

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

AARON C. PORTER,

Petitioner,

v.

Case No.: 8:23-cv-0441-JLB-AEP

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.

_____/

Corrected RESPONSE TO PETITION¹

Respondent, Secretary, Florida Department of Corrections, through the undersigned counsel, and files this limited response to the pro se 28 U.S.C. § 2254 petition. Respondent moves to dismiss the petition as time-barred by 28 U.S.C. § 2244(d). Respondent asserts all available bars.

Aaron C. Porter, (hereinafter referred to as *Porter* or *Petitioner*), a Florida prisoner, attacks his trial-based judgment for Robbery with a Firearm and False Imprisonment, which arose out of the Thirteenth Judicial Circuit for Hillsborough County, Florida. Porter is lawfully restrained, serving a sentence of life imprisonment. His claims warrant no relief. No district court judge or magistrate assigned this case participated in any of Petitioner's state court proceedings.

¹ The Response has been corrected to reflect the proper references to the exhibits were off by one number, starting at Respondent's Exhibit 16.

I. PROCEDURAL BACKGROUND

On August 13, 2010, the State Attorney for the Thirteenth Judicial Circuit filed an information charging Porter with Robbery with a firearm, in violation of section 812.13(12)(a), Florida Statutes (2010), in count one, and False Imprisonment, in violation of section 787.02, Florida Statutes (2010) (Ex. 001, at 12- 16).

Petitioner demanded and exercised his right to a speedy trial and exercised his right to represent himself at trial (Ex. 001, at 142-149; 177). Petitioner elected a jury trial, held on October 25-28, 2010, where the jury convicted Petitioner as charged as to both counts (Ex. 001, at 86-87; Ex. 1a, at 737-740). The jury made a special finding that, "During the commission of the offense the Defendant actually possessed a firearm." (Ex. 001, at 86; Ex. 1a, 739, at line 1).

Petitioner was sentenced as a Prison Releasee Reoffender to life in prison on the Robbery with a Firearm conviction (Ex. 001, at 110;113; Ex. 1a, at 749), and to five years imprisonment on his conviction for False Imprisonment (Ex. 001, at 110;116; Ex. 1a, at 749).

Direct Appeal of Judgment

Petitioner timely appealed to the Florida Second District Court of Appeal, and such proceeded in case number 2D10-5676, where counsel for Petitioner raised five issues for appellate review (Ex. 002). The state's answer brief is attached as Respondent's Exhibit 003. On May 11, 2012, the Florida Second District Court

(Altenbernd, Kelly, Khouzam), issued a silent affirmance in *Porter v. State*, 90 So.3d 289 (Table) (Fla. 2d DCA 2012) (Ex. 005). Mandate issued on June 28, 2012 (Ex. 006).

Petition Alleging Ineffective Assistance of Appellate Counsel

On September 7, 2012, Porter filed a *Petition Alleging Ineffective Assistance of Appellate Counsel* (Ex. 007). The Second District (Whatley, Kelly, Villanti) issued an order on October 3, 2012, denying the petition without directing a response from Respondent in *Porter v. State*, 99 So.3d 955 (Table) (Fla. 2d DCA 2012) (Ex. 008).¹

Successive Petition Alleging Ineffective Assistance of Appellate Counsel

Porter filed a second *Petition Alleging Ineffective Assistance of Appellate Counsel* on December 3, 2012 (Ex. 009). The Florida Second District (Altenbernd, Northcutt, Wallace) dismissed the petition as successive on January 16, 2013, in *Porter v. State*, 109 So.3d 212 (Table) (Ex. 010). Porter's request for rehearing was denied on February 8, 2013 (Ex. 011).

Motion to Correct Illegal Sentence

On April 25, 2013 (*prison date stamp*), Petitioner filed a *Motion to Correct Illegal*

¹ The Secretary was unable to locate two of those petitions because the state appellate court destroyed its files. Ex. 007; Ex. 009. Petitioner did not raise any ineffective assistance of appellate counsel claims in his federal habeas petition.

Sentence and Objections to Sentencing Pursuant to F.S. 775.083(9) and to Declare F.S. 775.082(9), Unconstitutional (Ex. 012). The post-conviction court entered an order

on May 15, 2013, denying the motion (Ex. 013). Petitioner appealed the denial (2D13-2727) and elected not to file an optional brief (Ex. 014). On December 27, 2013, the Florida Second District (Morris, Black, Sleet) issued an opinion with citations affirming the denial of relief in *Porter v. State*, 129 So.3d 370 (Table) (Fla. 2d DCA 2013) (Ex. 015). Mandate issued on January 22, 2014 (Ex. 016).

Motion for Post-Conviction Relief

Petitioner filed his initial *Motion for Post-Conviction Relief* on June 11, 2013, (*prison date stamp*) (Ex. 017). Petitioner filed numerous supplements and amendments throughout his proceedings. The post-conviction court issued an order dismissing without prejudice the post-conviction motion, with relief for Petitioner to refile and cure the deficiencies in his motion (Ex. 018). Petitioner filed his motion on July 16, 2013 (Ex. 019). He filed an amended post-conviction motion on July 23, 2013 (Ex. 020). Porter filed exhibits in support of his Amended Motion (Ex. 20a).

Porter then filed a *Supplemental Motion* on August 7, 2013 (Ex. 021), and another post-conviction motion on October 10, 2013 (Ex. 022). Petitioner filed a *First Supplemental Motion* (Ex. 023) and *Second Supplemental Motion* on November 1, and November 18, 2013 (Ex. 024).

Petition for Writ of Prohibition

Porter sought a writ of prohibition seeking to remove the Honorable Judge

Gregory P. Holder from his post-conviction proceedings (Ex. 025). Before the petition was resolved, the post-conviction court entered an order dismissing without prejudice, Petitioner's Motion for Post-conviction relief and both the First and Second Supplemental Motions for Post-Conviction relief (Ex. 026). On December 16, 2013, Porter filed a Motion for Post-conviction relief (Ex. 027).²

Regarding the writ of prohibition, the Florida Second District entered an order directing a response from the state (Ex. 028), which the state filed on January 9, 2014 (Ex. 029), with a supporting appendix (Ex. 030). Petitioner filed a reply (Ex. 031).³

Porter filed his *Amended Motion for Post-Conviction Relief* on January 27, 2014 (Ex. 032). The post-conviction dismissed the January 27, 2014, postconviction motion, without prejudice in part and reserving ruling in part (Ex. 034). Petitioner then filed a *First Supplemental*, *Amended First Supplemental*, and a *Second Amended Motion* (Ex. 035, 036, 037). The state was directed to respond (Ex. 038) and the state provided its response (Ex. 039). Subsequently, the post-conviction court entered

² The post-conviction motion may have crossed in the mail with the Court's December 5th Order.

³ The Florida Second District Court of Appeals issued an order dismissing Case 2D13-5591, as duplicative of his petition in 2D13-5537.

an order granting an evidentiary hearing on several claims (Ex. 040).

Motion to Correct Illegal Sentence

While the post-conviction motion was pending, Porter filed a *Motion to Correct Illegal Sentence* on September 20, 2016 (Ex. 041), which he supplemented (Ex. 042). This motion was denied by order of the court on January 5, 2017 (Ex. 043). It does not appear that Petitioner challenged the denial of this motion.

Rule 3.850 Evidentiary Hearing and Collateral Appeal

The evidentiary hearing was held on October 30, 2017, before the Hon. Vivian T. Corvo, Circuit Judge, where Petitioner was represented by counsel (Ex. 044). After the hearing, the post-conviction court entered an order denying Petitioner's claims (Ex. 045). Petitioner appealed the denial of his post-conviction motion in the Second District Court in 2D17-4545, where counsel for Petitioner filed an initial brief (Ex. 046). The state's answer brief is attached as Respondent's Exhibit 047. On November 7, 2018, the Florida Second District (Casanueva, Kelly, Atkinson), affirmed the postconviction court's denial of evidentiary claims, in *Porter v. State*, 257 So.3d 431 (Table) (Fla. 2d DCA 2018) (Ex. 048). Mandate issued on December 13, 2018 (Ex. 049).

Other State Court Proceedings

Porter then filed a *Motion for Discharge* (Ex. 050), on January 17, 2017, and a *Motion for Disqualification of Judge* on July 25, 2017 (Ex. 051). Petitioner also filed a *Petition for Writ of Habeas Corpus* on February 1, 2017 (Ex. 052). The post-conviction court entered an order denying Porter's *Motion for Discharge* and his *Petition for*

Writ of Habeas Corpus (Ex. 053).

Petitioner filed an appeal to challenge the denial of his Motions to Discharge and for Disqualification in 2D17-1261 (Ex. 054). Porter filed a Notice of Voluntary Dismissal (Ex. 055), however the Court directed Petitioner to file an unconditional notice of voluntary dismissal (Ex. 054). Porter never filed an unconditional notice. *Id.* On September 7, 2017, the Florida Second District Court (LaRose, Wallace, Black) issued an opinion with citations, in *Porter v. State*, 237 So.3d 307 (Table) (Fla. 2d DCA 2017), affirming the denial of the motions (Ex. 056).

Petition Alleging Ineffective Assistance of Appellate Counsel

The Petitioner filed a second set of petitions challenging the performance of his appellate counsel. One was filed in 2D19-333 and the second was filed in 2D19-0472. On January 18, 2019 (*prison date stamp*), Porter proceeded on an amended motion (Ex. 057) (Ex. 058). The Florida Second District Court (Silberman, Villanti, Atkinson) issued an order denying the petition on February 27, 2019, in *Porter v. State*, 266 So.3d 163 (Table) (Fla. 2d DCA 2019) (Ex. 059).⁴

Motion to Correct Illegal Sentence

⁴ The second petition filed in Case No.: 2D19-0472, was dismissed as a duplicate of Case no. 2D19-333.

Federal Habeas Proceeding 8:19-cv-2505-SDM-AAS

Porter filed a *Motion to Correct Illegal Sentence* on August 12, 2019 (Ex. 060). Before the state court could resolve the *Rule 3.800(a)* motion, Porter filed his federal petition, by providing it to prison officials for mailing on October 7, 2019, and such was docketed by the Clerk of this Honorable Court on October 9, 2019, in Case 8:19-cv-2505-SDM-AAS (Ex. 061).

The post-conviction court entered an order denying in part and directing the state to respond to Petitioner's motion (Ex. 062). The State filed a response conceding the sentence was illegal to the extent the trial court should have imposed a ten-year mandatory minimum (Ex. 063). On March 20, 2020, the post-conviction court entered an order granting the motion to correct, directing Petitioner to be re-sentenced with regard to count one (Ex. 064).

Following the granting of Petitioner's motion, the Respondent, on March 30, 2020, filed a *Motion to Stay or to Dismiss* the federal petition on grounds that the state court having granted Petitioner's motion would likely issue a new judgment (Doc. 12). The District Court agreed and dismissed the Petition without prejudice that Petitioner would be able to file a new petition (Doc. 13). Thus, the petition was dismissed without prejudice (Ex. 065).

In the state court, Porter sought to undue his rule 3.800(a) motion by filing a *Notice or Motion to Withdraw and/or Voluntary Dismissal of his Motion to Correct*

Illegal Sentence, on October 21, 2020 (Ex. 066). The state court entered an order denying the Notice / Motion on November 12, 2020 (Ex. 067).

The Petitioner, through counsel filed a *Motion to Correct Illegal Sentence per Rule 3.800(a) or in the Alternative to Correct Sentencing Error Per Rule 3.800(b)(2)* on July 23, 2021, alleging the sentence was imposed without a specific finding Petitioner had carried a weapon (Ex. 068). His motion was denied by the state court on July 29, 2021 (Ex. 069).

On August 4, 2021, a hearing was held before the Honorable Melissa Polo, where Porter waived his appearance (Ex. 070). The post-conviction court entered an amended judgment and sentence on August 9, 2021, *Nunc Pro Tunc to October 28, 2010* (Ex. 071). Petitioner appealed his judgment in the Florida Second District Court (case number 2D21-2480), where he filed an initial brief (Ex. 072). The state's answer is attached as Respondent's Exhibit 073. The Florida Second District Court (Atkinson, Stargel, Labrit), issued a silent affirmance on October 12, 2022, in *Porter v. State*, 349 So.3d 271 (Table) (Fla. 2d DCA 2022) (Ex. 074). Mandate issued on November 15, 2022 (Ex. 075).

Petitioner filed a *Motion Correct Illegal Sentence and Motion to Declare Fla. Stat. 775.082(9) Unconstitutional* on July 18, 2023 (Ex. 076). The post-conviction court denied the motion on August 31, 2023 (Ex. 077). Petitioner has not appealed the denial of this motion.

II. Present Petition

a. Timeliness Determination

Petitioner filed his 28 U.S.C. § 2254 petition for writ of habeas corpus, on February 22, 2023, (prison date stamp), and such was docketed as filed on February 27, 2023, by the Clerk of this Court (Doc. 1). The instant petition is governed by the Antiterrorism and Effective Death Penalty Act (“AEDPA”) effective April 24, 1996, which established a one-year statute of limitations for federal habeas corpus actions, 28 U.S.C. § 2244(d)(1) (Ex. 078; DE – 1).

In most cases, as in Petitioner's, the AEDPA's limitations period begins to run 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." 28 U.S.C. § 2244(d)(1)(A). *Bond v. Moore*, 309 F.3d 770, 772 (11th Cir. 2002); see also, *Clay v. United States*, 537 U.S. 522, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003)(concluding, in § 2255 context, § 2244(d)(1)(A)'s reference to a judgment becoming final "by the conclusion of direct review or the expiration of the time for seeking such review" made it clear that finality, for purposes of § 2244(d)(1)(A), was to be determined by reference to uniform federal rule, rather than to state law rules, which might differ from general federal rule and vary from state to state).

The triggering event relevant to this case is “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for

seeking such review.” 28 U.S.C. § 2244(d)(1)(A). Here, the petitioner’s judgment is final within the meaning of § 2244(d)(1)(A) when the 90-day period for petitioning for certiorari review expired. See Supreme Court Rule 13(3); *Nix v. Sec’y for Dep’t of Corr.*, 393 F.3d 1235, 1236-37 (11th Cir. 2004)(Florida prisoner’s conviction became “final” for AEDPA purposes on date that 90-day period for seeking certiorari review expired).

Porter’s limitations period commenced after his judgment became final on Thursday, **August 9, 2012**, when the 90-day period expired for petitioning for certiorari review following silent affirmance of his direct appeal on *May 11, 2012*. See Supreme Court Rule 13(3); *Gonzalez v. Thaler*, 132 S.Ct. 641, 646 (2012). Accordingly, Petitioner’s federal limitations period started the following day on Friday, *August 10, 2012*. The limitations period starts after the date of finality of judgment (excluding holidays and weekends). *See San Martin v. McNeil*, 633 F.3d 1257, 1266 (11th Cir. 2011).

Thereafter a period of **28 days** elapsed, which were not tolled before Petitioner filed a petition in the state appellate court alleging ineffective assistance of appellate counsel on **September 7, 2012**. The petition, “properly filed for tolling purposes,” remained pending until **October 18, 2012**, or fifteen days following the time for seeking rehearing elapsed. Florida Rules of Appellate Procedure, 9.330 provides that a petitioner has (15) days to seek rehearing following the denial.

Because the Florida rules provide a mechanism by which the petitioner could have sought rehearing of the denial of his petition for writ of habeas corpus alleging ineffective assistance of appellate counsel, the petition alleging ineffective assistance of appellate counsel remained “pending” for purposes of the AEDPA until the time period for filing a motion for rehearing expired, *Wilson v. Crews*, No. 14-21619-CIV, 2014 WL 8508535, at *16 (S.D. Fla. Dec. 16, 2014), *report and recommendation adopted*, No. 14-21619-CIV, 2015 WL 1566421 (S.D. Fla. Apr. 8, 2015).⁵ Petitioner’s federal limitations period resumed the following day on Friday, **October 19, 2012**.

Petitioner allowed another **188 days** to pass, untolled, before providing a Rule 3.800 Motion to Correct Illegal Sentence, to prison officials for mailing on April 25, 2013. The motion remained pending until the mandate was issued on **January 22, 2014**. (Ex. 016). *Lawrence v. Florida*, 549 U.S. 327, 331-32, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007)(Where a timely appeal of a rule 3.850 order is taken, the rule 3.850 motion is pending until the mandate is issued in the ensuing collateral appeal.); *Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) (under Florida law, appellate order is pending until mandate issues).

⁵ The Eleventh Circuit has held that a properly filed “motion for state court rehearing falls within the category of ‘State post-conviction or other collateral review,’” and therefore continues to toll the AEDPA’s limitations period until that motion is disposed of by the state court. *Nix v. Sec’y for Dep’t of Corr.*, 393 F.3d 1235, 1237 (11th Cir.2004) (*quoting* 28 U.S.C. § 2244(d)(2)).

By that time, Petitioner had filed his *Motion for Post-Conviction Relief* pursuant to Rule 3.850 on **June 11, 2013** (Ex. 017). The motion, “properly filed” for tolling purposes, remained pending until the mandate issued on the collateral appeal of the denial (following an evidentiary hearing) on **December 13, 2018** (Ex. 049).

Overlapping State Court Motions

During the time his post-conviction proceedings were being prosecuted, Porter filed several actions in the state circuit court including a *Motion for Discharge and Disqualification of Judge* and *Petition for Writ of Habeas Corpus*. See, Respondent’s Exhibits 050;051;052 and 053. None of these motions had an impact on Petitioner’s federal limitations period. That is so because each was disposed of before the mandate issued on the post-conviction appeal, **December 13, 2018**. The mandate issued on the appeal of the denial of these motions October 4, 2017, See, 2D17-1261. (Ex. 054).

Accordingly, Petitioner’s federal time clock resumed on Friday, *December 14, 2018*, and continued to run an additional **35 days**, before Porter filed a petition alleging ineffective assistance of appellate counsel on **January 18, 2019**. The petition remained pending until its denial on February 27, 2019, and the time to seek rehearing passed on **March 14, 2019**. Petitioner’s federal time clock resumed the following day on **March 15, 2019**. At such time, Petitioner had *114 days*

remaining on his federal time clock, or until **July 8, 2019**, to file a timely federal petition.⁶

Porter's federal time clock expired on **July 8, 2019**, before he filed a *Motion to Correct Illegal Sentence* on **August 12, 2019**, or **35 days** after his federal time clock expired. The *Motion to Correct Illegal Sentence* had no tolling effect because there was no time left to toll on the Petitioner's federal time clock. A "properly filed" state court application must be "pending" during the limitations period in order to toll such. *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (properly filed state court collateral pleading filed after expiration of limitations period cannot toll that period because there is no period remaining to be tolled); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (even "properly filed" state court petitions must be "pending" in order to toll the limitations period).

Accordingly, the instant petition, provided for filing on **February 22, 2023**, is untimely, by **1339 days**.

b. Petitioner's timeliness explanation:

Under *paragraph 18*, of the Petition, Porter states:

The instant petition is timely filed. The time for filing of this petition has continually been tolled as follows: The Second District Court of Appeal per curiam affirmed without written opinion on May 11, 2012. The Mandate issued: June 28, 2012. The Petitioner then tolled his clock on "When he filed his Writ of Habeas Corpus (I.A.A.C.) in the Second

⁶ The 114th day fell on Saturday, July 6, 2019. Consequently, Petitioner had until Monday, July 8, 2019 to file a timely petition.

District Court of Appeals. The Court denied this petition on: October 3, 2012. The Petitioner then filed on April 27, 2013, Motion to Correct an Illegal Sentence that was denied: May 15, 2013. Notice of appeal was filed: June 5, 2013, the 2nd DCA denied appeal on: January 23, 2014, per curiam affirmed without opinion. On: June 17, 2013, and amended on January 27, 2014/ The court below denied the post-conviction motion by order dated: November 27, 2017. Notice of appeal was filed: November 15, 2017, and the 2nd DCA denied appeal per curiam (without) opinion dated: November 7, 2018, mandated issued: December 13, 2018. Finally, on January 18, 2019, Petitioner filed petition for Writ of Habeas Corpus, (I.A.A.C.) on February 27, 2019, the 2nd DCA per curiam affirmed (without) opinion.

In 2019 Petitioner originally filed this instant petition. Case : 8-19-cv-02505-SDM-AAS. In 2020, this court dismissed/state the petition until after petitions [sic] motion to correct illegal sentence was heard in lower court and his de novo resentencing. The lower court also on August 4, 2021, the petitioner received a de novo resentencing. The Court reimposed a term of life with a 10-year minimum mandatory on count one. Notice of Appeal was filed August 10, 2021 case no.: 2021-2480. On October 12, 2022, the 2nd DCA per curiam affirmed. Case no: 2D21-2480, Mandate issued November 15, 2022. This petition follows.

(Doc. 1, at 47-49).

Petitioner's Federal Habeas Corpus 8:19-cv-02505

Following the expiration of his federal limitations period, but while his Rule 3.800(a) was pending in the state court, Porter filed his federal petition on **October 7, 2019**, docketed by the Clerk of this Honorable Clerk, on October 9, 2019.

On March 20, 2020, the state court granted Porter's Rule 3.800(a) Motion finding his sentence regarding count one was illegal to the extent a ten-year minimum mandatory term had not but should have been imposed (Ex. 064).

On March 30, 2020, Respondent moved to stay or dismiss the petition, concluding that the state court would enter a new judgment following the grant

of Porter's Rule 3.800(a) motion (Doc. 12). This Court agreed and entered an order dismissing the Petition without prejudice on April 2, 2020 (Doc. 13).

On August 9, 2021, the state court entered or filed with the circuit court clerk an amended judgment but did so **Nunc Pro Tunc to October 28, 2010** (Ex. 071). Petitioner challenged the granting of his Motion to Correct Illegal Sentence on appeal, which concluded with the mandate issuing on **November 15, 2022**. As previously stated, Porter's Rule 3.800(a) motion proceedings including the collateral appeal, had no impact on Porter's federal time clock because the time to file his federal petition expired on **June 24, 2019**. From undersigned's calculations, Petitioner's initial federal habeas petition was untimely filed, prior to its dismissal.

Petitioner's Federal Habeas Corpus 8:23-cv-00441

Petitioner filed his current petition on **February 22, 2023**, by providing it to prison officials for mailing. Although Porter arrives with an amended judgment, such judgment reflects the modified sentence, the addition of the mandatory minimum, which should have been imposed, was issued *nunc pro tunc to October 28, 2010*. Had the state court issued a new judgment, Petitioner would be entitled to a new trigger date for his federal habeas petition.

Effect of "Nunc Pro Tunc Judgment"

However, the "amended judgment," which was "nunc pro tunc" to the October 28, 2010 judgment, did not reset Petitioner's AEDPA limitations period.

See, e.g., Byrd v. Warden Riverbend CF, 648 Fed. Appx 881 (11th Cir. 2016) (Correction of clerical errors in a written sentence “to reflect the court’s intent at the time the sentence was imposed” does not create a new judgment “because it simply perfects the record.” The “sentence amendment was akin to the correction of a clerical error to reflect the court’s original intention that related back to the original sentence,” and was not a new judgment.).

This Court in *Osbourne v. Sec’y, Fla. Dep’t of Corr.*, 968 F.3d 1261, 1265–66 (11th Cir. 2020), affirmed the dismissal of a federal habeas petition as a second or unauthorized petition. There, Osborne maintained, an amended judgment, “nunc pro tunc” to the date of the original judgment resulted in a new judgment, for purposes of resetting his AEDPA time clock. The Eleventh Circuit disagreed finding that “there [was] no intervening new judgement here authorizing Osborne’s confinement,” and as a result, his second section 2254 petition “was an unauthorized second or successive petition over which the district court lacked jurisdiction,” *Id.* at 1266–67. As the *Osborne* court observed, “under Florida law, nunc pro tunc means now for then [thus] when a legal order or judgment is imposed nunc pro tunc it refers, not to a new or de novo decision, but to the judicial act previously taken, concerning which the record was absent or defective.” *Id.*

Moreover, the Court recognized that Florida courts may render such an

order “nunc pro tunc.” *De Baun v. Michael*, 333 So. 2d 106, 108 (Fla. 2d DCA 1976) (“It has long been settled that the function of an entry nunc pro tunc is to correct the record to reflect a prior ruling made in fact but defectively recorded.”). This Court found the state court’s designation of the order as “nunc pro tunc,” meant that the amended sentence related back to the judgment originally imposed. Accordingly, Osbourne had no intervening judgment between his previously filed §2254 petition and the second. Thus, the dismissal of Osbourne’s petition as an unauthorized second or successive petition was affirmed. *Osbourne*, 968 F. 3d at 1267.

Here, the only judgment authorizing Petitioner’s present confinement is the amended judgment, entered nunc pro tunc to October 28, 2010. Thus, Petition, filed on February 22, 2023, is untimely.

Several federal district courts in Florida have determined that an amended judgment imposed *nunc pro tunc* is not a new judgment and does not restart the federal habeas limitations period. *See, e.g., Heiser v. Sec’y, Dep’t of Corr.*, No. 8:18cv1365–TPB–AEP, 2021 WL 4295270, at *4 (M.D. Fla. Sept. 21, 2021); *James v. Sec’y, Dep’t of Corr.*, 499 F. Supp. 3d 1169, 1174 (S.D. Fla. 2020) (holding that an amended judgment which reduced a life sentence to a fifty-five year sentence, “contain[ed] a nunc pro tunc designation. And, therefore, ... [did] not qualify as a new judgment ... [it] instead relate[s] back to the date of the original judgment”);

Cuffy v. Dixon, No. 23-CV-61582-RAR, 2023 WL 6307794, at *2–4 (S.D. Fla. Sept. 28, 2023) (that Cuffy is serving a new sentence did not alter the fact his amended judgment was imposed *nunc pro tunc* meant he remained confined on original judgment).

Regarding the *nunc pro tunc* designation in his case, Petitioner did not challenge the designation on direct appeal following the partial grant of his *Motion to Correct Illegal Sentence* (Ex. 072).

Because the question of whether Florida courts impose a judgment *nunc pro tunc* is one of state law, this Court is bound by its determination. *Richardson v. Sec'y, Dep't of Corr.*, No. 8:20-CV-489-TPB-CPT, 2023 WL 4419731, at *1 (M.D. Fla. July 10, 2023). “It is a ‘fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters.’”) (quoting *Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997)).

With respect to the judgment, the state court specifically entered the judgment *nunc pro tunc to October 28, 2010*—the date of Petitioner’s original judgment and sentence (Ex. 001, at 113-116). Therefore, under Florida law, the amendment of Petitioner’s sentence related back to the date of the initial judgment and was not a new judgment for purposes of 28 U.S.C. § 2244(b). See *Osbourne v. Sec'y, Fla. Dep't of Corr.*, 968 F.3d 1261, 1265–66 (11th Cir. 2020) (recognizing that “under Florida law, *nunc pro tunc* means now for then [thus] when a legal order

or judgment is imposed nunc pro tunc it refers, not to a new or de novo decision, but to the judicial act previously taken, concerning which the record was absent or defective”).

At present, the Eleventh Circuit has firmly held that the imposition of a nunc pro tunc judgment in Florida does not restart the AEDPA time clock. The *nunc pro tunc* designation prevents Porter from using his amended judgment to a new trigger date under AEDPA. Because of the state court’s nunc pro tunc designation when issuing the sentence, the date of his sentences and conviction remained October 28, 2010.

WHEREFORE, based on the arguments and authorities presented, the instant petition should be dismissed as time-barred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of January 2024, I electronically filed the foregoing *Corrected* Response, with the Clerk of the Court, Tampa Division, by using the CM/ECF system, and a copy served by U.S. Mail, to the following non: CM/ECF participant: Aaron C. Porter, DOC# L37704, Suwannee Correctional Institution, 5964 U.S. Highway 90 Live Oak, Florida 32060, on this 24th day, January, 2024.

/s/ Tonja Vickers Rook
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