

Habeas Won and Lost: The Eleventh Circuit's Narrow View of State Court Judgments

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The Eleventh Circuit vacated its panel opinion in Patterson v. Secretary and reheard the case en banc. The court's new opinion revisits the prohibition against "second or successive" habeas corpus petitions in 28 U.S.C. § 2244(b) and embraces the dissenting view in the prior opinion, rejecting the reasoning of the majority. A new state court judgment resets the habeas clock, allowing a prisoner to file an additional federal habeas petition without running afoul of section 2244(b). Previously, the court offered an expansive view of such judgments, looking to whether the state court has substantively changed the prisoner's sentence. The court now offers a narrow view, looking only to whether the state court has authorized the prisoner's custody. This Article describes the majority and dissenting opinions in both iterations of Patterson v. Secretary. The Article then identifies both textual and subtextual disputes among the judges, arguing that the opinions are proxies for a deep division in criminal law between finality and justice.

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INTRODUCTION

It's all about custody. Or it's all about substance. Really, it depends on whom you ask. The Court of Appeals for the Eleventh Circuit recently reheard *Patterson v. Secretary*, and the case outcome flipped while the point of dispute between majority and dissent remained the same.¹ When Florida prisoner Ace Patterson first appeared before the Eleventh Circuit with a habeas corpus challenge to his state court judgment, he won relief from a divided panel.² Judge William Pryor opened his dissent with a statement that Patterson had “won the habeas lottery today.”³ His luck was fleeting. An order vacating the panel opinion and granting rehearing en banc forced Patterson to play the lottery again.⁴ This time, in front of the full bench, he lost.⁵

In both *Patterson I* and *Patterson II*, the Eleventh Circuit considered what constitutes a new judgment in state court. The answer is critical, as a new state court judgment wipes the habeas slate clean and allows a petitioner to file multiple petitions or applications in federal court without violating the statutory prohibition on “second or successive” petitions.⁶ The point of contention between the majority and dissenting opinions remained the same. According to Judge Jordan—writing for the majority in *Patterson I* and dissenting

¹ *Patterson v. Sec’y, Fla. Dep’t of Corr. (Patterson I)*, 812 F.3d 885, 891–94 (11th Cir. 2016), *reh’g en banc granted, opinion vacated*, 836 F.3d 1358, 1358 (11th Cir. 2016); *Patterson v. Sec’y, Fla. Dep’t of Corr. (Patterson II)*, 849 F.3d 1321, 1328 (11th Cir. 2017) (en banc); *id.* at 1332 (Jordan, J., dissenting).

² *Patterson I*, 812 F.3d at 886, 894.

³ *Id.* at 896 (Pryor, J., dissenting).

⁴ *Patterson I*, 836 F.3d at 1358.

⁵ *Patterson II*, 849 F.3d at 1321–22.

⁶ 28 U.S.C. § 2244(b) (2012); *see Magwood v. Patterson*, 561 U.S. 320, 341–42 (2010); *id.* at 324 n.1 (noting that the Supreme Court uses “petition” and “application” interchangeably in the habeas context).

in *Patterson II*—a substantive change in a prisoner’s sentence creates a new judgment, while any lesser change does not.⁷ According to Judge Pryor—dissenting in *Patterson I* and writing for the majority in *Patterson II*—a change in sentence that authorizes custody of the prisoner creates a new judgment, while any other change does not.⁸ Neither the law nor the facts changed, and neither explains the reversal from one hearing to the next. The explanation lies in each judge’s preference for finality or justice.

I. PATTERSON BACKGROUND

The facts of *Patterson* are horrific. Originally from Michigan, Ace Robert Patterson was visiting North Florida on July 31, 1997, when he met the eight-year-old girl who would soon become his victim, and who was later named in court papers as only “K.H.” to protect her identity.⁹ Patterson was in town to see his distant cousin, and K.H. was her daughter.¹⁰ The adults enjoyed time together at a local establishment and in the cousin’s mobile home.¹¹ After the children went to bed, the adults ate food and continued to socialize.¹² The evening wound down around 3:00 a.m., when K.H.’s mother drove Patterson to the residence where he was staying.¹³ He left—but not for good. During the night, Patterson broke through the back door of his cousin’s home, took the young girl from her bed, and carried her into the woods.¹⁴ He raped her repeatedly and gagged her with his fingers.¹⁵ He then fled on foot.¹⁶ K.H. survived the attack and found her way home. Crying, she knocked on her front door

⁷ See *Patterson I*, 812 F.3d at 891–92; *Patterson II*, 849 F.3d at 1332 (Jordan, J., dissenting).

⁸ See *Patterson I*, 812 F.3d at 899 (Pryor, J., dissenting); *Patterson II*, 849 F.3d at 1326.

⁹ *Patterson II*, 849 F.3d at 1323; En Banc Brief of Appellant at ii, *Patterson II*, 849 F.3d 1321 (No. 12–12653–AA).

¹⁰ *Patterson II*, 849 F.3d at 1323; see Order Granting Certificate of Appealability at 4, *Patterson I*, 836 F.3d 1358 (No. 12–12653–AA), ECF No. 39.

¹¹ Order Granting Certificate of Appealability, *supra* note 10, at 4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Patterson II*, 849 F.3d at 1323; Order Granting Certificate of Appealability, *supra* note 10, at 4–5.

¹⁵ *Patterson II*, 849 F.3d at 1323.

¹⁶ Order Granting Certificate of Appealability, *supra* note 10, at 5.

and woke her mother and her mother's fiancé.¹⁷ They found the child covered with bruises, scratches, and dirt.¹⁸ Her mother called the police.¹⁹

The Madison County Sheriff's Office distributed WANTED posters around town, showing a ten-year-old photo of Patterson.²⁰ About a week after the assault, a waitress in a sandwich shop recognized Patterson from the distinctive tattoo on his right arm, depicting a wizard with a crystal ball and stars.²¹ He had ordered a Coca-Cola, but quickly left the shop.²² The waitress followed him and called the authorities.²³ Patterson was soon caught and arrested.²⁴

In 1998, a Florida jury convicted Patterson on all charges: burglary with battery, aggravated kidnapping of a child, and two counts of capital sexual battery on a child under twelve years old.²⁵ The circuit court sentenced him to 311 months in prison for burglary and aggravated kidnapping, and consecutive terms of life imprisonment and chemical castration for sexual battery.²⁶ A Florida appellate court affirmed both the convictions and the sentences.²⁷

Patterson did not resign himself to these judicial defeats. He filed four habeas corpus petitions in state court directed to his convictions and sentences, three of which alleged that he had received ineffective assistance of counsel.²⁸ The Florida court indulged the repetitive filings, to a point. In 2001, denying the fourth petition, the

¹⁷ *Id.*; *Patterson II*, 849 F.3d at 1323.

¹⁸ *Patterson II*, 849 F.3d at 1323.

¹⁹ Order Granting Certificate of Appealability, *supra* note 10, at 5.

²⁰ *Tattoo Leads to Arrest*, TAMPA TRIB., Aug. 8, 1997, at 2; *Tattoo Helps Police Arrest Suspect in Girl's Assault*, ORLANDO SENTINEL, Aug. 8, 1997, at D3.

²¹ *Tattoo Leads to Arrest*, *supra* note 20; *Tattoo Helps Police Arrest Suspect in Girl's Assault*, *supra* note 20.

²² *Tattoo Leads to Arrest*, *supra* note 20.

²³ *Id.*

²⁴ *Id.*

²⁵ *Patterson II*, 849 F.3d 1321, 1323 (11th Cir. 2017) (en banc); Replacement Brief of Appellee at 1, *Patterson I*, 812 F.3d 885 (11th Cir. 2016), *reh'g en banc granted, opinion vacated*, 836 F.3d 1358 (11th Cir. 2016) (No. 12-12653-AA).

²⁶ *Patterson II*, 849 F.3d at 1323.

²⁷ *Id.* at 1323; *Patterson v. State*, 736 So. 2d 1185, 1185 (Fla. 1st DCA 1999) (mem.).

²⁸ *See Patterson v. State*, 788 So. 2d 397, 397 (Fla. 1st DCA 2001) (per curiam).

First District Court of Appeal “admonished [Patterson] that the filing of any further successive and/or frivolous petitions or appeals may result in the imposition of sanctions.”²⁹ In addition to targeting the perceived failings of his own counsel, he also lodged criticisms against opposing counsel. Patterson filed an ethics complaint against the trial prosecutor, which went nowhere.³⁰

Finding no relief in state court, Patterson shifted his attention to federal court for a collateral attack.³¹ In 2006, he filed a handwritten, pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254.³² Patterson claimed that his state court convictions had violated both the Due Process Clause of the Fourteenth Amendment and the Self-Incrimination Clause of the Fifth Amendment.³³ Still unhappy with his representation, Patterson also claimed that the convictions had violated his Sixth Amendment right to effective assistance of counsel because “an effective and perceptive defense attorney” would have chosen different jurors.³⁴ The district court for the Northern District of Florida dismissed the habeas petition as untimely under the one-year statute of limitations.³⁵

In 2009, Patterson changed strategy. More than a decade had passed since his crime. The victim became an adult. Patterson remained incarcerated in the Hendry Correctional Institution in Im-

²⁹ *Id.*

³⁰ *Patterson II*, 849 F.3d at 1323.

³¹ *See* 28 U.S.C. § 2254(b)(1)(A) (2012) (prohibiting habeas petitions in federal court unless, among other exceptions, “the applicant has exhausted the remedies available in the courts of the State”).

³² *Patterson II*, 849 F.3d at 1324.

³³ *Id.*; *cf.* 28 U.S.C. § 2254(a) (limiting federal habeas review to allegations of “custody in violation of the Constitution or laws or treaties of the United States”), (d)(1)–(2) (providing that federal court may grant habeas relief after state court adjudication only where state decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or “was based on an unreasonable determination of the facts”).

³⁴ *Patterson II*, 849 F.3d at 1324; Petition Under 28 U.S.C. § 2254 by a Person in Custody Pursuant to a State Court Judgment at 25, *Patterson I*, 812 F.3d 885 (11th Cir. 2016), *reh’g en banc granted, opinion vacated*, 836 F.3d 1358 (11th Cir. 2016) (No. 12–12653–AA) (Supp. App. of Appellee, Ex. F).

³⁵ *Patterson v. McDonough*, No. 4:06cv138–WS, 2007 WL 1577859, at *1 (N.D. Fla. May 31, 2007); *see* 28 U.S.C. § 2244(d)(1) (2012).

mokalee, Florida, and undeterred by repeated losses in the court system. He returned to state court and attacked the legality of his sentence. Specifically, he challenged the punishment of chemical castration, moving pro se to correct an illegal sentence under Florida Rule of Criminal Procedure 3.800.³⁶ Patterson argued that the trial court had failed to rest its order for chemical castration on the determination of a court-appointed medical expert, as it must under Florida statutory law.³⁷ In addition, the court had failed to specify the duration of the treatment.³⁸ This time, Patterson's strategy worked.

Both the state and the guardian ad litem for the victim stipulated to Patterson's motion to vacate the punishment of chemical castration in light of his consecutive life sentences.³⁹ The victim's guardian also sought to avoid unnecessary proceedings that would "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.'"⁴⁰ Accordingly, on December 14, 2009, the circuit court judge granted Patterson's motion and ordered that he "shall not have to undergo . . . 'Chemical Castration' as previously ordered by the Court at his sentencing in the above styled matter."⁴¹ The order ended there, with a finding that Patterson is currently serving life sentences but without an instruction regarding the components of his sentence that remained in force.⁴²

With this new state court order in hand, and now incarcerated in the Tomoka Correctional Institution in Daytona Beach, Florida, Patterson returned to federal court.⁴³ In 2011, he filed another pro se

³⁶ Motion to Correct Illegal Sentence at 1, *State v. Patterson*, No. 1997-171-CF (Fla. 3d Cir. Ct. Aug. 28, 2008); *Patterson II*, 849 F.3d at 1324.

³⁷ Motion to Correct Illegal Sentence, *supra* note 36, at 3-4.

³⁸ *Id.* at 4.

³⁹ Order Granting Defendant's Motion to Correct Illegal Sentence at 2, *State v. Patterson*, No. 1997-171-CF (Fla. 3d Cir. Ct. Dec. 14, 2009).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1-2.

⁴³ See Petition Under 28 U.S.C. § 2254 by a Person in Custody Pursuant to a State Court Judgment at 1, *Patterson I*, 812 F. 3d 885 (11th Cir. 2016), *reh'g en banc granted, opinion vacated*, 836 F.3d 1358 (11th Cir. 2016), No. 4:11-CV10-RH-CAS (N.D. Fla. Apr. 29, 2011), ECF No. 7 [hereinafter Amended Petition for Writ of Habeas Corpus].

petition for a writ of habeas corpus under 28 U.S.C. § 2254.⁴⁴ The petition again alleged that his 1998 convictions had violated his rights under the Fifth, Sixth, and Fourteenth Amendments, this time including the Double Jeopardy Clause.⁴⁵ The district court for the Northern District of Florida considered whether the new habeas petition was an unauthorized “second or successive” petition under 28 U.S.C. § 2244(b), given that the court’s dismissal of Patterson’s prior petition as time-barred was an adjudication on the merits.⁴⁶ Without authorization from the court of appeals, the district court would lack jurisdiction to hear any “second or successive” petition.⁴⁷

As amended in the Antiterrorism and Effective Death Penalty Act of 1996, section 2244(b)(1) provides that “[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.”⁴⁸ With exceptions not applicable here, section 2244(b)(2) requires dismissal even for claims “in a second or successive habeas corpus application” that were not previously presented.⁴⁹ Yet, not all second-in-time habeas petitions are unauthorized “second or successive” petitions.⁵⁰ A new judgment from state court after Federal Petition #1 resets the habeas clock, inviting a future habeas petition directed to that intervening judgment to be a new Federal Petition #1.⁵¹ After all, the future petition is the first challenge to the intervening judgment, which had not yet been issued at the time of the

⁴⁴ *Id.*; see *Patterson II*, 849 F.3d 1321, 1324 (11th Cir. 2017) (en banc); Order Granting Certificate of Appealability, *supra* note 10, at 2.

⁴⁵ *Patterson II*, 849 F.3d at 1324; Order Granting Certificate of Appealability, *supra* note 10, at 2; Amended Petition for Writ of Habeas Corpus, *supra* note 43, at 5–6.

⁴⁶ Report and Recommendation to Deny § 2254 Petition at 5, *Patterson v. Tucker*, No. 4:11cv10–RH/CAS, 2012 WL 1365965 (N.D. Fla. Apr. 18, 2012) (adopted as district court opinion).

⁴⁷ 28 U.S.C. § 2244(b)(3)(A) (2012).

⁴⁸ *Id.* § 2244(b)(1).

⁴⁹ *Id.* § 2244(b)(2).

⁵⁰ See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007) (“The Court has declined to interpret ‘second or successive’ as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application.”).

⁵¹ *Patterson II*, 849 F.3d 1321, 1325 (11th Cir. 2017) (en banc); see *Magwood v. Patterson*, 561 U.S. 320, 341–42 (2010) (noting the “straightforward

prior petition.⁵² The Supreme Court put it plainly: to determine whether a second habeas petition is barred under 28 U.S.C. § 2244(b), the “existence of a new judgment is dispositive.”⁵³

According to the district court, the “critical question” was whether Patterson was “in custody pursuant to a new sentence imposed in 2009.”⁵⁴ The court’s answer: No. Section 2244(b) barred Patterson’s new habeas petition because the Florida court’s new order did not constitute an intervening judgment that would break the succession of habeas petitions.⁵⁵ Because the Florida order “merely invalidated a condition which had no impact on the prison sentence to be served,” Patterson was simply trying to “challenge[] his custody pursuant to the original sentence.”⁵⁶ He already tried that once and failed with a late petition. He could not try a second time.

Along with denying Patterson’s habeas petition, the district court also granted a certificate of appealability.⁵⁷ Patterson then took his case to the Court of Appeals for the Eleventh Circuit. Twice.

II. PATTERSON OPINIONS

The existence of a new state court judgment may be dispositive for counting federal habeas petitions. But identifying a new judgment is no easy task. Both section 2244(b)(1) and section 2244(b)(2) expressly refer to habeas applications “under section 2254.”⁵⁸ Section 2254 contemplates “[a]n application for a writ of habeas corpus

rule” that where “there is a new judgment intervening between the two habeas petitions, an application challenging the resulting new judgment is not second or successive at all”) (internal quotation and citation omitted); *Insignares v. Sec’y, Fla. Dep’t of Corr.*, 755 F.3d 1273, 1281 (11th Cir. 2014) (concluding “that 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”).

⁵² *Magwood*, 561 U.S. at 339 (recognizing petitioner’s habeas application as the “first application challenging that intervening judgment”).

⁵³ *Id.* at 324; *cf.* *Burton v. Stewart*, 549 U.S. 147, 156 (2007) (noting “there was no new judgment intervening between the two habeas petitions”).

⁵⁴ Report and Recommendation to Deny § 2254 Petition, *supra* note 46, at 6.

⁵⁵ *Id.* at 8–9.

⁵⁶ *Id.* at 9.

⁵⁷ *Patterson v. Tucker*, No. 4:11cv10–RH/CAS, 2012 WL 1365965, at *2 (N.D. Fla. Apr. 18, 2012).

⁵⁸ 28 U.S.C. § 2244(b)(1), (2) (2012).

on behalf of a person in custody pursuant to the judgment of a State court.”⁵⁹ A “judgment of a State court” comprises both conviction and sentence.⁶⁰ Change either the conviction or the sentence, and a new judgment arises.

In its two *Patterson* hearings, the Eleventh Circuit wrestled with how a criminal sentence must change to render a new “judgment of a State court.” A divided panel initially ruled in favor of Patterson, finding that his 2011 federal habeas petition was not “second or successive” and, thus, should be heard on the merits.⁶¹ The division on the panel was even deeper than the 2-1 vote suggests. The concurring opinion came from a federal district judge sitting by designation.⁶² Counting only active judges sitting on the Eleventh Circuit, the court divided evenly, one to one, on Patterson’s appeal. Judge Jordan wrote the majority opinion, with a concurring vote tipped in the petitioner’s favor, and Judge Pryor wrote the dissent. Upon rehearing en banc, those two judges took up their same argumentative mantles. Judge Pryor repeated paragraphs from his prior dissent to write the new majority opinion,⁶³ and Judge Jordan quoted his vacated panel opinion to write the new dissent.⁶⁴ This time around, Judge Pryor secured the one extra vote needed for the court’s opinion, and Patterson lost by a vote of 6-5.⁶⁵

⁵⁹ *Id.* § 2254(b)(1).

⁶⁰ *Insignares v. Sec’y, Fla. Dep’t of Corr.*, 755 F.3d 1273, 1281 (11th Cir. 2014); *see Ferreira v. Sec’y, Dep’t of Corr.*, 494 F.3d 1286, 1292 (11th Cir. 2007) (noting that “the judgment to which AEDPA refers is the underlying conviction and most recent sentence that authorizes the petitioner’s current detention”); *Burton v. Stewart*, 549 U.S. 147, 156 (2007) (noting that petitioner’s “limitations period did not begin until both his conviction *and* sentence became final”) (internal quotation omitted).

⁶¹ *Patterson I*, 812 F.3d 885, 894 (11th Cir. 2016), *reh’g en banc granted, opinion vacated*, 836 F.3d 1358, 1358 (11th Cir. 2016).

⁶² *See id.* at 894–96 (Haikala, J., concurring and sitting by designation from the Northern District of Alabama).

⁶³ *Compare id.* at 897–99, 904 (Pryor, J., dissenting), *with Patterson II*, 849 F.3d 1321, 1323–25, 1327 (11th Cir. 2017) (en banc).

⁶⁴ *Patterson II*, 849 F.3d at 1329 (Jordan, J., dissenting).

⁶⁵ *Id.* at 1321–22 (majority opinion). One judge voting with the majority filed a concurring opinion and wrote separately only to clarify questions left unanswered. *See id.* at 1328 (Carnes, C.J., concurring) (“I fully concur in the well-reasoned majority opinion . . .”).

A. Custodial Change in Sentence

The crux of Judge Pryor's opinion, now elevated from dissent to majority, is that a sentencing change must be about custody to render a new state court judgment.

To determine whether a state court has issued a new judgment intervening between federal habeas petitions, "[t]he judgment that matters for purposes of section 2244 is 'the judgment authorizing the prisoner's confinement.'"⁶⁶ Section 2244 covers applications filed under section 2254. Quoting 28 U.S.C. § 2254(b)(1), the Eleventh Circuit interpreted that statutory text to govern only petitions "that challenge 'the judgment of a State court' 'pursuant to' which the prisoner is 'in custody.'"⁶⁷ Not every change to a criminal sentence resets the habeas clock, not even every material change.⁶⁸ An increased or decreased imprisonment sentence likely would constitute a new judgment, while a clerical correction likely would not.⁶⁹ The only relevant question is whether a state court order authorizes a prisoner's confinement.⁷⁰ If it does, then the order gives rise to a new judgment. If it does not, then there is no new judgment.

In Patterson's case, the Florida circuit court did not issue a new imprisonment sentence when granting his uncontested motion to vacate the punishment of chemical castration.⁷¹ Rather, the circuit

⁶⁶ *Id.* at 1325 (majority opinion) (quoting *Magwood v. Patterson*, 561 U.S. 320, 332 (2010)); *see id.* ("the new judgment must be a judgment authorizing the prisoner's confinement") (internal quotation omitted); *see also id.* at 1326 (using "custody" and "confinement" interchangeably and noting that the need for two forms "to determine the scope of Patterson's confinement does not transform the 2009 order into a judgment that authorizes Patterson's custody").

⁶⁷ *Id.* at 1325; *see id.* at 1323.

⁶⁸ *Id.* at 1326 (stating that "our precedent . . . suggests that not all changes to a sentence create a new judgment" and that a limitation to material changes "still misses the point"); *id.* at 1327 (reiterating that "Patterson's focus on the magnitude and type of change to the sentence is beside the point").

⁶⁹ *Id.* at 1326 (distinguishing the facts of *Patterson* from the facts of *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273, 1277, 1281 (11th Cir. 2014) (where the state court had corrected a sentence by reducing mandatory-minimum imprisonment sentence from twenty years to ten years, but retained a twenty-seven year imprisonment sentence), and noting that "when a court corrects a clerical mistake, no new judgment arises" for FED. R. APP. P. 4(b)(1)(A)).

⁷⁰ *Id.* at 1326–27.

⁷¹ *See Order Granting Defendant's Motion to Correct Illegal Sentence*, *supra* note 39.

court's "1998 judgment remains the only order that commands the Secretary to imprison Patterson."⁷² Thus, "because Patterson is not 'in custody pursuant to' the consent order that he not undergo chemical castration, that order does not trigger a new round of federal collateral review."⁷³ Patterson had his chance. He's done. The Eleventh Circuit affirmed dismissal of the petition.⁷⁴

B. *Substantive Change in Sentence*

The crux of Judge Jordan's opinion, now downgraded from majority to dissent, is that a sentencing change must be substantively different to render a new state court judgment.

A criminal sentence plays a "critical role" in a judgment, and chemical castration is one punishment a defendant may face.⁷⁵ An order vacating that punishment "substantively changes the way that the Department of Corrections can execute the initial judgment."⁷⁶ Rather than giving "primacy to custody" as in the majority opinion, the dissent looked to the nature of the sentencing change: chemical castration is a "*substantive* punishment," and the "new sentence . . . is *substantively* different than the original sentence."⁷⁷ The dissent agreed that a clerical correction would not create a new judgment, but not because such correction is irrelevant to confinement.⁷⁸ Rather, a typo is trivial: "there is no way anyone can say" that a chemical castration order "is in any way clerical."⁷⁹

Here, the Florida court's vacatur order "affects and modifies Mr. Patterson's initial sentence."⁸⁰ Thus, the court "impose[d] a new sentence" on the prisoner, called a respectful "Mr. Patterson" by the

⁷² *Patterson II*, 849 F.3d at 1327.

⁷³ *Id.* at 1323.

⁷⁴ *Id.* at 1328.

⁷⁵ *Id.* at 1330.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1332 (both emphases added); *see id.* at 1329 (quoting *Patterson I* majority opinion that described state court order as "*substantively* vacating a portion of the sentence but leaving Mr. Patterson's remaining convictions and total custodial sentences intact") (emphasis added).

⁷⁸ *Id.* at 1332.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1331.

dissent alone.⁸¹ A new sentence gives rise to a new judgment, and a new judgment in state court gives rise to a new habeas opportunity in federal court.⁸² Mr. Patterson's case deserves further review. Of course, now he won't get it.

III. TEXTUAL AND SUBTEXTUAL DISPUTES

With all votes counted, the Eleventh Circuit has codified a narrow view of state court judgments for purposes of federal habeas review. Both the majority and dissenting opinions in *Patterson II* have merit and enough appeal to divide the court. But there is no textual basis to prefer one opinion over the other. Although the majority stresses fidelity to the language of 28 U.S.C. § 2244(b), in fact it takes grammatical liberties. Underlying the language, the core issue is subtextual. The judges' point of dispute—custody or substance—is a proxy for a deeper and older point of dispute in criminal law—finality or justice.

The majority opinion in *Patterson II* has the passing appearance of superiority because it closely tracks the text of section 2244(b). Specifically, the majority analyzes the reference to section 2254, while the dissent does not. Relying on its textual analysis, the majority presents its conclusion as “follow[ing] from the text of the statute.”⁸³ Section 2244(b) requires dismissal of “[a] claim presented in a second or successive habeas corpus application *under section 2254*.”⁸⁴ Section 2254(b) describes applications “on behalf of a person *in custody pursuant to the judgment of a State court*.”⁸⁵ According to the majority, combining these two statutes makes clear that the only relevant judgment from state court “is the judgment ‘pursuant to’ which the prisoner is ‘in custody.’”⁸⁶ The conclusion,

⁸¹ *Id.* Compare *id.* at 1322–28 (majority opinion), with *id.* at 1329–33 (Jordan, J., dissenting).

⁸² *Id.* at 1325 (majority opinion).

⁸³ *Id.*

⁸⁴ 28 U.S.C. § 2244(b)(1), (2) (2012) (emphasis added).

⁸⁵ *Id.* § 2254(b)(1) (emphasis added).

⁸⁶ *Patterson II*, 849 F.3d at 1326.

then, focuses squarely on custody. The prohibition on second or successive habeas petitions bars a prisoner from repeatedly “contesting the judgment authorizing his confinement.”⁸⁷

However, the statutory text is not so easily grafted onto the majority opinion, and the custody conclusion not so direct. Section 2254(b) provides, more fully, that “[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that” certain conditions hold.⁸⁸ Notice the main point of the sentence: An application shall not be granted unless Notice, in particular, the grammar: “on behalf of” introduces a prepositional phrase with the noun “person” as its object: “on behalf of a person.” The noun “person” is also modified by a prepositional phrase: “in custody.” The noun “custody” is then modified: “pursuant to the judgment.” So, too, the noun “judgment”: “of a State court.” Each prepositional phrase conveys a relation as it modifies the prior noun.⁸⁹ All together, the phrases specify the “application” at the heart of the sentence: one seeking habeas corpus relief, and one filed on behalf of a certain type of person. Section 2254 governs habeas applications filed only on behalf of a person who is in custody, and only in the type of custody that comes from a state court judgment.

In its opinion, the majority extracts “a person in custody pursuant to the judgment of a State court” and rearranges the words: “section 2254 governs petitions that challenge ‘the judgment of a State court’ ‘pursuant to’ which the prisoner is ‘in custody.’”⁹⁰ Yet, the statute contains prepositional phrases stacked like nesting dolls, one

⁸⁷ *Id.* at 1325; *see* *Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005) (habeas “seeks invalidation (in whole or in part) of the judgment authorizing the prisoner’s confinement”); *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (quoting *Wilkinson*, 544 U.S. at 83).

⁸⁸ 28 U.S.C. § 2254(b)(1).

⁸⁹ *See* ANNE ENQUIST, LAUREL CURRIE OATES & JEREMY FRANCIS, *JUST WRITING* 162–63 (5th ed. 2017); RANDOLF QUIRK ET AL., *A COMPREHENSIVE GRAMMAR OF THE ENGLISH LANGUAGE* 657 (1985).

⁹⁰ *Patterson II*, 849 F.3d at 1325; *see id.* at 1323 (“*Patterson* is not ‘in custody pursuant to,’ § 2254(b)(1), the consent order”), 1324 (“*Patterson* was ‘not in custody pursuant to’ the 2009 order.”), 1326 (“[T]he only judgment that counts for purposes of section 2244 is the judgment ‘pursuant to’ which the prisoner is ‘in custody.’”).

after the other. The order matters. A sentence is composed as a semantic structure, such that its word order influences its meaning.⁹¹ Changing the order risks changing the meaning. The sentence “John amuses Amy” is not accurately quoted as “Amy amuses John,” even though the component words are identical.⁹² Similarly, “a person in custody pursuant to the judgment of a State court” is not accurately quoted as “the judgment of a State court pursuant to which a person is in custody.” Section 2254 refers to “state court” only to modify “judgment,” refers to “judgment” only to modify “custody,” refers to “custody” only to modify “person,” and refers to “person” only to modify the subject, “application.” On its face, section 2254 governs petitions filed by a certain type of person who is in a certain type of custody.

This interpretation finds support not only in the plain language of the statute and linguistic principles, but also in companion provisions and legislative history. First, as a threshold matter, subsection 2254(b) should not be read in isolation. The title of section 2254 is “State custody; remedies in Federal courts.”⁹³ This title situates the entire section in the context of state custody. Although statutory titles and headings cannot limit or displace the operative text, they “are tools available for the resolution of a doubt about the meaning of a statute.”⁹⁴ Second, in 1996, as part of its habeas corpus reforms in the Antiterrorism and Effective Death Penalty Act, Congress added a one-year statute of limitations to habeas filings, specifying

⁹¹ See Kathrin Glüer, *Theories of Meaning and Truth Conditions*, in CONTINUUM COMPANION TO THE PHILOSOPHY OF LANGUAGE 84, 86 (Manuel García-Carpintero & Max Kölbel eds., 2012) (“Sentences have a constituent structure; they are composed of ‘smaller’ parts, and their meaning seems to depend, in a systematic manner, on the parts they are built of, and the way in which these parts are put together.”).

⁹² See *id.* at 100 n.6 (“That the way in which the parts of a sentence are put together, i.e. its syntactic mode of composition, plays a role here can be seen from examples such as ‘Bob kicks Mary’ and ‘Mary kicks Bob’. These sentences are composed of the same parts, but differ in meaning. The difference depends on which syntactic role the parts play.”).

⁹³ Compare 28 U.S.C. § 2254 (2012) (entitled “State custody; remedies in Federal courts”), with 28 U.S.C. § 2255 (2012) (entitled “Federal custody; remedies on motion attacking sentence”).

⁹⁴ *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (internal quotation omitted); *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (internal quotation omitted).

those filings by use of a similar prepositional phrase: the limitations period applies “to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”⁹⁵ As in section 2254, “judgment” is relevant as a modifier for “custody,” which modifies “person,” which in turn modifies “application.” Finally, in 1966, when Congress previously amended the habeas corpus statute, the House Committee on the Judiciary described the bar against successive petitions as applying “when a person, in custody pursuant to a judgment of a State court, has been denied . . . release from custody.”⁹⁶ Even three decades before the Antiterrorism and Effective Death Penalty Act, Congress was already focused on the person filing the petition rather than the judgment challenged in the petition. It is an interpretive stretch to switch the focus to judgment and conclude, as the majority does, that the text governs only those petitions directed to a judgment authorizing confinement.

From a textual perspective, the dispute between the majority and dissenting opinions ends in a toss-up. Only the majority pays attention to section 2244(b)’s reference to section 2254, but it engages in grammatical acrobatics to reach a conclusion that does not naturally flow from the text. Looking beneath the text, it is not surprising that the dispute between the majority and dissenting opinions in *Patterson II* defies easy resolution. The majority opinion gives precise, but narrow, guidance for interpreting state court judgments: *Does the new judgment authorize the prisoner’s custody?* The dissenting opinion gives imprecise, but expansive, guidance for interpreting state court judgments: *Is the new judgment substantively different?* Each view reflects a different value judgment. For the majority, prohibiting second or successive habeas petitions respects finality, as a benefit to the victim, by keeping a past trauma firmly in the past, and to society, by deterring and rehabilitating offenders with swift sanctions.⁹⁷ For the dissent, prohibiting second or successive habeas

⁹⁵ H.R. REP. NO. 104–518, at 4 (1996) (Conf. Rep.); see 28 U.S.C. § 2244(d)(1) (2012).

⁹⁶ H.R. REP. NO. 89–1892, at 7–8 (1966) (Conf. Rep.); see *id.* at 3 (noting that House bill “revises the procedures applicable to the review by lower [f]ederal courts of petitions for habeas corpus *by prisoners who have been convicted and who are in custody pursuant to the judgment of a State court*”) (emphasis added).

⁹⁷ *Patterson II*, 849 F.3d 1321, 1325 (11th Cir. 2017) (en banc).

petitions respects justice, as state courts may impose criminal sentences as they see fit and federal courts may review any significant sentencing changes.⁹⁸ Indeed, federal oversight of state convictions as a tool for justice extends back to the Reconstruction Era, when Congress sought “to deal severely with the States of the former Confederacy.”⁹⁹

The dispute among the judges in *Patterson II* lays bare a deep and enduring dispute in criminal law between finality and justice.¹⁰⁰ Modern habeas corpus law promotes both concerns. Congress has tried to alleviate the burden on federal courts “by introducing a greater degree of finality of judgments in habeas corpus proceedings” while at the same time recognizing that the “writ of habeas corpus is one of the most important safeguards of individual liberty.”¹⁰¹ In the Antiterrorism and Effective Death Penalty Act, Congress “wished to curb delays, to prevent ‘retrials’ on federal habeas, and to give effect to state convictions.”¹⁰² This legislative wish must

⁹⁸ *Id.* at 1331 (Jordan, J., dissenting) (noting that “Florida law does not require that a criminal judgment be in writing” and that “AEDPA—in both text and spirit—is meant to respect the way that states administer their criminal justice systems”); see Oral Argument at 37:50, *Patterson II*, 849 F.3d 1321 (11th Cir. 2017) (No. 12-12653) (“Member of the Court: Castration is a pretty significant part of a sentence, you would agree with me. But your argument is that, it doesn’t matter how significant the judgment is—got to be a new piece of paper, in Florida? Counsel for the State: It’s got to be a new piece of paper to hold him in confinement.”).

⁹⁹ *Fay v. Noia*, 372 U.S. 391, 415 (1963), *overruled in part by* *Wainwright v. Sykes*, 433 U.S. 72, 87–88 (1977); see The Habeas Corpus Act of Feb. 5, 1867, ch. 28, 14 Stat. 385; see also *Habeas Corpus: Hearings Before the Subcomm. on Civil & Constitutional Rights of the Comm. on the Judiciary*, 103d Cong. 26 (1995) (statement of Rubin Carter) (describing federal courts as extending a hand of friendship to “those as the bottom of the empowerment pile”).

¹⁰⁰ See *McCleskey v. Bowers*, 501 U.S. 1281, 1282 (1991) (Marshall, J., dissenting from denial of stay of execution) (admonishing Court for denying constitutional protections to death penalty defendants and, “in essence, valu[ing] finality over justice”); *Sawyer v. Whitley*, 505 U.S. 333, 359 (1992) (Blackmun, J., concurring in judgment) (“That the Court permitted [petitioner in *McCleskey*] to be executed without ever hearing the merits of his claims starkly reveals the Court’s skewed value system, in which finality of judgments, conservation of state resources, and expediency of executions seem to receive greater solicitude than justice and human life.”).

¹⁰¹ H.R. REP. NO. 89–1797, at 2 (1966); H.R. REP. NO. 89–1892, at 4 (1966).

¹⁰² *Williams v. Taylor*, 529 U.S. 362, 386 (2000); see H.R. REP. NO. 104–518, at 111 (1996) (Conf. Rep.) (designing “reforms to curb the abuse of the statutory

contend with the original purpose of habeas corpus: to fulfill the promise of the Magna Carta “that no man would be imprisoned contrary to the law of the land.”¹⁰³ As codified in the Habeas Corpus Act of 1679, the writ governed all prisoners “committed or detained . . . for any [c]rime”—even violent crimes against children.¹⁰⁴

With its ancient pedigree and revered status as the Great Writ, habeas corpus is a flash point for the competing concerns of finality and justice.¹⁰⁵ The tension between these concerns arises in other areas of criminal law, as well, including constitutional provisions that Patterson himself invoked in his many court filings.¹⁰⁶ For example, in 1824, Justice Story articulated a “manifest necessity” exception to the double jeopardy bar against a second trial.¹⁰⁷ That nineteenth-century case involved a mistrial after the jury was unable

writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases”); *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (“[W]e hold the general rule to be that, where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence. The rule accommodates the need to allow courts to remedy actual injustice while recognizing that, at some point, the State must be allowed to exercise its ‘sovereign power to punish offenders.’”) (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)).

¹⁰³ *Boumediene v. Bush*, 553 U.S. 723, 740 (2008).

¹⁰⁴ Habeas Corpus Act of 1679, 31 Car. 2, ch. 2 §§ 3, 7 (Eng.) (requiring release upon certain sureties for crimes other than “Treason or Felony plainly and specially expressed in the Warrant of Commitment” and requiring prompt criminal proceedings for treason or felonies); *see also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 557–58 (2004) (Scalia, J., dissenting) (recounting history of habeas corpus).

¹⁰⁵ *See, e.g., Ex parte Bollman*, 8 U.S. 75, 95 (1807) (“[W]hen we say *the writ of habeas corpus*, without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution.”). *Compare Zant*, 499 U.S. at 491 (“Finality has special importance in the context of a federal attack on a state conviction.”), *with* *Gilbert v. United States*, 640 F.3d 1293, 1337 (11th Cir. 2011) (Hill, J., dissenting) (“Finality with justice is achieved only when the imprisoned has had a meaningful opportunity for a reliable judicial determination of his claim.”).

¹⁰⁶ *See Patterson II*, 849 F.3d 1321, 1324 (11th Cir. 2017) (en banc).

¹⁰⁷ *United States v. Perez*, 22 U.S. 579, 579–80 (1824) (stating that, in the event of a hung jury, “the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated”).

to reach a verdict, and to this day a hung jury remains the gold standard for manifest necessity.¹⁰⁸ The manifest necessity exception pursues justice over finality, a debatable balance of values.¹⁰⁹ The majority opinion in *Patterson II* pursues finality at the cost of justice; the dissenting opinion pursues justice at the cost of finality. As expressive of core value judgments, the divide on the bench over “second or successive” habeas corpus petitions will remain.

CONCLUSION

In the end, the federal statute does not determine whether a particular habeas corpus petition is “second or successive.” Because there is no basis in statutory language to prefer one opinion over the other, judges choose the view that reflects their values. *Patterson I* set a bar of substantive change, promoting justice. *Patterson II* set a bar of custodial change, promoting finality. Both views have merit. The same facts and law came up twice before the Eleventh Circuit. When the audience changed, the outcome changed. As federal law evolves toward a more narrow view of state court judgments, the habeas lottery will be more often lost than won.

¹⁰⁸ *Id.*; see *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (“While other situations have been recognized by our cases as meeting the ‘manifest necessity’ standard, the hung jury remains the prototypical example.”).

¹⁰⁹ See *Ex parte Lange*, 85 U.S. 163, 169 (1873) (“The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.”); *Wade v. Hunter*, 336 U.S. 684, 689 (1949) (recognizing that “a defendant’s valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public’s interest in fair trials designed to end in just judgments”); *Arizona v. Washington*, 434 U.S. 497, 509 (1978) (“[T]he courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society’s interest in giving the prosecution one complete opportunity to convict those who have violated its laws.”); see also David O. Markus, *Should There Be a Retrial in Cosby?*, SDFLA BLOG (June 19, 2017), <http://sdfla.blogspot.com/2017/06/should-there-be-retrial-in-cosby.html> (“[P]erhaps it is time to revisit this issue as citizens should simply not be forced to fight the Government more than once on the same facts . . .”).