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No. 07-1008

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

ANTHONY FERREIRA,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Title 18, U.S.C. § 3006A(d)(7) and Rule 39 of this Court, Respondent Anthony Ferreira requests leave to proceed in forma pauperis ("IFP") and to file the attached Brief For The Respondent In Opposition.

The district court and the United States Court of Appeals for the Eleventh Circuit granted Respondent leave to proceed IFP, and Eleventh Circuit appointed the undersigned counsel to represent Respondent pursuant to Title 18 U.S.C. § 3006A in proceedings before that court.

Respectfully submitted, this 7th day of May, 2008.

Michael N. Loebl*
FULCHER HAGLER LLP
One 10th Street, Suite 700
Augusta, GA 30901
Phone: (706) 724-0171
Fax: (706) 396-3630
Email: mloebl@fulcherlaw.com

* Counsel of Record, Appointed Below Pursuant to 18 U.S.C. § 3006A

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Michael N. Loebl*
FULCHER HAGLER LLP
One 10th Street, Suite 700
Augusta, GA 30901
Phone: (706) 724-0171
Fax: (706) 396-3630
Email: mloebl@fulcherlaw.com

* Counsel of Record, Appointed Below Pursuant to 18 U.S.C. § 3006A

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly held that, in applying the one-year statute of limitations mandated by 28 U.S.C.§ 2244(d)(1)(A), the statutory reference to "the date on which the [petitioner's] judgment became final" refers to the date on which both the conviction *and* sentence the petitioner is serving, and which together hold the petitioner in custody, became final.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. at A-1 through A-16) is reported at 494 F.3d 1286.

JURISDICTION

The court of appeals entered its judgment on August 7, 2007. A petition for rehearing en banc was denied on November 1, 2007. The Petition was filed on January 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The instant habeas action has been before this Court on a prior occasion; on February 20, 2007, this Court granted Anthony Ferreira's Petition for Writ of Certiorari, vacated a non-precedential ruling of the Eleventh Circuit which had

affirmed the district court's dismissal of Ferreira's 28 U.S.C. § 2254 petition as time-barred, and remanded the case to the Eleventh Circuit for reconsideration in light of Burton v. Stewart, 543 U.S. 147, 127 S. Ct. 793 (2007). See Ferreira v. Secretary for the Dep't of Corrs., 183 Fed. Appx. 885 (11th Cir. June 8, 2006) (Ferreira I), cert. granted, judgment vacated, and remanded, Ferreira v. McDonough, _ U.S. _, 127 S. Ct. 1256 (2007). Following supplemental briefing by the parties, the same panel of the Eleventh Circuit which had previously affirmed the dismissal of Ferreira's first federal habeas petition as untimely issued a published decision holding that Ferreira's § 2254 application was timely filed under 28 U.S.C. § 2244(d)(1)(A) and reversing the judgment of the district court accordingly. See Ferreira v. Secretary for the Dep't of Corrs., 494 F.3d 1286, 1286-93 (11th Cir. 2007) (Ferreira II). Florida's Secretary for the Department of Corrections ("Secretary" or "State") now petitions the Court to grant certiorari for the purpose of addressing the Eleventh Circuit's ruling and what the Secretary contends is a conflict among the circuit courts of appeal created by the Eleventh Circuit's Ferreira II decision.

Although Respondent Anthony Ferreira contends that the Question Presented as set forth in the Secretary's Petition does not accurately reflect the holding or rationale of the court of appeals' decision, Ferreira acknowledges that the Secretary's Petition accurately states the history of Ferreira's trial and

postconviction (state and federal) proceedings (see Pet. at 3-7). As pertinent to the instant Petition, the material events and corresponding dates are stated below.

1. Following a jury trial, Ferreira was convicted of first degree murder and attempted armed robbery with a deadly weapon. He was sentenced to life imprisonment on the murder conviction and a consecutive thirty years on the armed robbery conviction.

2. Ferreira appealed his convictions through the state appellate system. On September 11, 1997, the Florida Supreme Court denied Ferreira's appeal. Ferreira did not file a petition for writ of certiorari with this Court.

3. On August 18, 1998, Ferreira filed a postconviction motion under Fla. R. Crim. P. 3.850. The state trial court denied relief. Ferreira appealed; however, the state appellate court denied relief and issued its mandate on February 8, 2002.

4. On June 24, 2002, Ferreira filed a motion to correct an illegal sentence under Fla. R. Crim. P. 3.800. The state trial court granted Ferreira's motion and ordered that Ferreira's sentences run concurrently rather than consecutively, as originally imposed by the sentencing court. The trial court's order directed the "Office of the Clerk [to] amend the sentence for count II to reflect that it shall run concurrently with count I." Ferreira's judgment and sentence, as amended, were then re-recorded by the Clerk. The State appealed. The appellate court affirmed in a published decision. Florida v. Ferreira, 840 So. 2d 304 (Fla. 5th DCA 2003). Mandate issued on April 14, 2003.

5. On June 10, 2003, Ferreira executed his § 2254 petition and submitted it to the district court.[1] As recognized by the district court, Ferreira's § 2254 petition challenged "his original convictions and proceedings." (Pet. App. at D-6.) On September 8, 2003, the State filed its response to Ferreira's § 2254 petition.

6. On October 20, 2003, the district court issued an order noting that State's response did not address the applicability of the Eleventh Circuit Court of Appeals' then-recent decision in Walker v. Crosby, 341 F.3d 1240, 1246 (11th Cir. Aug. 13, 2003) ("[T]he statute of limitations for a habeas corpus application challenging a resentencing court's judgment begins to run on the date the resentencing judgment became final and not the date the original judgment became final."). The trial court ordered the State to file "a supplemental response addressing applicability of the Walker decision to the instant proceeding." (Oct. 20, 2003 Order, dist. ct. docket doc. no. 7, at 1-2.)

7. On November 17, 2003, the State filed its supplemental response. The State's supplemental response argued that "[t]he facts underlying Walker clearly make it inapposite to this case." (State's Supplemental Response to Petition, dist. ct. docket doc. no. 8, at 3.) The State's supplemental response explained:

> In Walker, the petitioner's one year period had expired when he filed a motion to correct his sentence. The State trial court found grounds to re-sentence the petitioner and issued a completely different

[1] The Petition was docketed with the Clerk on June 24, 2003, the date which the Secretary references on page 4 of the Petition. The discrepancy between the two dates is immaterial in this case. That said, the Eleventh Circuit recognizes the "mailbox rule" for habeas corpus petitioners, see Adams v. United States, 173 F.3d 1339, 1341 (11th Cir. 1999) (§ 2255 motion); Alexander v. Secretary for the Dep't of Corrs., No. 06-12501, __ F.3d __, 2008 WL 926137, at *2 (11th Cir. Apr. 8, 2008) (§ 2254 petition), and the Eleventh Circuit deemed Ferreira's § 2254 opinion as filed on June 10, 2003. Ferreira II, 494 F.3d at 1287.

> sentence on two of his convictions. Based on the new sentence, the petitioner claimed a federal constitutional violation.
>
> In resolving the case, the Walker court determined that it is not possible to separate claims within a habeas petition. If one claim is timely, then the entire application is timely. Since one of Walker's claims was based on his re-sentencing, the entire petition was timely.
>
> In the instant case, however, Petitioner raises no claims which stem from his motion to correct his sentence. Each and every claim raised in his federal habeas petition relates back to his trial and conviction. There were no claims which arose after his trial and conviction. Therefore, the **latest** event which triggered the one-year limitation period was the conclusion of Petitioner's direct appeal.

(Id. at 3-4) (emphasis in original). Neither the supplemental response nor any other document filed in the district court challenged the validity or correctness of the Eleventh Circuit's Walker v. Crosby decision.

8. In an order entered September 30, 2004, the district court dismissed Ferreira's § 2254 petition with prejudice. The district court determined that the petition was untimely under 28 U.S.C. § 2244(d)(1)(A). (Pet. App. at D-4 through D-5.)

9. Ferreira sought a certificate of appealability ("COA"), which the district court denied. On January 28, 2005, the Eleventh Circuit issued an order authorizing Ferreira to proceed in forma pauperis and granting a COA on a single issue: "Whether the district court properly found that a habeas corpus petitioner who was resentenced and who only challenged the original trial proceedings without raising any challenge based on resentencing procedures is not entitled to the benefit of a new statute of limitations period commencing from the date the resentencing judgment became final?"

10. After issuance of the Eleventh Circuit's COA, Ferreira submitted a pro se brief, and the State filed its brief as appellee in response. Thereafter, Ferreira served a pro se reply brief in support of his appeal.

11. In December 2005, the Eleventh Circuit appointed the undersigned to represent Ferreira in his habeas appeal. Counsel filed a supplemental brief on Ferreira's behalf in January 2006. The State served its supplemental brief as appellee on February 13, 2006. In its supplemental brief, the State argued that the court of appeals should "revisit" Walker v. Crosby. The State's supplemental brief argued:

> For the same reasons the Fielder[v. Varner, 379 F.3d 113 (3d Cir. 2004)] court espoused, this Court should revisit Walker to further analyze the language in § 2244(d)(1)(D). Based on that language, this Court should find that a federal habeas petition should be reviewed on a claim by claim basis, giving effect to the Legislature's clear intent.
>
> Even if this Court finds that the Walker interpretation should stand as correct, [Ferreira's] federal habeas corpus petition was untimely. Apart from all other analyses, it is clear that the petitioner in Walker raised at least one claim which was based on his resentencing proceedings. The Court allowed Walker to include time-barred claims in the petition challenging the new sentence.
>
> In the instant case, **all** of Appellant's claims were time-barred. All of the claims were related to his trial and conviction, and were outside of the one-year limitation period. He raised absolutely **no** claims relating to his sentence - either his original sentence or his amended sentence. In short, Appellant attempts to bring **only** time-barred claims by relying on an unrelated amended sentencing form.

(Answer Br. of Appellee, served Feb. 13, 2006, at 12-13) (emphasis in original).

12. Following supplemental briefing, the Eleventh Circuit scheduled oral argument in Ferreira's habeas appeal for May 2006.

13. On March 29, 2006, the Eleventh Circuit issued a published decision in Rainey v. Secretary for the Dep't of Corrs., 443 F.3d 1323, 1326 (11th Cir. 2006),[2] wherein the court held "that when a petitioner who has been resentenced brings an application challenging only his original judgment of conviction, the one-year statute of limitations under the AEDPA runs from the date the original judgment of conviction became final and not the date the resentencing judgment became final." The Eleventh Circuit's Rainey opinion re-affirmed the court's Walker v. Crosby precedent but distinguished Walker on the basis that petitioner Rainey had not challenged any aspect of his resentencing in his § 2254 petition. See Rainey, 443 F.3d at 1327 ("We find Appellant's case distinguishable . . . because . . . Appellant's petition contested only his original judgment of conviction and in no way challenged his resentencing judgment. A challenge to resentencing is essential to a petitioner's obtaining the benefit of a later limitations period under the AEDPA.").

14. On March 29, 2006, the Eleventh Circuit requested Ferreira and the Secretary to submit letter briefs addressing the effect of Rainey on the disposition of Ferreira's then-pending appeal. In its letter brief dated April 19, 2006, the State asserted that "[t]he facts of the instant case are identical to those in Rainey." (Appellee's Apr. 19, 2006 Letter Br., at 1.) The State asked the court to find "that Rainey is dispositive of [Ferreira's] appeal." (Id. at 3.) The State neither suggested nor argued that Rainey's reliance on Walker v. Crosby was improper or otherwise misplaced, nor did the State's supplemental letter brief intimate that the full court

[2] As explained herein, Rainey was overruled by the Eleventh Circuit's decision in Ferreira II, 494 F.3d at 1293.

should use Ferreira's appeal as a vehicle for reconsidering the precedential (binding) decision rendered by the circuit in Walker v. Crosby.

15. On the basis of Rainey, the Eleventh Circuit canceled oral argument scheduled in Ferreira's appeal and, shortly thereafter, issued a non-precedential decision which, relying heavily on Rainey, affirmed the lower court's dismissal of Ferreira's § 2254 petition as time-barred. Ferreira I, 494 Fed. Appx. at 886.

16. Ferreira timely filed a petition for rehearing en banc with the Eleventh Circuit, wherein Ferreira requested the full court to rehear Ferreira's appeal and to inter the circuit's then-recently issued Rainey decision. The State did not file any petition or other document requesting the full court (or the panel, for that matter) to reconsider or ultimately overrule Walker v. Crosby. The Eleventh Circuit denied Ferreira's petition for rehearing.

17. Ferreira timely filed a petition for writ of certiorari in this Court. In sum, Ferreira's petition argued that the rule established by the Eleventh Circuit in Rainey and which the panel found dispositive of Ferreira's habeas appeal was untethered to the statutory language implemented by AEDPA and was unfaithful to the precedents of this Court. The State did not file any petition or other document with this Court challenging any aspect of the Eleventh Circuit's Walker v. Crosby decision or any circuit precedents (such as Rainey or Ferreira I) which adhered to the rule set out in that decision. In fact, although one of the two out-of-circuit decisions cited in the Secretary's instant Petition as being in conflict with Ferreira II was by that point bound in the Federal Reporter, see Fielder v. Varner, 379 F.3d 113 (3d Cir. 2004), the State's January 17, 2007 Brief in Opposition neither cited

Fielder nor suggested the presence of any conflict among the circuits with respect to any aspect of either Ferreira I or the line of Eleventh Circuit precedent on which that decision was ultimately adjudicated. Further, the State's Brief in Opposition candidly acknowledged that the district court based its decision on the finality prong of 28 U.S.C. § 2244(d)(1)(A), see Secretary's Jan. 17, 2007 BIO at 2, even going so far as to assert that the § 2244(d)(1)(A) calculation at issue in *this case* is "highly fact specific" and "unworthy of this Court's discretionary jurisdiction" (id. at 12). Suffice it to say the Secretary opposed certiorari.

18. As noted above, on February 20, 2007, this Court GVR'd for further consideration in light of Burton v. Stewart.

19. On remand the Eleventh Circuit (once again) requested supplemental briefing. The State served its supplemental letter brief on April 16, 2007. In essence, the State's submission argued that Ferreira I was "correctly decided" and requested the Court to "re-issue its previous decision." (Appellee's Apr. 16, 2007 Letter Br., at 1.) The State's supplemental brief did not challenge Walker v. Crosby or otherwise suggest that any existing circuit precedent on which the court's holding in Ferreira I was based was in conflict with any other federal circuit court ruling.

20. On August 7, 2007, the same panel which had decided Ferreira I issued its published decision in Ferreira II. (The authoring jurist, the Honorable Susan H. Black, also authored the circuit's decisions in Walker v. Crosby and Rainey.) The court's published decision in Ferreira II contains a detailed examination of the circuit's published precedents in Walker v. Crosby and Rainey v. Secretary for the Dep't of Corrs., as well as this Court's decision in Burton v.

Stewart. As explained in Ferreira II, this Court's decision in Burton triggered a paradigm shift in how the Eleventh Circuit analyzed the timeliness of a petitioner's § 2254 application in circumstances where the petitioner has undergone resentencing in the state courts; Burton, the court of appeals reasoned, "interpreted the judgment at issue to be based on both the conviction and the sentence the petitioner is serving." Ferreira II, 494 F.3d at 1292. Pursuant to Burton, "the judgment that forms the basis of the habeas petition is the one that places the petitioner in custody." Id. at 1292 (citing Burton, 127 S. Ct. at 796). Thus, what the Eleventh Circuit "ha[d] previously called the judgment of conviction and the sentencing judgment together form the judgment that imprisons the petitioner." Id. at 1293. On that basis, the Ferreira II court held "that AEDPA's statute of limitations begins to run when the judgment pursuant to which the petitioner is in custody, which is based on both the conviction and sentence the petitioner is serving, is final." Id. The court reversed the judgment of the district court dismissing Ferreira's § 2254 petition as time-barred.

21. The State filed a petition for rehearing en banc with the Eleventh Circuit Court of Appeals. The State's principal contention was that the Ferreira II panel's overruling of Rainey ran afoul of the prior panel rule enforced in the Eleventh Circuit. (Pet. App. at B-15 through B-19.) The State's petition for rehearing also argued that Burton v. Stewart was "readily distinguishable" from and "inapposite to this case." (Id. at B-20.) The State's petition did not argue that Walker v. Crosby should be overruled or that Ferreira's case should be used as a vehicle for reconsidering (or overruling) prior circuit precedent.

22. On November 1, 2007, the court of appeals denied the Secretary's petition for rehearing en banc.

23. On January 30, 2008, the Secretary filed and served the instant Petition for Writ of Certiorari. According to the Secretary's Petition, "[t]he Eleventh Circuit Court of Appeals' decision in Ferreira II conflicts with the Sixth Circuit Court of Appeals' decision in Bachman v. Bagley, 487 F.3d 979 (6th Cir. 2007) and the Third Circuit Court of Appeals' decision in Fielder v. Varner, 379 F.3d 113 (3d Cir. 2004) on the same legal matter." (Pet. at 2.)

ARGUMENT

The Secretary's contention that Ferreira II created a conflict among the circuit courts of appeal on the calculation of AEDPA's one-year statute of limitations is misplaced. The timeliness issue before the Court in this case concerns the calculation of AEDPA's period of limitations in circumstances where the habeas petitioner has undergone resentencing in the state courts, resulting in a modification to the judgment which imprisons (or places "in custody") the habeas petitioner. This issue was neither considered nor presented in the Third Circuit Court of Appeals' decision in Fielder v. Varner, 379 F.3d 113 (3d Cir. 2004), or the Sixth Circuit's more recent decision in Bachman v. Bagley, 487 F.3d 979 (6th Cir. 2007). Equally significant, the Eleventh Circuit's application of § 2244(d)(1)(A) in Ferreira II is largely grounded on this Court's interpretation of AEDPA in Burton v. Stewart, a case which neither Fielder v. Varner nor Bachman v. Bagley addressed. The lower federal courts that have considered the precedential rule established by the Eleventh Circuit in Ferreira II have cited the case favorably; numerous district

courts and at least one circuit court of appeals have followed the analysis employed by the Eleventh Circuit in Ferreira II. Notwithstanding the Secretary's admonitions to the contrary, there exists no true conflict among the circuit courts of appeal on any issue fairly presented in the instant Petition, and at a minimum, this Court's review of the § 2244(d)(1)(A) statute-of-limitations issue presented by a habeas corpus petitioner's resentencing in the state courts will benefit from further percolation of this matter in the lower federal courts. The Secretary's Petition should be denied.

1. The Third Circuit's decision in Fielder v. Varner is not in conflict on any issue fairly presented by Ferreira's appeal. Under 28 U.S.C. § 2244(d)(1)(A), the one-year period of limitation commences on "the date on which the judgment became final . . ." Based on this Court's analysis in Burton v. Stewart, the court below reasoned that "the judgment to which AEDPA refers is the underlying conviction and most recent sentence that authorizes the petitioner's current detention." Ferreira II, 494 F.3d at 1292; see also id. ("The Supreme Court applied AEDPA and held that the judgment that forms the basis of the habeas petition is the one that places the petitioner in custody."); id. at 1287 ("AEDPA's statute of limitations runs from the date the judgment pursuant to which the petitioner is in custody becomes final, which is the date both the conviction *and* sentence the petitioner is serving become final."). Because Ferreira underwent resentencing pursuant to a judgment that became final by issuance of the Florida Fifth District Court of Appeals' mandate on April 14, 2003, Ferreira's 28 U.S.C. § 2254 application

filed some 57 days later on June 10, 2003, was commenced within AEDPA's one-year period of limitations. Id. at 1292-93.

The petitioner in Fielder did not undergo any resentencing, and the Third Circuit's decision does not at all speak to the AEDPA calculation in circumstances where the § 2254 petitioner has undergone resentencing in the state courts. Indeed, the COA commencing the habeas appeal which culminated in the Third Circuit's published Fielder decision questioned whether the petitioner's "newly discovered evidence" claim "affect[ed] the application of § 2244(d)(1)(D)" and "whether § 2244(d)(1)(D) applie[d] to the entire petition if the time period under § 2244(d)(1)(A) for trial claims had not expired at the time of the discovery of the factual predicate of the claim of new evidence." Fielder, 379 F.3d at 116. Ferreira and the courts that have addressed the timeliness of *his* § 2254 petition all agree that the timeliness of Ferreira's § 2254 petition is governed by § 2244(d)(1)(A) -- not § 2244(d)(1)(D). The Secretary's desire to equate the Third Circuit's discussion of § 2244(d)(1)(D) and of petitioner Fielder's "newly discovered evidence" claim which triggered that provision with the Eleventh Circuit's application of AEDPA's one-year period of limitations to Ferreira's § 2254 petition is puzzling.

Fielder sheds no light on the application of § 2244(d)(1)(A) in circumstances where the § 2254 petitioner is resentenced in the state court system years after the petitioner's conviction has become final. Moreover, while it is true that the Third Circuit's Fielder decision criticized the analysis employed by the Eleventh Circuit in Walker v. Crosby, Fielder's holding that a "newly discovered evidence" claim timely filed under § 2244(d)(1)(D) does not trigger a new period of limitations for other

claims which are otherwise untimely under the finality standard of § 2244(d)(1)(A) is, while perhaps interesting, beside the point with respect to the evaluation of Ferreira's § 2254 petition. Insofar as Ferreira has been able to determine, no court has ever suggested that any of Ferreira's claims, or his application as a whole, should be examined for timeliness under § 2244(d)(1)(D).[3] Moreover, to the extent there exists some disagreement between the Sixth and Eleventh Circuits concerning the correctness of the Eleventh Circuit's ruling in Walker v. Crosby,[4] the Secretary failed to seek the overruling of Walker below; in his many filings lodged in the district court and in the court of appeals addressing Walker v. Crosby (chronicled above), the Secretary sought to limit, but ultimately did not challenge, the rule laid down by the court of appeals in Walker v. Crosby. The Secretary's attempt to propel the instant case into this Court by manufacturing a circuit split on a point which the Secretary failed to preserve and which, in any event, is not presented by the instant case, is futile.

2. In a similar vein, the State's Petition misreads the Sixth Circuit's Bachman decision. Following affirmance of his convictions and sentences, the petitioner in Bachman underwent an "adversary proceeding pursuant to the requirements of Ohio's sex offender registration law[.]" 487 F.3d at 980. In short, Bachman did not undergo any resentencing, and the very rule enunciated by the

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[3] Cf. Pace v. DiGuglielmo, 544 U.S. 408, 416 n.6 (2005) ("§ 2244(d)(1) provides that a '1-year period of limitation shall apply to an *application* for a writ of habeas corpus.' . . . The subsection then provides one means of calculating the limitation with regard to the 'application' as a whole, § 2244(d)(1)(A) (date of final judgment), but three others that require claim-by-claim consideration, § 2244(d)(1)(B) (governmental interference); § 2244(d)(1)(C) (new right made retroactive); § 2244(d)(1)(D) (new factual predicate).").

[4] See Walker, 341 F.3d at 1246 ("[U]nder § 2244(d)(1)(A) the statute of limitations for a habeas application challenging a resentencing court's judgment begins to run on the date the resentencing became final and not the date the original judgment became final.").

Eleventh Circuit in Ferreira II yields the same result as that reached by the Sixth Circuit in Bachman. The Secretary's worn assertion that Ferreira II is in "direct conflict" with Bachman suffers from at least two major deficiencies.

As an initial matter, the "adversary proceeding" which resulted in Bachman's designation as a sexual predator was not a sentencing hearing or a hearing at which any criminal punishment was imposed. Although the Secretary does not venture to explain the adversary hearing contemplated by Ohio Rev. Code § 2950.09 and which provided the authority for Bachman's designation as a sexual predator, that provision (since repealed) has been the subject of much litigation. Essentially, the sex offender provisions underlying Bachman's contention that his § 2254 petition had been timely filed concerned state law classification, registration, and community-notification requirements. See State v. Cook, 700 N.E.2d 570, 574-76 (Oh. 1998). Just as this Court concluded in Kansas v. Hendricks, 521 U.S. 346, 358 (1997), that civil *commitment* of a "sexually violent predator" was non-punitive and comported with due process requirements, the Ohio Supreme Court has unequivocally held that "Chapter 2950 does not inflict punishment" because it is remedial, as opposed to criminal, in nature. State v. Williams, 728 N.E.2d 342, 358 (Oh. 2000); Cook, 700 N.E.2d at 581. Indeed, the Sixth Circuit Court of Appeals has determined that classification as a sexual predator by the State of Ohio does not result in the offender being "in custody" for federal habeas purposes. Leslie v. Randle, 296 F.3d 518, 522-23 (6th Cir. 2002); see also Bachman v. Wilson, No. 5:05-CV-1735, 2007 WL 4553988, at *8 (N.D. Oh. Dec. 19, 2007) ("[T]he Petition does not attack any sentence for which Bachman is in state 'custody,' as required for federal

habeas jurisdiction. The Court is bound by Leslie and thus the Court has no jurisdiction over Bachman's Petition"); 28 U.S.C. § 2254(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.").

As explained above, Ferreira II held that under § 2244(d)(1)(A), "AEDPA's statute of limitations runs from the date the judgment pursuant to which the petitioner is in custody becomes final, which is the date both the conviction *and* sentence the petitioner is serving become final." 494 F.3d at 1287 (emphasis in original). Because the "adversary proceeding" which resulted in Bachman being labeled a sexual predator was not a sentencing or resentencing hearing, and because the classification, registration, and notification requirements imposed on Bachman at the conclusion of that hearing were neither criminal nor punitive in nature, and as the classification, registration, and notification requirements imposed on Bachman do not meet the threshold "in custody" requirements of the habeas statute, the adversary proceeding had no effect on the running of AEDPA's statute of limitations -- even under the analysis employed by the Eleventh Circuit in Ferreira II. The Secretary's repeated assertion that Bachman is in "direct conflict" with Ferreira II is grounded on a superficial reading of the Sixth Circuit's Bachman decision.

The second major flaw in the Secretary's assertion is that it is based on a mischaracterization of the Eleventh Circuit's holding in Ferreira II. Contrary to what is suggested by the phraseology of the Secretary's Question Presented and in contrast to the Secretary's substantive arguments, Ferreira II did not hold that a new one-year statute of limitations is triggered "whenever a State prisoner is resentenced." (Pet. at 10.) The court's holding is both more limited and more nuanced than the Secretary's Petition suggests. This Court's analysis in Burton v. Stewart "focused on the judgment which holds the petitioner in confinement" and that is the measuring stick utilized by the Eleventh Circuit in its construction of § 2244(d)(1)(A). Ferreira II, 494 F.3d at 1293. Under the Eleventh Circuit's framework, a habeas petitioner who undergoes "resentencing" but whose custodial sentence is unaffected as a result of the "resentencing" will not receive the benefit of what the Secretary terms a "new" one-year period of limitations. In other words, the calculation of AEDPA's period of limitations does not turn on whether a petitioner has undergone "resentencing" per se; rather, the analysis depends on when "the judgment" became final, which in turn hinges on when the conviction and sentence the petitioner is serving became final. Ferreira II, 494 F.3d at 1293.

Furthermore, for the same reasons that the Third Circuit's criticism of Walker v. Crosby does little to justify this Court's review of the case at bar, the Sixth Circuit's passing criticism of Walker v. Crosby does not somehow transform Ferreira II into a case that is in conflict with the Sixth Circuit's Bachman decision. Application of the Eleventh Circuit's rule to the facts before the Sixth Circuit in Bachman would not affect the holding or result of Bachman one iota. The Secretary

did not challenge below the rule established by the court of appeals in Walker v. Crosby, and the Secretary's effort to catapult Ferreira II to a merits decision in this Court on the basis of Bachman's general criticism of Walker v. Crosby is doomed to fail.

3. Ferreira II is consistent with, and faithful to, this Court's precedents. Ferreira II contains a detailed and thoughtful examination of Burton v. Stewart, and while it is true that Burton is not on all-fours with the timeliness issue that confronted the Eleventh Circuit in its adjudication of Ferreira's appeal, the court of appeals' extrapolation from this Court's reasoning and holding in Burton is well grounded. See Ferreira, 494 F.3d at 1291 (explaining that Burton "interpreted the judgment at issue to be based on both the conviction and the sentence the petitioner is serving"); Burton, 127 S. Ct. at 798 ("That [1998] judgment, the same one challenged in the subsequent 2002 petition, was the judgment pursuant to which Burton was being detained."). Burton's holding that the petitioner's 2002 federal habeas petition constituted a second or successive petition for which pre-filing authorization was required, see 28 U.S.C. § 2244(b)(3), turned on the content this Court gave to "the judgment" as that phrase is used in 28 U.S.C. § 2254(a). Pursuant to Burton, "the judgment to which AEDPA refers is the underlying conviction and most recent sentence that authorizes the petitioner's current detention." Ferreira II, 494 F.3d at 1292. There is neither reason nor justification for believing that "the judgment" means one thing in the context of § 2254(a) and something entirely different under § 2244(d)(1)(A), a point on which the Secretary's Petition is notably silent. See, e.g., Powerex Corp. v. Reliant Energy Servs., Inc.,

U.S. __, 127 S. Ct. 2411, 2417 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.").

The Secretary has not demonstrated that the court of appeals misread Burton or that the lower court applied Burton's rationale in some manner that fails to comport with settled principles of statutory construction. By the same token, the Secretary's assertion that "[t]he Eleventh Circuit based its Ferreira II decision completely on the language in Burton which stated that the judgment is the sentence" is wrong. (Pet. at 16.) In its examination of Burton, the court of appeals carefully and accurately set out both the facts of the case and the relevant issues that were before this Court in its adjudication of petitioner Burton's habeas petition. Ferreira II, 494 F.3d at 1291-92. The panel also explained how (in its view) this Court's reasoning and holding in Burton abrogated prior circuit precedent construing 28 U.S.C. § 2244(d)(1)(A). See id. The Secretary's mischaracterization of Ferreira II and the reasoning employed by the court of appeals in its published decision reversing the district court's judgment does little to advance the Secretary's cause in this Court.

4. The panel of Eleventh Circuit jurists who issued Ferreira II adhered to this Court's mandate to consider the timeliness of Ferreira's § 2254 petition in light of this Court's decision in Burton v. Stewart. It would have been an easy and painless gesture for the panel to nod to this Court's GVR order and, at the same time, re-issue its prior opinion in this case (Ferreira I). To its credit, the panel did not do that; instead, it engaged in a detailed analysis of this Court's Burton decision

and grappled with the implications of that decision on existing circuit precedent. The Third Circuit's 2004 Fielder decision obviously does not contain any examination of Burton, and the Sixth Circuit's Bachman opinion, while issued for publication more than three months after this Court decided Burton, does not so much as cite to Burton. To date, the handful of lower court cases which have discussed Ferreira II have cast the decision, and its consideration of Burton v. Stewart, in a favorable light,[5] and at least one circuit court of appeals has followed (and even extended) Ferreira II in the § 2255 context.[6] The Secretary has not demonstrated a genuine conflict between the court of appeals' holding in Ferreira II and either a decision of another circuit court of appeals or a decision issued by this Court. Plainly put, it would be premature for the Court to grant certiorari for the purpose of reviewing an issue which the Secretary previously (and correctly) conceded is "fact-specific" and would thus entail "fact-intensive review." (Secretary's BIO, No. 06-7361, at 13.)

5. Finally, the parade of horribles outlined in the penultimate paragraph of the pending Petition provides no basis for granting certiorari. The Secretary's contention that "[i]n Florida, and in other States, a defendant can move to correct his sentence **at any time**" is a questionable assertion. (Pet. at 17, emphasis in original.) Florida's principal postconviction mechanism, available under Fla. R. Crim. P. 3.850 and utilized by Ferreira in the course of exhausting his postconviction challenges, *does* contain a period of limitations. Fla. R. Crim. P. 3.850(b). Many other states have implemented similar deadlines for the filing of

[5] See, e.g., Chew v. Hendricks, No. 04-5894, 2007 WL 2437830, at *6-7 (D.N.J. Aug. 23, 2007); Jennings v. Morgan, No. 3:06CV-P309-S, 2007 WL 4292038, at *2-3 (W.D. Ky. Dec. 6, 2007).
[6] See United States v. Messervey, No. 06-51534, _ Fed. Appx. _, 2008 WL 631499, at *2 (5th Cir. Mar. 5, 2008).

state postconviction motions in the wake of AEDPA's amendments implemented at the federal level. E.g., O.C.G.A. § 9-14-42.

More to the point, to the extent the citizens of Florida (or any other state) desire to impose time limitations on the filing of state postconviction filings, they may do so through the normal democratic process; having the federal courts rewrite a piece of federal legislation for the purpose of addressing the Secretary's concerns borne out of what the Secretary represents as a state-law procedural rule which purportedly permits state prisoners to file motions to correct their sentences at any point during their incarceration is like swatting a gnat with a sledgehammer. In any event, the Secretary's suggestion that this Court has the authority to improve upon and/or rewrite validly enacted legislation is mistaken. See Artuz v. Bennett, 531 U.S. 4, 10 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them."). This Court should deny the Secretary's Petition.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted, this 7th day of May, 2008

Michael N. Loebl*
FULCHER HAGLER LLP
One 10th Street, Suite 700
Augusta, GA 30901
Phone: (706) 724-0171
Fax: (706) 396-3630
Email: mloebl@fulcherlaw.com

* Counsel of Record, Appointed Below Pursuant to 18 U.S.C. § 3006A