No. 17-445

In the Supreme Court of the United States

BRUCE WESTBROOKS, Warden,
Petitioner,
v.
WILLIAM G. ALLEN,
Respondent.

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

REPLY BRIEF OF PETITIONER

HERBERT H. SLATERY III
Attorney General & Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

NICHOLAS W. SPANGLER
Assistant Attorney General
Counsel of Record

P.O. Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 741-3486
Fax: (615) 532-4892
Nick.Spangler@ag.tn.gov

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY

I. IMMEDIATE REVIEW IS ESSENTIAL TO PREVENT IRREPARABLE HARM TO THE PETITIONER IN HAVING TO DEFEND AGAINST A PATENTLY ABUSIVE CLAIM.

Respondent contends that certiorari should be denied because the case comes to this Court "in an interlocutory posture." (BIO, 13.) But that is no reason to deny review here. 28 U.S.C. § 1254(1) gives this Court discretionary and unlimited jurisdiction over cases in the federal courts of appeals both "before or after rendition of a judgment or decree." And when there is a "clear-cut issue of law that is fundamental to the further conduct of the case," this Court will grant review despite an interlocutory posture. Shapiro, Stephen, et al., *Supreme Court Practice*, § 4.18 (10th Ed. 2013). For example, the Court has granted review of interlocutory decisions to resolve important jurisdictional questions, *Land v. Dollar*, 330 U.S. 731 (1947), *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), and to hasten or finally resolve litigation, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (reversing class certification order).

Moreover, when "the question presented is of substantial importance, and . . . further proceedings below would not likely aid [this Court's] consideration of it," the Court may "avoid the finality issue simply by granting certiorari." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). The potential to "obviate the need for further proceedings" is yet another reason cited for certiorari review of decisions involving a remand. *New Orleans v. Dukes*, 427 U.S. 297, 302 (1976) (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-478,

480, 485-486 (1975)). And finally, the "immediate and irreparable" effect of an interlocutory order may also warrant immediate review. *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

These considerations all weigh heavily in favor of review here. The question presented is substantial, involving an important jurisdictional issue and a circuit split that respondent acknowledges. (BIO, 16-19.) Immediate review of this issue is needed to prevent irreparable harm to petitioner. The statutory prohibition on second or successive applications and the abuse-of-the-writ doctrine both independently serve an essential gatekeeping function. *See United States v. Lopez*, 577 F.3d 1053, 1060-68 (9th Cir. 2009) ("[N]o court has ever held AEDPA expands the availability of habeas relief or allows federal courts to consider claims that would have been barred under the abuse-of-the-writ doctrine."); *Goldblum v. Klem*, 510 F.3d 204, 216 n.8 (3d Cir. 2007) (noting that AEDPA gatekeeping scheme did not supplant the abuse-of-the-writ doctrine but rather built on it); *Davis v. Fechtel*, 150 F.3d 486, 491 (5th Cir. 1998) ("[W]e need not determine whether the gate-keeping provisions of the AEDPA apply to the instant petition . . . because it clearly constitutes an abuse of the writ either under our pre- or post-AEDPA jurisprudence.") But that function is nullified if petitioner is forced to re-defend the merits of a claim before challenging whether those gates were properly lifted.

Finally, remand proceedings will not aid review at a later time. The threshold procedural question presented is a purely legal one. It will not benefit from

further record development or briefing in the district court. Indeed, respondent will most likely assert that the question is inappropriate for further consideration on remand, having already been decided by the court of appeals. This Court should resolve the question now because it is fully ripe, and immediate review will obviate the need for further proceedings on a patently abusive claim.

II. THE ABUSE-OF-THE-WRIT DOCTRINE IS PROPERLY BEFORE THIS COURT BECAUSE THE PARTIES HAVE ADDRESSED THE QUESTION AND THE COURT OF APPEALS SQUARELY DECIDED IT.

Respondent also contends that petitioner has waived arguments not offered as a basis for rehearing in the court of appeals or pressed in the district court. (BIO, 14-16.) But respondent cites no authority for the proposition that petitioner has waived arguments not first submitted for rehearing. Indeed, he correctly acknowledges that "a petitioner need not seek rehearing to seek certiorari." (BIO, 15.) And petitioner's decision to seek redress in this Court rather than on rehearing in the court of appeals has no bearing on the strength of the petition. The significance of the question presented should not be measured by petitioner's considered and informed decision not to seek rehearing. The appropriate measures are the existing circuit split and the need to conserve state and federal resources that abusive claims, like respondent's claim here, would otherwise consume.

Moreover, when petitioner argued in the court of appeals that the grand-jury claim was an abuse of the writ, respondent did not assert waiver. Rather, he addressed the argument on the merits, and the court of appeals squarely decided the issue, concluding that "the abuse-of-the-writ doctrine did not permit the district court to dismiss this case as second or successive." (App. 9 n.12.) The issue was thus both pressed and passed upon below, either of which was sufficient to preserve the issue for this Court's review. *See, e.g., Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

III. RESPONDENT MINIMIZES THE ROBUST CIRCUIT SPLIT AND THE NEED FOR CLARIFICATION BY THIS COURT.

Respondent also contends that petitioner "is misleading [about] the extent of any circuit split." (BIO, 16.) But in a prior petition to this Court, he acknowledged a "robust circuit conflict" that "needs to be resolved." Pet. for Cert at 6, *Allen v. Carpenter*, No. 14-6304 (U.S. Sept. 10, 2014). In any event, the decisions upon which petitioner relies evince a clear need for guidance from this Court about the full reach of *Magwood*.

The *Lampton* decision situates the Fifth Circuit apart from the majority of circuits insofar as the determination of successiveness in that case was made despite the Second Circuit's contrary holding in *Johnson v. United States*, 623 F.3d 41 (2d Cir. 2010), on "virtually identical facts." *In re Lampton*, 667 F.3d 585, 589 (5th Cir. 2012). The *Lampton* court took a component-focused approach by distinguishing between individual counts of the singular judgment under

attack. *Id*. at 588-589. To be sure, this case concerns a modification to the sentencing component of the judgment rather to an individual count component of the judgment. But the reasoning in *Lampton* is sufficiently nuanced to highlight a distinction from the majority approach.

The *Hensley* decision further demonstrates the Fifth Circuit's unique approach to applying *Magwood*. Hensley was convicted by a jury of armed robbery and sentenced to 60 years. *In re Hensley*, 836 F.3d 504, 506 (5th Cir. 2016). The state trial court later found Hensley to be a habitual offender and sentenced him to life imprisonment. *Id*. The federal habeas court later vacated Hensley's life sentence and re-imposed his 60-year sentence. *Id*. Thereafter, Hensley sought authorization to file a second habeas petition based on this modification, but the Fifth Circuit concluded that the sentence "adjustment" did not constitute a new intervening judgment because it did not result from anything resembling a "full resentencing." *Id*. The modification to respondent's judgment involves a similar sort of technical sentence adjustment rather than a full resentencing. Thus, the Fifth Circuit's focus on "the impetus and effect of the amended judgment" when applying *Magwood* cannot be discounted. *In re Parker*, 575 F. App'x 415, 418 (5th Cir. 2014).

The Tenth Circuit's decision in *Martin* further highlights the challenge in identifying judgment modifications that will qualify as new judgements for *Magwood*'s purposes. To be sure, the Tenth Circuit is not alone in concluding that clerical-error corrections do not result in new judgments. *See Marmolejos v. United States*, 789 F.3d 66, 71-72 (2d Cir. 2015);

Johnson v. Duffy, 591 F. App'x 629, 629-630 (9th Cir. 2015); *In re Martin*, 398 F. App'x 326, 327 (10th Cir. 2010). But other circuits have similarly refused to apply *Magwood*'s new-judgment rule to technical sentence modifications under 18 U.S.C. § 3582(c). *See United States v. Jones*, 796 F.3d 483, 485-487 (5th Cir. 2015) (collecting cases); *White v. United States*, 745 F.3d 834, 836-837 (7th Cir. 2014). These decisions demonstrate the need for clarification about the limits of *Magwood*'s reach. They also undermine respondent's contention that his technical sentence modification from 99 years to life removed important statutory and common-law guards against the reconsideration of a meritless claim attacking his undisturbed conviction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General & Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

NICHOLAS W. SPANGLER
Assistant Attorney General
Counsel of Record

P.O. Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 741-3486
Fax: (615) 532-4892
Nick.Spangler@ag.tn.gov

Counsel for Petitioner