and raising the same issues as [in] his 2011 petition," the later petition was second or successive and the district court did not have jurisdiction to adjudicate it. *See id.* at 1278. We rejected the State's argument.

Relying on *Ferreira v. Secretary*, 494 F.3d 1286, 1288 (11th Cir. 2007), we affirmed the district court's determination that Mr. Insignares' new habeas corpus petition was not "second or successive" under *Magwood*. We held that "[t]he 2009 resentencing by the state judge resulted in a new judgment, and [Mr. Insignares' 2011 petition was the] first federal challenge to that 2009 judgment." *Insignares*, 755 F.3d at 1281. And we did so even though the new judgment was beneficial to Mr. Insignares and even though the claims asserted by Mr. Insignares challenged his initial convictions and not the new judgment. *See id.* at 1277.

We declined to follow the Seventh Circuit's decision in *Suggs v. United States*, 705 F.3d 279, 282–284 (7th Cir. 2013), which concluded that a second motion to vacate is "second or successive," even where the defendant has been resentenced, if the motion attacks the underlying conviction and not the new sentence. We phrased our holding as follows: "[W]hen 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. We then addressed Mr. Insignares' claims (several claims of ineffective assistance of counsel, a claim that a juror had been sleeping at trial, and a claim of cumulative error) and rejected them on the merits, even though the first habeas petition asserting those same claims had been previously dismissed as untimely. *See id.* At 1282–84.

A "basic principle of justice [is] that like cases should be decided alike," *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005), and we find no meaningful distinction between Mr. Insignares' case and Mr. Patterson's case. Just as Mr. Insignares' initial § 2254 petition was dismissed for untimeliness, so too was Mr. Patterson's initial § 2254 petition. Just as Mr. Insignares filed a motion with the state trial court to correct his illegal sentence under Rule 3.800, so too did Mr. Patterson. Just as the state trial court granted Mr. Insignares' motion to correct, substantively amending a part of the sentence but leaving Mr. Insignares' remaining convictions and total custodial sentences intact, so too did the state trial court here grant Mr. Patterson's motion to correct, substantively vacating a portion of the sentence but leaving Mr. Patterson's remaining convictions and total custodial sentences intact. Just as Mr. Insignares benefitted from the new sentence, so too did Mr. Patterson benefit from the new sentence. And just as the second habeas petition filed by Mr. Insignares asserted claims related to his underlying convictions (and not to the new sentence), so too did the second habeas petition filed by Mr. Patterson assert claims related to his underlying convictions (and not to the new sentence). As in *Insignares*, the state trial court's grant of Mr. Patterson's Rule 3.800 motion and its vacatur of the punishment of chemical castration from the original sentence constituted a resentencing that resulted in a new judgment, even though Mr. Patterson's total custodial term (life in

prison) remained the same, and even though the current habeas corpus petition challenges only the underlying convictions.

B

The State contends that *Insignares* is Distinguishable for two reasons. We are not persuaded.

First, the State argues that, unlike the situation in *Insignares*, Mr. Patterson was not resentenced. Instead, the state trial court merely barred the Department of Corrections from carrying out a portion of Mr. Patterson's initial judgment and sentence. We do not see the distinction.

Initially, Mr. Patterson's sentence consisted of a term of 311 months of imprisonment for his burglary and aggravated kidnapping convictions, as well as consecutive terms of life imprisonment *plus* chemical castration for his sexual battery convictions. The total sentence not only authorized the Department of to incarcerate Mr. Patterson, but also, at its discretion, to chemically castrate him by administering MPA during his term of incarceration. *See* Fla. Stat. § 794.0235(2)(b) ("In all cases involving defendants sentenced to a period of incarceration, the administration of treatment with medroxyprogesterone acetate (MPA) shall commence not later than one week prior to the defendant's release from prison or other institution."). The State concedes in its brief that the administration of MPA "is a part of the defendant's . . . sentence," *see* Appellee's Brief at 27, and we accept that concession because it is consistent with Florida law. Indeed, *Tran v. State*,

965 So. 2d 226, 229 (Fla. 4th DCA 2007), holds that chemical castration is not for medical treatment and constitutes "part of the defendant's punishment and sentence."

Following entry of the state trial court's Rule 3.800 order vacating the chemical castration portion of Mr. Patterson's sentence, the Department of Corrections was no longer authorized to chemically castrate him through the administration of MPA. It was, in other words, not able to carry out one of the punitive measures permitted by Florida law and initially imposed by the trial court at sentencing. The Rule 3.800 order, together with the 1998 judgment, are what currently "authoriz[e] [Mr. Patterson's] confinement." *Magwood*, 561 U.S. at 332.

We fail to understand how an order vacating the punishment of chemical castration—a recognized part of Mr. Patterson's original sentence under Florida law—can be considered anything but a resentencing. Indeed, the State admitted at oral argument that, in implementing the sentence, the Department of Corrections must abide by the trial court's Rule 3.800 order and therefore cannot administer MPA to Mr. Patterson. *Cf. Murphy v. United States*, 634 F.3d 1303, 1314 (11th Cir. 2011) (stating that a resentencing occurs "where an old sentence is invalidated and replaced with a new one"). Accordingly, we are not swayed by the State's first argument. *See* H. Friendly, *Indiscretion About Discretion*, 31 Emory L. J. 747, 758 (1982) ("the jurisprudential rule of like treatment demands consistency not only between cases that are

precisely alike but among those where the differences are not significant").

Second, the State says that *Insignares* is distinguishable because in that case, after granting the Rule 3.800 motion, the state trial court entered a "corrected sentence and new judgment." *Insignares*, 755 F.3d at 1277. The State asserts that here there is only one judgment in the record—the one rendered in 1998—and it contends that, because the state trial court did not enter a new judgment in Mr. Patterson's case following its grant of Rule 3.800 relief, *Insignares* does not apply.

Again, we are not convinced. For starters, Florida law requires *only* that a "judgment of guilty" or "not guilty . . . be rendered . . . in writing, signed by the judge, filed, and recorded." Fla. R. Crim. P. 3.670. With regards to a defendant'S sentence, Florida Rule of Criminal Procedure 3.700 requires *only* that "[e]very sentence . . . be pronounced in open court . . . [and] [t]he final disposition of every case [ ] be entered in the minutes in courts which minutes are kept and . . . docketed in courts that do not maintain minutes." Florida Rule of Criminal Procedure 3.986 provides a sample "uniform Judgment and Sentence form," but "[n]either Rule 3.986 nor any other rule makes the completion and filing of the authorized form of judgment and sentence a condition to a valid sentence." *Flowers v. State*, 351 So. 2d 387, 389 (Fla. 1st DCA 1977). Indeed, under Florida law even the requirement that a judgment of guilt be rendered in writing "should not be read as

suspending the effect of the sentence pronounced in open court until the paper is filed." *Id.* In other words, under Florida law a sentencing (or resentencing) order need not be documented in a formal separate judgment to be effective. Thus, the mere fact that the state trial court here did not, in addition to issuing its Rule 3.800 order, enter a new judgment does not affect the validity of its resentencing of Mr. Patterson, and it is not determinative of whether a new judgment exists under *Magwood* and *Insignares.*[1]

To accept the State's argument would be to make the form that a new judgment takes—rather than its substance—dispositive. If we were to accept the State's view—that it is the entry of a new separate paper judgment (and only the entry of a new separate paper judgment) that results in a "new judgment" under *Magwood* and *Insignares*—then a state trial court's correction of a simple clerical error through the entry of a new separate

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[1] Imagine a scenario where a Florida state court sentences a defendant convicted of fraud to 10 years in prison at hard labor. After being forced to do hard labor for a year, the defendant files a Rule 3.800 motion to correct an illegal sentence, arguing that the hard labor portion of the original sentence violates the Eighth Amendment. The state trial court agrees, and issues an order deleting the hard labor aspect of the initial sentence and telling the prison authorities that they can no longer require the defendant to perform hard labor. Although the state trial court does not enter a new separate judgment without the hard labor condition, its order deleting that punitive condition is a resentencing which constitutes a new judgment under *Magwood* and *Insignares*.

paper judgment (for example, replacing "500 months in prison" with "50 months in prison" to correct a typographical error) would necessarily result in a new judgment giving a defendant a new opportunity to seek federal habeas relief. We have already rejected the notion that the mere issuance of a revised paper judgment under such circumstances necessarily constitutes a resentencing. *See United States v. Portillo*, 363 F.3d 1161, 1165 (11th Cir. 2004) (holding that the correction of a clerical error that is "minor and mechanical in nature" in a sentence under Federal Rule of Criminal Procedure 36 does not result in the entry of a new criminal "judgment" under Federal Rule of Appellate Procedure 4(b)(1)(A)).

We do not think the Supreme Court intended for *Magwood* to extend that far, and thereby conflict with the central purpose behind AEDPA's restrictions on the filing of second or successive petitions—that of "ensur[ing] greater finality of state and federal court judgments in criminal cases[.]" *Gonzalez v. Secretary*, 366 F.3d 1253, 1269 (11th Cir. 2004), *aff'd on other grounds sub nom. Gonzalez v. Crosby*, 545 U.S. 524 (2005). Where state court orders are concerned, principles of federalism and comity counsel against federal courts insisting that a state trial court use a particular method (or piece of paper) to render a criminal judgment. Given the potential variety of forms of criminal judgments available in state criminal justice systems, a federal rule for determining successiveness should and must be

based on the substance, and not the merely the form, of a trial court's sentencing order.

For all of these reasons, we believe the appropriate approach is to focus on the legal error corrected by, and the substantive effect of, the state trial court's Rule 3.800 order. As we emphasized in *Insignares*, "courts must look to the *judgment* challenged to determine whether a petition is second or successive." *Insignares*, 755 F.3d at 1278 (emphasis in original). And we have previously explained, in the context of applying AEDPA's one-year statute of limitations, that "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.

Where a state court corrects a legal error in an initial sentence, and imposes a new sentence that is substantively different than the one originally imposed, there is a new judgment under *Magwood* and *Insignares*. Here, the initial imposition of the punishment of chemical castration was erroneous under Florida law, and the subsequent removal of that punishment substantively altered the punitive terms of Mr. Patterson's custody. So the original 1998 judgment, standing alone, no longer accounts for the authority of the Department of Corrections to detain and exert control over Mr. Patterson. Instead, as the State admits, one must now look to the original 1998 judgment, together with the 2009 order removing the punishment of chemical castration, in order to determine Mr. Patterson's present and legally authorized sentence. *See*

Magwood, 561 U.S. at 332 ("A § 2254 petitioner is applying for something: His petition 'seeks invalidation (in whole or in part) of the judgment authorizing the prisoner's confinement.'"). *Cf.* B. Garner, Garner's Dictionary of Legal Usage 495 (3d ed. 2011) (defining an American judgment as "the final decisive act of a court in defining the rights of the parties"). Because this is Mr. Patterson's first § 2254 petition challenging this new judgment, we conclude that it is not "second or successive" under § 2244(b).

C

The Fifth Circuit's decision in *In re Lampton*, 667 F.3d 585 (5th Cir. 2012), is not to the contrary. Mr. Lampton, a federal prisoner, was convicted by a jury of, among other things, one count of conspiracy to distribute heroin and marijuana and one count of engaging in a continuing criminal enterprise. The district court sentenced him to concurrent life sentences for each conviction. The district court, however, later granted in part Mr. Lampton's motion to vacate under 28 U.S.C. § 2255, ruling that his convictions violated the constitutional prohibition against double jeopardy. The district court vacated Mr. Lampton's conspiracy conviction and sentence, leaving in place the continuing-criminal-enterprise conviction and the life sentence for that conviction.

Mr. Lampton then filed a second § 2255 motion, arguing that under *Magwood* his motion was not second or successive because it was his first § 2255 motion challenging his amended judgment. He argued that, because the district court granted his

first § 2255 motion, he was now in custody pursuant to a new, amended judgment and this was his first § 2255 motion challenging that new, amended judgment. The Fifth Circuit disagreed with Mr. Lampton and held that, where a first collateral attack results in the vacatur of a conviction and sentence for a lesser-included offense, which has the same concurrent sentence as the conviction for the greater offense (which remains valid), the granting of the first collateral attack does not yield a new judgment.

The Fifth Circuit reached this result, in part, because despite the amended judgment, Mr. Lampton still had to serve a life sentence on the continuing-criminal- enterprise conviction that was imposed by the original judgment entered by the district court. Mr. Lampton's punishment, in other words, did not change. "[T]he rule announced in *Magwood* applies only when a new sentence was imposed as a result of the first habeas proceeding." *Id.* at 589. Because no new sentence was imposed as a result of Mr. Lampton's initial § 2255 motion, the Fifth Circuit concluded that his prior § 2255 petition did not yield a new judgment of conviction. "Whether a new judgment has intervened between two habeas petitions, such that the second petition can be filed without th[e] [c]ourt's permission, depends on whether a new sentence has been imposed." *Id.* at 589 (citing *Burton v. Stewart*, 549 U.S. 147, 156 (2007) ("Final judgment in a criminal case means sentence. The sentence is the judgment.")). In Mr. Lampton's case, the "sentence on the [continuing-criminal-enterprise] conviction

remained intact after the initial § 2255 proceeding was completed." *Id.* at 589. Because "no new sentence was imposed[,] [t]he less fundamental change made to [Mr.] Lampton's judgment of conviction [was] not enough to allow him to bypass AEDPA's restrictions on piecemeal habeas litigation." *Id.* at 590.[2]

Here, unlike the situation in *Lampton*, the state trial court's Rule 3.800 order substantively changed Mr. Patterson's sentence. The order eliminated the punishment of chemical castration from the initial sentence, and as a result a new sentence was imposed.

Notably, the Fifth Circuit in *Lampton* cited with approval its prior order in *In re Barnes*, No. 11-30319 (5th Cir. June 23, 2011) (per curiam). In that case, after his first habeas petition was dismissed on limitations grounds, the petitioner later filed a

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[2] The Fifth Circuit also reached this result based upon its own circuit precedent, which it concluded did not require the district court to enter a new judgment as to the remaining counts in a multi-count conviction after one of the counts was vacated. *See Lampton*, 667 F.3d at 588-89 ("It has long been the law of this Circuit that where a defendant has been improperly convicted of and sentenced on both a greater offense and a lesser-included offense, 'the proper remedy is to vacate both the conviction and sentence on the included-offense, leaving the conviction and sentence on the greater offense intact.' Thus, when a first habeas petition results in vacatur of the conviction and sentence associated with one count of a multi-count conviction, the district court is not required to enter a new judgment as to the remaining counts. Those convictions and sentences, as well as the judgment imposing them, remain undisturbed."). That scenario is not presented here.

motion in state court to correct his life sentence. The state court granted the motion and amended the petitioner's life sentence to a 99-year sentence. The Fifth Circuit held that the petitioner could file another § 2254 petition without obtaining prior authorization under § 2244 "because a new sentence constitutes a new judgment." *Lampton*, 667 F.3d at 588 (citing *In re Barnes*, slip opinion at 3).

Our holding is consistent with the Fifth Circuit's reasoning in *Lampton*, in that we too conclude that it is Mr. Patterson's new sentence—a sentence that no longer contains a previously imposed punishment —which yields a new judgment. As a result of the state trial court's Rule 3.800 order, the Department of Corrections can no longer chemically castrate Mr. Patterson. That is, it cannot carry out a punishment that it was previously legally authorized to carry out while Mr. Patterson was in its custody. This substantive alteration of the punitive terms of Mr. Patterson's original judgment resulted in a new sentence, which yielded a new judgment.[3]

D

We respect the passionate dissenting views of our colleague, Judge William Pryor. Yet we suspect that Judge Pryor's real disagreement is with *Magwood* and our prior decision in *Insignares*. Judge Pryor, for example, complains that our decision allows a state prisoner to raise, in a

[3] If we are mistaken, and *Lampton* is inconsistent (or in tension) with *Insignares*, our loyalty, of course, is to *Insignares* rather than *Lampton*.

subsequent federal habeas petition, claims that he failed to assert in his first petition. That complaint, however, should be addressed to the Supreme Court. The Justices who dissented in *Magwood* pointed out that the majority was permitting the exact same thing that Judge Pryor now bemoans. *See Magwood*, 561 U.S. at 343-44 (Kennedy, J., dissenting) ("The Court today decides that a state prisoner who succeeds in his first federal habeas on a discreet sentencing claim may later file a second petition raising numerous previously unraised claims, even if that petition is an abuse of the writ of habeas corpus."). It is not for us to overhaul Supreme Court precedent. *See King v. Morgan*, 807 F.3d 154, 159 (6th Cir. 2015) (explaining that in *Magwood* the majority ruled in favor of the habeas petitioner notwithstanding the "animating" purpose of AEDPA – "to cut back on successive habeas challenges").

There is also an aspect of Judge Pryor's dissent that we do not fully understand. Judge Pryor, like the State, says that *Insignares* does not control because in that case the state trial court entered an amended judgment after issuing its Rule 3.800 order. According to Judge Pryor, that separate judgment—which is missing here—makes all the difference, because formalism should reign supreme (even though he acknowledges that under Florida law a separate written judgment is not necessary). But Judge Pryor then apparently endorses an opinion which holds that an amended judgment reducing a sentence under 18 U.S.C. § 3582(c) due to a retroactive guideline amendment

is not a new judgment under *Magwood*. *See White v. United States*, 745 F.3d 834, 836–37 (7th Cir. 2014). So it is unclear whether formalism is the guiding principle, and we are left to guess whether it is a piece of paper, or a vacatur, or a substantive change (or something else altogether) that matters.

If Judge Pryor thinks that *White* is correctly decided, then his characterization of its rationale—that there is no new judgment unless the original judgment is vacated—fits here, for the state trial court's Rule 3.800 order in Mr. Patterson's case set aside, i.e., vacated, the punishment of chemical castration mandated and authorized by the 1998 judgment. Florida courts have long held and recognized that an order granting a Rule 3.800 motion is effective (and appealable) if it imposes a new sentence, thereby putting an end to judicial labor. *See, e.g., State v. Del Valle*, 745 So.2d 541, 542 (Fla. 4th DCA 1999); *Pate v. State*, 908 So.2d 613, 614 (Fla. 2d DCA 2005); *Adams v. State*, 949 So.2d 1125, 1126-27 (Fla. 3d DCA 2007).

Finally, to the extent that Judge Pryor is suggesting that we are in some way trying to undermine AEDPA, such an accusation is as disappointing as it is wrong. As the Seventh Circuit recently noted, *see Kramer v. United States*, 797 F.3d 493, 502 (7th Cir. 2015), reasonable jurists can disagree about what constitutes a new judgment under *Magwood*. We have tried to faithfully apply AEDPA and *Magwood* in light of binding circuit precedent, and that binding circuit precedent is *Insignares*. We believe we have accomplished that task, Judge Pryor's protests notwithstanding.

III

We reverse the dismissal of Mr. Patterson's habeas corpus petition as second or successive and remand for further proceedings consistent with this opinion. We express no views on Mr. Patterson's claims.

REVERSED AND REMANDED.

HAIKALA, District Judge, concurring specially:

Judge Pryor and Judge Jordan have prepared thorough opinions in this case. I have studied both opinions. I agree with Judge Pryor that this case is not hard. I agree with Judge Jordan's analysis of the issue presented to the Court. Like Judge Jordan, I conclude that the rationale of *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273 (11th Cir. 2014), requires reversal. I write separately to address a few points in Judge Pryor's opinion. In his opinion, Judge Pryor describes Mr. Patterson's reprehensible criminal behavior. Minority Op. at 2-3. There is no doubt that the conduct that gave rise to Mr. Patterson's conviction and sentence is heinous, but that conduct has no bearing upon the legal standard that governs the issue before the Court. As the United States Supreme Court wrote in *Chessman v. Teets*: "On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in

accordance with the procedure demanded by the Constitution." 354 U.S. 156, 165 (1957). Stated differently,

> [T]he Constitution upon which this country is founded protects all citizens, even the worst among the citizenry who have engaged in the most reprehensible of acts. In this context, the broad protections of the Constitution therefore turn a blind eye to the individual facts of the underlying crime and instead focus on rights, even the rights of those who gave their victims no such analogous consideration. Such fundamental fairness in application must inform cases like the one before this Court today, animating the proceedings so that justice, however often slow, is ultimately done. To accept less would be to diminish the Constitution.

Cooey v. Strickland, No. 2:04-CV-1156, 2009 WL 4842393, at *102 (S.D. Ohio Dec. 7, 2009). Similarly, when interpreting and applying a statute, a court must turn a blind eye to the individual facts of the underlying crime if those facts are not relevant to the statutory issue before the court. To do otherwise would be to abandon

objective legal standards for subjective sliding scales.[1]

Judge Pryor also expresses concern that the majority decision may cause "state prisoners [to] have greater access to the writ" and state courts to be more hesitant to correct sentencing errors. Minority Op. at 19-20. Respectfully, I do not share these concerns. If anything, the majority opinion may, as a practical matter, engender fewer writs. The obvious way to avoid a second writ is to make certain that every criminal judgment fully complies with all procedural and substantive rules that govern the judgment when the judgment is first entered. Judges are human though, and trial judges – federal and state alike – occasionally make mistakes. Mistakes have consequences. To fulfill their obligations, trial judges routinely issue decisions – legally sound decisions – that produce consequences that the judge may wish he or she could avoid, but every judge, by oath, is obligated to "faithfully and impartially discharge and perform all of the duties" of the judicial office.[2] The notion that a trial judge would refrain from correcting a sentencing error that all of the parties have acknowledged (as is the case here) to avoid a potential habeas petition is repugnant to the judicial office.

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[1] The Supreme Court followed this principle in *Magwood*. The defendant in that case murdered an Alabama sheriff just outside of the jail where the sheriff worked. The state trial court sentenced Mr. Magwood to death for his crime. *Magwood*, 561 U.S. at 323-24.

[2] *See* 28 U.S.C. § 453.

Similarly, we must follow binding precedent even when application of that precedent may open the door – however briefly – to a second habeas petition.[3] As our Circuit has acknowledged, Supreme Court precedent dictates that a criminal judgment is "comprised of both the sentence and conviction." *Insignares*, 755 F.3d at 1281 (discussing and citing *Burton v. Stewart,* 549 U.S. 147, 156 (2007); *Deal v. United States,* 508 U.S. 129, 132 (1993) ("A judgment of conviction includes both the adjudication of guilt and the sentence."); and *Ferreira*, 494 F.3d at 1292 ("[T]he judgment to which AEDPA refers is the underlying conviction and most recent sentence that authorizes the petitioner's current detention.") (alteration in original). *Insignares* instructs that when a trial court corrects a sentence, even if the revision does not impact the stated term of incarceration and even if the amended sentence benefits the criminal defendant, the trial court renders a new "judgment." And "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." *Insignares*, 755 F.3d at 1281; *see*

[3] Although the habeas petition at issue is "not subject to AEDPA's restrictions on 'second or successive' petitions, AEDPA's other limitations still apply. For example, '[a] petitioner may not raise in federal court an error that he failed to raise properly in state court in a challenge to the judgment reflecting the error.' Moreover, previously decided claims may be foreclosed by the law-of-the-case doctrine." *Insignares*, 755 F.3d at 1281 n.9 (quoting *Magwood,* 561 U.S. at 340).

generally Majority Op. at 4-12. When the trial judge corrected Mr. Patterson's sentence, the judge rendered a new criminal judgment. Mr. Patterson's recent writ is the first following the new judgment; the writ is not second or successive.[4]

Judge Pryor's and Judge Jordan's opinions express an honest disagreement about the import of this Circuit's precedent. I vote with Judge Jordan. As Judge Fay explained in his special concurrence in *Insignares*, "there is language in *Magwood* that indicates [] that the Supreme Court may well take a different tack should it deal with a case like this one." *Insignares*, 755 F.3d at 1285 (Fay, J., concurring specially). "When the Supreme Court has a case exactly like this one, we will know the answer. Until then, we are bound by our precedent in *Ferreira*" and *Insignares*. *Id.*

WILLIAM PRYOR, Circuit Judge, dissenting:

Ace Patterson—a child rapist, kidnapper, and burglar—won the habeas lottery today. The majority gives him a second chance to collaterally attack his convictions in federal court, seventeen years after his trial and nine years after he filed his first federal petition for a writ of habeas corpus. Most state prisoners are not so lucky, as the Antiterrorism and Effective Death Penalty Act prohibits the filing of a "second or successive" petition for a writ of habeas corpus. 28 U.S.C.

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[4] *Insignares* also instructs that "the phrase 'second or successive' applies to habeas *petitions,* not to the *claims* they raise." *Insignares*, 755 F.3d at 1281 (emphasis in *Insignares*).

§ 2244(b). But Patterson is luckier still. In a sleight of hand, the majority rules that a 2009 order sparing him from chemical castration—an unopposed order that *benefited* Patterson—somehow hit the reset button on his ability to obtain federal habeas relief, even though the 2009 order is not "the judgment authorizing [Patterson's] confinement" and is irrelevant for purposes of the bar on second or successive petitions. *Magwood v. Patterson*, 561 U.S. 320, 332, 130 S. Ct. 2788, 2797 (2010) (emphasis omitted) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 83, 125 S. Ct. 1242, 1248 (2005)). The clear text of the statute makes "the judgment of a State court" that holds the prisoner "in custody" the judgment that matters for our collateral review. 28 U.S.C. § 2254(b)(1). And for good reason. Patterson, after all, does not object to anything in the 2009 order that spared him from chemical castration or allege that the removal of chemical castration somehow violated his federal constitutional rights. He instead seeks to collaterally attack the judgment of convictions entered against him in 1998—a judgment he has already collaterally attacked once in federal court and four times in state court. And the majority lets him do it. Because that ruling is wrong in every way, I dissent.

I. BACKGROUND

The majority provides a barebones accounting of the facts and the procedural history of this appeal. But the nature of Patterson's crimes, the trauma he caused the victim, and his repeated and often frivolous collateral attacks vividly illustrate why

the Antiterrorism and Effective Death Penalty Act bars second or successive petitions. Here's the rest of the story.

Ace Patterson is a prisoner in the custody of the Secretary of the Florida Department of Corrections. In 1997, he visited his cousin and his cousin's fiancée at their home in Madison County, Florida. There, Patterson was introduced to the couple's eight-year-old daughter before she went to bed. Patterson ate dinner and spent time with the couple and then left for the night. But he later returned uninvited.

In the middle of the night, Patterson broke into his cousin's home, lifted his cousin's sleeping eight-year-old daughter out of her bed, and carried her outside. Patterson dropped her in a dirty area of the woods and raped her. When she tried to scream, Patterson gagged her by sticking his fingers down her throat. When she tried to escape, Patterson grabbed her leg, dragged her back into the dirt, and raped her again. After the assault, the girl found her way back home. Her parents awoke to the sound of their eight-year-old daughter knocking on the front door—crying, covered in dirt, missing a clump of hair, and covered in scratches and bruises. The medical examiners later discovered dirt in her vagina and severe vaginal lacerations.

In 1998, a jury convicted Patterson of burglary, aggravated kidnapping of a child, and two counts of capital sexual battery. The Florida trial court sentenced him to 311 months imprisonment, consecutive terms of life imprisonment, and chemical castration. The 1998 sentence "committed

[Patterson] to the custody of the Department of Corrections" and directed the Department to "keep and safely imprison" Patterson for the remainder of his life. A copy of the 1998 sentence is attached as Appendix A to this dissent. Patterson's convictions and sentence were affirmed on direct appeal.

Patterson then initiated a flurry of collateral attacks against his convictions, including four petitions for writs of habeas corpus in state court and an ethics complaint against the prosecutor who tried his case. His efforts failed, and a Florida appellate court warned him that "the filing of any further successive and/or frivolous petitions or appeals may result in the imposition of sanctions." *Patterson v. State*, 788 So. 2d 397 (Fla. Dist. Ct. App. 2001) (mem.).

In 2006, Patterson filed his first federal petition for a writ of habeas corpus. He alleged that his convictions were secured in violation of the Due Process Clause of the Fourteenth Amendment, the Self-Incrimination Clause of the Fifth Amendment, and the right to effective assistance of counsel under the Sixth Amendment. The district court dismissed his 2006 petition as untimely. Ordinarily, that decision would have brought closure to the victim of his crimes, who was by then eighteen years old. Patterson then pursued a different line of attack. Instead of challenging his convictions, he challenged the portion of his sentence that required chemical castration. Patterson filed a motion to correct an illegal sentence under Florida Rule of Criminal Procedure 3.800(a) on the ground that the trial court did not

comply with the statutory prerequisites for chemical castration. The State of Florida and the guardian ad litem for the victim acquiesced in Patterson's motion. With Patterson imprisoned for life, the prosecutor and guardian ad litem understandably viewed chemical castration as a "moot point" and believed that contesting his motion was not worth "expos[ing] the victim to the painful remembrance of the Defendant's actions against her." In 2009, the Florida trial court granted Patterson's motion in an order that stated, "[T]he Defendant shall not have to undergo [chemical castration] as previously ordered by the Court at his sentencing in the above styled matter." The 2009 order did not vacate Patterson's original sentence and replace it with a new one. Nor did it direct the Department of Corrections to hold Patterson or to do any affirmative act. A copy of the 2009 order is attached as Appendix B to this dissent.

After his success in state court, Patterson resumed attacking his 1998 convictions in federal court. In 2011, he filed a second petition for a writ of habeas corpus, which again alleged that his convictions were secured in violation of the Fifth, Sixth, and Fourteenth Amendments. The district court dismissed his 2011 petition as second or successive.

II. DISCUSSION

After a state prisoner has had a trial, direct appeal, and an opportunity for collateral review in the state courts, he typically gets one, and only one, chance to collaterally attack his conviction in federal court.

With exceptions not relevant here, section 2244(b) prohibits a state prisoner from filing a "second or successive" habeas petition. 28 U.S.C. § 2244(b). This prohibition "is grounded in respect for the finality of criminal judgments." *Calderon v. Thompson*, 523 U.S. 538, 558, 118 S. Ct. 1489, 1502 (1998). Finality, in turn, is essential to achieving the goals of our criminal justice system: "Deterrence depends upon the expectation that 'one violating the law will swiftly and certainly become subject to punishment, just punishment.' Rehabilitation demands that the convicted defendant realize that 'he is justly subject to sanction, that he stands in need of rehabilitation.'" *Engle v. Isaac*, 456 U.S. 107, 127 n.32, 102 S. Ct. 1558, 1571 n.32 (1982) (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146 (1970)). Finality also "benefits the victim by helping [her] put the trauma of the crime and prosecution behind [her]." *Presnell v. Kemp*, 835 F.2d 1567, 1573 (11th Cir. 1988).

Whether a petition is second or successive depends on "the *judgment* challenged." *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273, 1278 (11th Cir. 2014). The judgment that matters for purposes of section 2244 is "the judgment authorizing the prisoner's confinement." *Magwood*, 561 U.S. at 332, 130 S. Ct. at 2797 (emphasis omitted) (quoting *Dotson*, 544 U.S. at 83, 125 S. Ct.

at 1248); *see also Burton v. Stewart*, 549 U.S. 147, 156, 127 S. Ct. 793, 798 (2007) (explaining that the judgment for purposes of section 2244 is "the judgment pursuant to which [the prisoner] [i]s being detained"); *Insignares*, 755 F.3d at 1281 ("[T]he judgment to which AEDPA refers is the underlying conviction and most recent sentence that *authorizes the petitioner's current detention*." (alteration in original) (emphasis added) (quoting *Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286, 1292 (11th Cir. 2007))). This conclusion follows from the text of the statute. Section 2244(b) refers to second or successive petitions "under section 2254," 28 U.S.C. § 2244(b), and section 2254 governs petitions that challenge "the judgment of a State court" "pursuant to" which the prisoner is "in custody," *id.* § 2254. Accordingly, the bar on second or successive petitions ordinarily prevents a prisoner from twice contesting the judgment authorizing his confinement. *See Burton*, 549 U.S. at 153, 127 S. Ct. at 796.

A petition is not second or successive if it challenges a "new judgment" issued after the prisoner filed his first petition. *Magwood*, 561 U.S. at 324, 130 S. Ct. at 2792. But, again, the new judgment must be a new "judgment authorizing the prisoner's confinement." *Id.* at 332, 130 S. Ct. at 2797 (emphasis omitted) (quoting *Dotson*, 544 U.S. at 83, 125 S. Ct. at 1248). For example, in *Magwood*, a prisoner filed his first habeas petition, and the district court granted it and vacated his sentence. *Id.* at 326, 130 S. Ct. at 2793. The state court then conducted a new sentencing hearing and

entered a new sentence. *Id.* When the prisoner filed a second habeas petition, the U.S. Supreme Court held that it was not second or successive because the petition was the prisoner's "*first*" challenge to the new sentence. *Id.* at 339, 130 S. Ct. at 2801. Although the prisoner's second petition restated the same errors as his first petition, the errors he alleged were "*new*." *Id.* At the resentencing hearing, the state court had heard and rejected the prisoner's arguments a second time, and "[a]n error made a second time is still a new error." *Id.*

Based on the text of the statute and the precedent of the Supreme Court, this case should have been easy. The judgment requiring Patterson's confinement is the sentence entered in 1998. That judgment "committed [Patterson] to the custody of the Department of Corrections," and that commitment has never been vacated or replaced. Patterson challenged that judgment in his 2006 petition for a writ of habeas corpus. When the 2006 petition was dismissed as untimely, Patterson lost his one chance to obtain federal habeas relief. *See Murray v. Greiner*, 394 F.3d 78, 81 (2d Cir. 2005) ("[D]ismissal of a § 2254 petition for failure to comply with the one-year statute of limitations constitutes an adjudication on the merits that renders future petitions under § 2254 challenging the same conviction 'second or successive' petitions under § 2244(b)."). Because Patterson's 2011 petition tries to challenge the 1998 sentence a second time, it should be dismissed as second or successive.

The majority contends that the 2009 order sparing Patterson from chemical castration is a "new judgment" that renders the 2011 petition not second or successive, Majority Op. at 5, but the majority ignores the plain text of the statute. The presence of an intervening judgment or sentence is irrelevant on its own; a new judgment counts for purposes of section 2244 only if it is a new judgment "pursuant to" which the prisoner is "in custody." 28 U.S.C. § 2254; *see Magwood*, 561 U.S. at 332–33, 130 S. Ct. at 2797; *Burton*, 549 U.S. at 156, 127 S. Ct. at 798; *Insignares*, 755 F.3d at 1281. And Patterson is not in custody pursuant to the 2009 order. That order does not *authorize* anything; it instead states, in the negative, that Patterson "shall not have to undergo [chemical castration]." Standing on its own, the 2009 order imposes no sentence and gives the Florida Department of Corrections no authority. The 1998 sentence is the only judgment that allows the Department to detain Patterson. Although the majority asserts that the 2009 order authorizes Patterson's confinement, Majority Op. at 10, the majority never quotes any language from the order that would support such a conclusion.

Because the 2009 order is obviously not the order that authorizes Patterson's confinement, the majority holds that any order that *affects* the judgment authorizing a prisoner's confinement somehow creates a new judgment authorizing his confinement. *Id.* at 14. Requiring the actual entry of a new judgment, the majority contends, would exalt form over substance. *Id.* at 13–14. But if

"substance" requires departing from the text of the statute and usurping the role of Congress, count me a formalist. To quote Justice Scalia, "Long live formalism. It is what makes a government a government of laws and not of men." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 25 (1997).

Indeed, at least two other circuits have embraced the "formalistic" distinction that the majority rejects. The Fifth and Seventh Circuits have held that an order that affects the judgment requiring the prisoner's confinement, but does t vacate and replace that judgment, does not lift the bar on second or successive petitions. The Fifth Circuit has held that an order partially vacating a sentence is not a new judgment for purposes of the bar on second or successive petitions. *See In re Lampton*, 667 F.3d 585, 589–90 (5th Cir. 2012). In *Lampton*, the federal prisoner filed his first motion to vacate, and the district court granted it in part and entered an order "vacating Lampton's conspiracy conviction and the life sentence that had been imposed based on that conviction." *Id.* at 587. This order did not allow Lampton to file a second or successive motion, Judge Higginbotham wrote, because Lampton's original sentence "remained intact" and the later order did not "impose[]" a "new sentence" or "enter an amended judgment." *Id.* at 589–90. The majority's attempt to distinguish *Lampton* omits the key reasoning of that decision. The point was not that Lampton's sentence "did not change," Majority Op. at 16; it was that a partial vacatur is the type of "less fundamental change"

that does not allow a prisoner to "bypass AEDPA's restrictions on piecemeal habeas litigation." *Lampton*, 667 F.3d at 590. Even more on point, the Seventh Circuit has held that an order reducing a prisoner's sentence based on a change in the Sentencing Guidelines, 18 U.S.C. § 3582(c)(2), does not create a new judgment for purposes of the bar on second or successive petitions. *See White v. United States*, 745 F.3d 834, 836–37 (7th Cir. 2014). In *White*, the federal prisoner's first motion to vacate was dismissed, but he later filed a successful motion for a sentencing reduction under section 3582(c)(2). *Id.* at 835. The district court reduced his sentence by 68 months. *Id.* This reduction was not a new judgment, Judge Easterbrook wrote, because "the original judgment [wa]s not declared invalid." *Id.* at 836. Although "White's sentence ha[d] *changed*," the older judgment requiring his confinement was not "vacated" and White was not "resentenced." *Id.* (emphasis added). "*Magwood* does not reset the clock or the count" just because "a prisoner's sentence is reduced." *Id.* at 837. The conflict between these decisions and the majority opinion is plain and makes this appeal a ripe target for the State of Florida to file a petition for a writ of certiorari in the Supreme Court.

Our decision in *Insignares* does not support the majority. True, both Patterson and Insignares filed successful motions to correct an illegal sentence under Florida Rule of Criminal Procedure 3.800(a). But the Florida trial court in *Insignares* went a step further: it also "entered [a] corrected sentence

and new judgment." 755 F.3d at 1277. Specifically, three days after it granted Insignares's motion, the Florida trial court issued a "Corrected Sentence" that "committed [Insignares] to the custody of the Department of Corrections" for a term of twenty-seven years. Here, by contrast, the Florida trial court never issued a corrected sentence to replace Patterson's 1998 sentence. It simply issued the 2009 order, which bars the imposition of chemical castration but does not supersede the 1998 sentence. In short, Insignares had an intervening "judgment authorizing [his] confinement," but Patterson does not. *Id.* at 1279 (emphasis omitted) (quoting *Magwood*, 561 U.S. at 332, 130 S. Ct. at 2797). For the sake of comparison, Insignares's second judgment is attached as Appendix C to this dissent.

The majority does not view the difference between this case and *Insignares* as "meaningful," Majority Op. at 8, but the presence of a new judgment authorizing the prisoner's confinement is the *only* meaningful difference under the statute. As we reiterated in *Insignares*, "the existence of a new judgment is *dispositive*." 755 F.3d at 1280 (emphasis added) (quoting *Magwood*, 561 U.S. at 338, 130 S. Ct. at 2800). And the new judgment must be a new "judgment authorizing the prisoner's confinement." *Id.* at 1279 (emphasis omitted) (quoting *Magwood*, 561 U.S. at 332, 130 S. Ct. at 2797). Contrary to the majority opinion, our decision in *Insignares* never held—or even suggested—that any order affecting a prisoner's sentence would necessarily constitute a "new

judgment" for purposes of section 2244. Instead, we repeatedly stressed that the Florida trial court had entered a corrected sentence *after* it granted Insignares's motion under Rule 3.800(a). *See, e.g.*, *id.* at 1281 ("The 2009 resentencing by the state judge *resulted in a new judgment*." (emphasis added)); *id.* at 1275 ("Because resentencing by the state judge *resulted in a new judgment*, . . . we conclude Insignares's petition is not successive." (emphasis added)).

I fully appreciate that *Insignares* is the law of this Circuit and binds this panel, whether or not it was correctly decided. *Cf.* Majority Op. at 19. But "opinions are to be read in the light of the facts of the case under discussion" and "[t]o keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court." *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S. Ct. 165, 168 (1944). Our decision in *Insignares* addressed a collateral attack on a new judgment authorizing the prisoner's confinement. Extending it to a case like this one where no such judgment exists not only misreads *Insignares* but also conflicts with the plain text of the statute.

Nor is the majority opinion remotely consistent with the purposes of the statute. *Cf.* Majority Op. at 13–14. In what should raise a massive red flag to any student of the history of habeas law, the majority's interpretation makes it *easier* to file a federal habeas petition after the Antiterrorism and Effective Death Penalty Act of 1996 than before that watershed statute was enacted. *See generally*

Gilbert v. United States, 640 F.3d 1293, 1310–11 (11th Cir. 2011) (en banc). Before 1996, Patterson's second petition would be considered an "abuse of the writ" because it raises claims that he could have raised in his first petition. *McCleskey v. Zant*, 499 U.S. 467, 498, 111 S. Ct. 1454, 1472 (1991). It would be barred unless Patterson could prove either cause and prejudice or a fundamental miscarriage of justice. *Id.* at 494–95, 111 S. Ct. at 1470. Yet, the majority allows him to file a second petition when he could prove neither exception—a poor interpretation of a statute that was enacted to promote "greater finality of state . . . court judgments in criminal cases," *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1269 (11th Cir. 2004) (en banc), and to impose "new and tighter limits on successive petitions," *Suggs v. United States*, 705 F.3d 279, 285 (7th Cir. 2013). True, the Antiterrorism and Effective Death Penalty Act partially modifies the doctrine of abuse of the writ when it defines "second or successive" with respect to "the judgment challenged," instead of the "claims" raised. *Magwood*, 561 U.S. at 333–36, 130 S. Ct. at 2797– 99. But that textual modification does not apply here because Patterson is raising the same claims *and* challenging the same judgment. Outside of the modification identified in *Magwood*, seven Justices have explained that the doctrine of abuse of the writ should continue to guide our interpretation of section 2244(b). *See id.* At 343, 130 S. Ct. at 2803 (Breyer, J., joined by Stevens and Sotomayor, JJ., concurring in part and concurring in the judgment); *id.* at 344, 130 S. Ct.

at 2803–04 (Kennedy, J., joined by Roberts, C.J., and Ginsburg and Alito, JJ., dissenting). The majority opinion does not heed that instruction.

The majority argues that its opinion somehow *promotes* finality, federalism, and comity, Majority Op. at 13–14, but that's a laugher. Leaving aside the fact that the State of Florida argues for the opposite result, the majority opinion will greatly expand the opportunities for federal courts to reopen and reexamine the criminal judgments of state courts. A prisoner will be able to file another petition for a writ of habeas corpus any time a state court issues an order affecting his sentence—for example, an order removing a restitution obligation or a fine, an order reducing a sentence for substantial assistance to the government or based on a reduced sentencing guideline, or an order shortening a term of probation. The majority's rule will not only undermine the bar on second or successive petitions in section 2244(b), but it will also undermine the one-year statute of limitations in section 2244(d) because both provisions use the same definition of "judgment." *See Insignares*, 755 F.3d at 1281. The corresponding blow to the finality of criminal judgments will be substantial. A prisoner in Florida, for example, can forever hold out hope for another round of federal habeas review because Florida allows prisoners to file motions to correct an illegal sentence "at any time." Fla. R. Crim. P. 3.800(a). This ever-looming specter of federal review will torpedo Florida's interest in "insuring that there will at some point be the certainty that comes with an end to litigation, and

that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Isaac*, 456 U.S. at 127, 102 S. Ct. at 1571 (quoting *Sanders v. United States*, 373 U.S. 1, 25, 83 S. Ct. 1068, 1082 (1963) (Harlan, J., dissenting)). And the increase in federal petitions will burden the state officials who must contest them after the "[p]assage of time, erosion of memory, and dispersion of witnesses." *Id.* at 127, 102 S. Ct. at 1572; *see also McCleskey*, 499 U.S. at 492, 111 S. Ct. at 1469 ("If reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still."). Far from respecting federalism, the majority will place state prosecutors in a double bind: either contest the prisoner's motion for a sentencing alteration, draining precious resources and forcing the victim to relive the crime and prosecution; or acquiesce in the prisoner's motion, triggering another round of federal habeas review and risking the release of the prisoner due to stale evidence. In short, I frankly do not understand how the majority can contend that its opinion is friendly to the interests of federalism, comity, and finality. With friends like these, the states and victims of crime don't need enemies.

The majority offers two additional justifications for its opinion, but both are red herrings. First, the majority explains that Florida law does not require trial judges to enter a written sentence. Majority Op. at 11–12. True, but irrelevant. If the Florida

trial court in this case had entered a new judgment authorizing Patterson's confinement in an oral pronouncement, I would not be dissenting. But the Florida trial court did not enter *any* new judgment authorizing Patterson's confinement, orally or otherwise. The majority is knocking down a strawman when they portray my position as a "paper judgment" requirement. *See id.* at 13, 20. Second, the majority contends that focusing on the entry of a new judgment— never mind that the statute requires exactly that focus—would mean that judgments correcting only "clerical" errors would qualify as new judgments. *Id.* At 13. But this argument cannot be taken seriously. We have already held that clerical corrections do not create a new "judgment" for purposes of Federal Rule of Appellate Procedure 4(b)(1)(A). *United States v. Portillo*, 363 F.3d 1161, 1165–66 (11th Cir. 2004). We would surely extend this holding to the context of second or successive petitions under section 2244(b), as we have done already in an unpublished opinion. *See United States v. Cano*, 558 F. App'x 936, 941 n.6 (11th Cir.) ("The fact that the district court entered an amended judgment to correct clerical errors does not result in a new judgment that is exempt from the rules on second or successive petitions . . . ."), *cert. denied*, 135 S. Ct. 387 (2014); *accord Marmolejos v. United States*, 789 F.3d 66, 71–72 (2d Cir. 2015); *United States v. Ledesma-Cuesta*, 476 F. App'x 412, 412 n.2 (3d Cir. 2012); *In re Martin*, 398 F. App'x 326, 327 (10th Cir. 2010).

The majority opinion is symptomatic of a disturbing phenomenon in the federal judiciary: an open disdain for the Antiterrorism and Effective Death Penalty Act. Recently, three Justices lamented that one of our sister circuits "seems to have acquired a taste for disregarding AEDPA." *Rapelje v. Blackston*, __ U.S. __, 136 S. Ct. 388, 389 (2015) (Scalia, J., joined by Thomas and Alito, JJ., dissenting from the denial of certiorari). A judge from a different circuit recently criticized the Act as "misconceived at its inception and born of misguided political ambition." Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1221 (2015). And another recently labeled it "a cruel, unjust and unnecessary law" that "has resulted . . . in much human suffering" and "should be repealed." Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xlii (2015). But the Antiterrorism and Effective Death Penalty Act is the law of the land and has been for nearly twenty years. The task of rectifying any perceived defects falls to Congress, not unelected judges. "[F]ederal judges must obey" the duly enacted laws of Congress, including the Act, which "some federal judges find too confining." *White v. Woodall*, __ U.S. __, 134 S. Ct. 1697, 1701 (2014). And it is no more legitimate to chip away at the Act by exalting its judicially imagined "substance" over its clear textual "form" than it is to ignore the

statute entirely. *Cf.* Majority Op. at 13–14. Aside from ignoring the text of the statute and undermining its purposes, the majority's position could provide a pyrrhic victory for its intended beneficiaries. True, after the majority opinion, state prisoners will have greater access to the writ. But once state officials learn that any change to a prisoner's sentence will trigger another round of federal habeas review, they will be less willing to agree to sentencing alterations that benefit the prisoner. And state courts will be more hesitant to accept their concessions. Judge Haikala's opinion balks at the notion that a state court would decline to correct a conceded "error," Concurring Op. at 3, but that is not my point. Courts have the discretion to accept a prosecutor's concession, in lieu of reaching the merits, in close cases and in cases where no error occurred. *See Santiago-Lugo v. Warden*, 785 F.3d 467, 475 (11th Cir. 2015); *Casey v. United States*, 343 U.S. 808, 808, 72 S. Ct. 999, 999 (1952). But "it has been the sound practice of Florida's courts to not accept improper concessions by the state" when it "might be to the detriment of the victims of crime and/or to the people of the State of Florida," *Reed v. State*, 783 So. 2d 1192, 1196 n.2 (Fla. Dist. Ct. App. 2001), *quashed on other grounds*, 837 So. 2d 366 (Fla. 2002), a possibility that will arise more often after today's decision. Judge Haikala's opinion also predicts that the majority's decision will benefit defendants because an increase in the opportunities for federal habeas review will decrease the number of constitutional errors made in the state courts. *See*

Concurring Op. at 2. But the Supreme Court long ago stated the opposite: "Rather than enhancing [constitutional] safeguards, ready availability of habeas corpus may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself." *Isaac*, 456 U.S. at 127, 102 S. Ct. at 1571.

When it comes to federal habeas petitions, the more is not the merrier. Relaxing the bar on second or successive petitions will "prejudice the occasional meritorious application" for a writ of habeas corpus by "bur[ying] [it] in a flood of worthless ones." *McCleskey*, 499 U.S. at 492, 111 S. Ct. at 1469 (quoting *Brown v. Allen*, 344 U.S. 443, 537, 73 S. Ct. 397, 425 (1953) (Jackson, J., concurring in the result)). Despite the best efforts of Congress to prevent that "flood," the majority is praying for rain.

This case is not hard. And nobody should be fooled by the majority's atextual decision. After seventeen years of repeated and often frivolous attempts to overturn his convictions, Patterson is being given another go-round based on an order issued in 2009 that both the State of Florida and the guardian ad litem thought was meaningless. That order does not authorize his confinement, and he does not allege that it violates his constitutional rights. Nor should he: the 2009 order gave him all of the relief that he requested. Today's decision is gimmickry that will require the State of Florida to defend a child rapist's convictions for the umpteenth time and will threaten a twenty-six

year-old woman to relive the horror of his monstrous crimes.

I dissent.

Case No._____

IN THE SUPREME COURT OF THE UNITED STATES

JULIE L. JONES, SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
Ace Patterson,
Respondent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

ACE PATTERSON,

Petitioner,

v. CASE NO. 4:11cv10-RH/CAS

SECRETARY KENNETH S. TUCKER,

Respondent.
_____/

ORDER DENYING THE PETITION AND GRANTING A CERTIFICATE OF APPEALABILITY

This petition for a writ of habeas corpus under 28 U.S.C. § 2254 is before the court on the magistrate judge's report and recommendation, ECF No. 15, and the objections, ECF No. 19. I have reviewed *de novo* the issues raised by the objections. The report and recommendation correctly concludes that the petition should be dismissed as an unauthorized second or successive petition. The report and recommendation is adopted as the court's opinion on this issue. I also conclude, however, that a certificate of appealability should be granted on this issue.

Rule 11 of the Rules Governing § 2254 Cases requires a district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *See Miller-El v. Cockrell*, 537 U.S. 322, 335-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); *see also Williams v. Taylor*, 529 U.S. 362, 402-13 (2000) (setting out the standards applicable to a § 2254 petition on the merits). As the Court said in *Slack*:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were " 'adequate to deserve encouragement to proceed further.' "
>
> *Slack*, 529 U.S. at 483-84 (quoting *Barefoot*, 463 U.S. at 893 n.4). Further, in order to obtain a certificate of appealability when dismissal is based on procedural grounds, a petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial

> of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

The petitioner has made the required showing. A petition challenging a new judgment is not "second or successive" even if the new judgment carries forward the substance of a decision that was part of an original judgment that was attacked through an earlier petition. *See Magwood v. Patterson*, 130 S. Ct. 2788 (2010); *Campbell v. Sec'y, Dep't of Corr.*, 447 F. App'x 25 (11th Cir. 2011) (unpublished); *cf. Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286, 1292-93 (11th Cir. 2007). The law of the circuit is unsettled on whether the state court's order deleting a term of the original sentence—the term requiring administration of medroxyprogesterone acetate—constituted a new judgment, so that the current petition was not second or successive. *See also Wentzell v. Neven,* No. 10-16605, 2012 WL 1071638 (9th Cir. April 2, 2012); *Johnson v. United States*, 623 F.3d 41 (2d Cir. 2010); *Martin v. Bartow*, 628 F.3d 871 (7th Cir. 2010).

For these reasons,

IT IS ORDERED:

1. The report and recommendation is ACCEPTED.

2. The clerk must enter judgment stating, "The petition is DENIED with prejudice."

3. A certificate of appealability is GRANTED on this issue: whether the state-court order deleting from the petitioner's sentence the term requiring administration of medroxyprogesterone acetate constitutes a new judgment, so that the current petition is not second or successive.

4. The clerk must close the file.

SO ORDERED on April 18, 2012.

s/ Robert L. Hinkle
United States District Judge

Case No._____

IN THE SUPREME COURT OF THE UNITED STATES

JULIE L. JONES, SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
Ace Patterson,
Respondent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

ACE PATTERSON,

Petitioner,

vs. Case No. 4:11cv10-RH/WCS

SECRETARY KENNETH S. TUCKER, [1]

Respondent.
_____/

REPORT AND RECOMMENDATION TO DENY § 2254 PETITION

This cause is before the court for ruling on Petitioner's amended petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, with supporting memoranda and exhibits. Doc. 7 in ECF (Electronic Case Filing).[2] Doc. 13. Respondent filed

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[1] Kenneth S. Tucker is the current Secretary of the Florida Department of Corrections, and is automatically substituted as Respondent. Fed.R.Civ.P. 25(d).

[2] The petition, two memoranda, and exhibits were scanned and filed by the clerk as a single document. Hereafter, references to doc. 7 will be to the page numbers of the document as scanned and filed in ECF. The petition is at pp. 1-45, the supporting memorandum is at pp. 46-50, the

a motion to dismiss with exhibits. Unless otherwise noted, references to exhibits are to those filed electronically as docs. 13-1, 13-2, and 13-3. Petitioner filed a reply. Doc. 14.

Respondent seeks dismissal of the petition with prejudice as untimely filed. Doc. 13, p. 9. There is a one year limitations period for filing a § 2254 petition. 28 U.S.C. § 2244(d)(1). The period generally 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." § 2244(d)(1)(A). Later dates which may commence the period are the date on which an unconstitutional impediment which prevented the applicant from filing is removed; the date on which the right asserted was recognized by the Supreme Court and made retroactive on collateral review; and the date on which the factual predicate could have been discovered with due diligence. § 2244(d)(1)(B)-(D). The period is tolled for the time during which a "properly filed" application for relief is pending in state court. § 2244(d)(2).[3]

Petitioner previously filed a § 2254 petition in this court, case number 4:06cv138- WS/WCS, challenging his state conviction and sentence

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memorandum regarding the period of limitations is at pp. 51-53, and the exhibits are at pp. 54-78.

[3] The time may be equitably tolled only in rare cases, and "only if a petitioner establishes *both* extraordinary circumstances and due diligence." Diaz v. Secretary for Dept. of Corrections, 362 F.3d 698, 702 (11th Cir. 2004) (citation omitted, emphasis in original).

imposed on July 14, 1998.[4] A motion to dismiss the petition was granted and the petition was dismissed as untimely. Docs. 18, 29, and 30 in that case (report and recommendation, order adopting it, and judgment entered on the docket on May 31, 2007).[5] A certificate of appealability and request to appeal in forma pauperis were denied by this court, and by the Eleventh Circuit. Docs. 34, 40, and 41 in that case.

Petitioner claims that this petition is not untimely because he was resentenced. He identifies the date of conviction and sentence as May 13,

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[4] The documents are available in ECF, so the court references the document numbers in that case. Respondent has also supplied copies of the relevant documents as Exs. F-I.

[5] The timeliness calculation in the earlier case was as follows:

> The judgment was affirmed on June 28, 1999. Petitioner did not seek rehearing or file a petition for writ of certiorari. His conviction therefore became final on or about Monday September 27, 1999, when the 90 days for seeking certiorari expired.
>
> Unless a later commencement date applies or the period was tolled, Petitioner's time for filing a § 2254 petition expired on September 27, 2000. Absent other tolling before that date, by the time the petition for writ of habeas corpus was filed in state court on November 1, 2000, there was no time left to toll.

Doc. 18 in case number 4:06cv138-WS/WCS, pp. 2-3 (citations and record references omitted).

1998, and July 14, 1998, and identifies the date of resentencing as December 14, 2009. Doc. 7, p. 1. The verdict was returned on May 13, 1998, and Petitioner was originally sentenced on July 14, 1998. Exs. B and C. In Petitioner's memorandum regarding the limitations period (attached to the amended petition), he asserts that he was resentenced on December 14, 2009, when his Fla.R.Crim.P. 3.800(a) motion was granted. He claims the finality of that latter judgment is the operative date for calculating the one-year period. Doc. 7, p. 52, *citing*, Ferreira v. Secretary, Dept. of Corrections, 494 F.3d 1286 (11th Cir. 2007), *cert. denied*, 555 U.S. 1149 (2009) (commencing the one-year period from the date of resentencing, where state prisoner was resentenced as a result of a successful Fla.R.Crim.P. 3.850 motion). As explained in Ferreira, "[w]hat this Court has previously called the judgment of conviction and the sentencing judgment together form the judgment that imprisons the petitioner," and the one year "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, *following* Burton v. Stewart, 549 U.S. 147, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007) (other citations omitted).[6]

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[6] In Burton, a § 2254 petition had been filed challenging the petitioner's 1994 conviction. Later, after exhausting remedies following resentencing, the petitioner filed a petition challenging his 1998 resentencing. Burton, 127 S.Ct. at 795-796. The Court found this was an unauthorized second or

Respondent claims that the current petition is untimely under the same rationale relied upon in dismissed the previous petition, that there was no resentencing to commence anew the one-year period, and that the prior ruling as to timeliness is the law of the case. Doc. 13, pp. 4-9.

More critical than timeliness, however, is whether this is a second or successive § 2254 motion. Assuming Petitioner challenges his confinement pursuant to the same state court judgment as challenged in his first petition, this court lacks jurisdiction to consider it unless and until authorization for filing is granted by the court of appeals. *See, e.g.*, Burton, 549 U.S. at 157, 127 S.Ct. at 799 (as petitioner had neither sought nor received authorization to file a second or successive petition, the district court lacked jurisdiction). The dismissal of the prior § 2254 petition as time barred "constitutes an adjudication on the merits that renders future petitions under § 2254 challenging the same conviction 'second or successive' petitions under [28 U.S.C.] § 2244(b)." Murray v. Greiner,

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successive petition over which the district court lacked jurisdiction. The time limit was discussed in rejecting Petitioner Burton's argument that, had he not filed his § 2254 petition until remedies were exhausted regarding the resentencing, his challenges to the underlying conviction would have been time barred. 127 S.Ct. at 798. The Court said the sentence is the judgment, and "Burton's limitations period did not begin until both his conviction *and* 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 [initial] petition." *Id.*, at 798-799.

394 F.3d 78, 81 (2d Cir. 2005) (citations omitted).[7] *See also* McNabb v. Yates, 576 F.3d 1028, 1029-30 (9th Cir. 2009) (holding that dismissal as untimely constitutes a disposition on the merits and renders a later petition second or successive) (citing Murray) (footnote omitted);[8] Altman v. Benik, 337 F.3d 764, 766 (7th Cir. 2003) (prior untimely petition "counts" to render subsequent petition successive: "a statute of limitations bar is not a curable technical or procedural deficiency but rather operates as an irremediable defect barring consideration of the petitioner's substantive claims."). *Cf.* Jordan v. Sec'y Dep't of Corr., 485 F.3d 1351, 1353 (11th Cir.), *cert. denied*, U.S., 128 S.Ct. 450, 169 L.Ed.2d 315 (2007) (not discussing the issue but noting that the first petition was

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[7] Although the Supreme Court did not address this issue, Murray was cited favorably in Gonzalez v. Crosby, 545 U.S. 524, 533 n. 6, 125 S.Ct. 2641, 2645, n. 6, 162 L.Ed.2d 480 (2005), rejecting the argument that the fact that dismissal of an unexhausted petition does not render subsequent petition successive: "If this argument is correct, petitioner would be able to file not just a Rule 60(b) motion, but a full-blown habeas petition, without running afoul of § 2244(b). But see, *e.g., Murray v. Greiner*." (full citation omitted). The Court did not need to decide the question, however, because it concluded the Rule 60(b) motion, which did not raise any claim for relief from the conviction or sentence, should not be treated as a second or successive petition. *Id.*

[8] The court noted that a Fed.R.Civ.P. 60(b) motion challenging a prior dismissal on the basis of untimeliness would not necessarily be a second or successive motion *Id.*, at 1030, n. 1 (*citing* Gonzalez, *supra* n. 4) (other citation omitted).

denied with prejudice as untimely, and authorization for filing the second or successive petition had been granted).[9]

The critical question remains whether Petitioner Patterson is now in custody pursuant to a new sentence imposed in 2009. If so, he would not be in custody under the same judgment challenged in the § 2254 petition filed in 2006, and he has not previously challenged his custody under a 2009 judgment. *See* Magwood v. Patterson, --- U.S. ----, 130 S.Ct. 2788, 2796, 177 L.Ed.2d 592 (2010) (agreeing that § 2244(b) applies only to a second or successive application challenging the *same* state court judgment, so a first application challenging a new judgment following resentencing "cannot be 'second or successive' such that § 2244(b) would apply."). "[B]oth § 2254(b)'s text and the relief it provides indicate that the phrase 'second or successive' must be interpreted with respect to the judgment challenged." *Id.*, at 2797.

Petitioner's "Uniform Commitment to Custody of Department of Corrections," with attached judgment, is Ex. D (doc. 13-1, pp. 26-42). See Fla.R.Crim.P. 3.810 (the judgment and sentence shall be attached to the commitment, and the

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[9] *Compare*, Gonzalez v. Crosby, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005) (a Fed.R.Civ.P. 60(b) motion, challenging dismissal of prior § 2254 petition only on the basis of the court's timeliness analysis and raising no claims for relief on the merits, was not the equivalent of a second or successive petition; still affirming the denial of relief as extraordinary circumstances justifying Rule 60(b) relief had not been shown).

sheriff shall transfer the defendant with the commitment and certified copies to the official whose duty it is to execute the sentence). Petitioner was sentenced to terms of 311 months on counts one and two, and terms of life on counts three and four. As to counts three and four, Petitioner was determined to be a sexual predator, and there is a check mark on the form next to "Chemical Castration pursuant to F.S. 794.0325 [sic] M.P.A." Doc. 13-1, pp. 37 and 40).[10]

Petitioner filed a motion to correct illegal sentence pursuant to Fla.R.Crim.P. 3.800(a) on August 12, 2008. Ex. L (doc. 13-3, pp. 50-53). He noted he was sentenced to concurrent terms of 311 months on counts one and two, and consecutive life terms on counts three and four. He did not challenge the sentences, but challenged the sentencing court's order, under Fla. Stat. § 794.0235. That statute authorizes administration of medroxyprogesterone acetate (MPA) chemical castration under the discretion of the prison commencing "not later than one week prior to the defendant's release from prison" and shall continue for a duration of years as specified by the sentencing court or for life. Ex. L, p. 3; Fla. Stat. § 794.0235(2)(a). Petitioner argued that the court had not complied with the requirements of § 794.0235 in ordering administration of MPA. *Id.*, pp. 3-4. For relief, he asked the court "to remove the order of MPA from his judgment and sentence." *Id.*, p. 4.

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[10] The citation was incorrect, the statute is (and was in 1998) § 794.0235; there is no § 794.0325.

The State conceded that the 3.800 motion was facially sufficient, and an evidentiary hearing was scheduled. Exs. N and O. A hearing was not held because the State stipulated to the facial sufficiency of the motion "and stipulates to the Defendant's motion in light of the Defendant's consecutive Life sentences in the above styled matter." Ex. P, p. 2. The Guardian Ad Litem agreed to the stipulation "as it is a moot issue in light of the Defendant's consecutive Life sentences," and did not want to subject the victim to painful recollections "by having a contested hearing on an issue that is a 'moot point.' " *Id.*

The court ordered:

> [T]he Defendant's Motion to Correct an Illegal Sentence is GRANTED and the Defendant shall not have to undergo [the MPA injection], also known as "Chemical Castration" as previously ordered by the Court at his sentencing in the above styled matter.

Id., p. 3 (doc. 13-3, p. 67 in ECF). The order was signed on December 14, 2009. *Id.*

Consequently, Petitioner is not in custody pursuant to this order, which simply removed the MPA treatment condition from his original sentence. The MPA condition did not affect his term of imprisonment one way or another, as MPA "may not be imposed in lieu of, or reduce, any other penalty prescribed under s. 794.011." § 794.0235(1). There was no hearing on the MPA issue as it was

considered moot in light of the consecutive life sentences, which were not challenged or invalidated. *Cf,* Murphy v. United States, 634 F.3d 1303, 1314 (11th Cir. 2011) (because Fed.R.Crim.P. 35(b) reduction does not affect finality of judgment, and it "does not constitute a resentencing where an old sentence is invalidated and replaced with a new one," reduction did not alter the date of finality and § 2255 motion was untimely).

The order of December 14, 2009, did not invalidate the original prison sentences on the four counts, or even reiterate the sentences. It merely invalidated a condition which had no impact on the prison sentence to be served. It can, therefore, only be pursuant to the original sentence and judgment that Petitioner remains in custody of his multiple terms of 311 months and life. He has already challenged his custody pursuant to the original sentence, and this is an unauthorized second or successive § 2254 petition over which the court lacks jurisdiction. Respondent's motion should be granted, though not for the reasons argued (that the petition is untimely), and the petition should be dismissed.

Certificate of Appealability

Section 2254 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §

2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. § 2254 Rule 11(b).

I find no substantial showing of the denial of a constitutional right. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000) (explaining how to satisfy this showing) (citation omitted). Therefore, I recommend that the court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." The parties shall make any argument as to whether a certificate should issue by objections to this report and recommendation.

Conclusion

It is therefore respectfully **RECOMMENDED** that Respondent's motion to dismiss (doc. 13) be **GRANTED**, and the court **DISMISS** Petitioner's § 2254 petition challenging the 1998 judgment of the Third Judicial Circuit, Madison County, as an unauthorized second or successive petition. It is further **RECOMMENDED** that a certificate of appealability be **DENIED** pursuant to § 2254 Rule 11(a), and that leave to appeal in forma pauperis be **DENIED** as an appeal would not be taken in good faith.

IN CHAMBERS at Tallahassee, Florida, on March 20, 2012.

s/ William C. Sherrill, Jr.
WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings andrecommendations within 14 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 14 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

Case No._____

IN THE SUPREME COURT OF THE UNITED STATES

JULIE L. JONES, SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
Ace Patterson,
Respondent.

APPENDIX D

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MADISON COUNTY, FLORIDA

CASE NO. 97-000171-CF

STATE OF FLORIDA

-vs-

ACE ROBERT PATTERSON
_____/

ORDER GRANTING DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE

THIS MATTER, having come on to be heard before the Court on the Defendant's Motion to Correct Illegal Sentence, the State having acknowledged the Factual Sufficiency of Same the Court being otherwise fully informed in the premises, finds as follows:

1. The Defendant is currently serving a sentence of 311.7 months for Count 1 Burglary of a

Dwelling Person Assaulted and a concurrent 311.7 months for Count 2 Kidnapping and Count 3 and 4 Capital Sexual Battery, the Defendant is serving Life sentences with Count 4 consecutive to Count 3. The Defendant was also ordered to undergo Mexdroxypragestrone Acetate (MPA) injection also known as chemical castration.

2. The Defendant filed a Motion to Correct Illegal Sentence alleging that the Court did not comply with requirements of law when it sentenced him to be "Chemically Castrated" as the Court did not appoint a medical expert to determine whether the defendant was an appropriate candidate for said "Chemical Castration" within 60 days required by Florida Statute 794.0235. Nor did the Court specify the duration of said treatment as required by Florida Statute 794.0135 [(sic)].
3. The State has conceded that the Defendant's motion is "Factually Sufficient" and stipulates to the Defendant's motion in light of the Defendant's consecutive Life sentences in the above styled matter.
4. Guardian-Ad-Litem Linda Daggat, Circuit Director of the Guardian-Ad-Litem's office in Live Oak, Florida, has been contacted by the State and she agrees with the State's Stipulation to the Defendant's motion as it is a moot issue in light of the Defendant's consecutive Life sentences. Further, the Guardian-Ad-Litem on behalf of the victim, does not want to expose the victim to the painful

remembrance of the Defendant's actions against her by having a contested hearing on an issue that is a "moot point".

IT IS THEREFORE,

ORDERED AND ADJUDGED, the Defendant's Motion to Correct Illegal Sentence is GRANTED and the Defendant shall not have to undergo Medroxypragestrone Acetate (MPA) injection, also known as "Chemical Castration" as previously ordered by the Court at his sentencing in the above styled matter.

DONE AND ORDERED in chambers at Madison, Madison County, Florida this 14th Day of December, 2009.

S/ Gregory S. Parker
GREGORY S. PARKER
CIRCUIT JUDGE