No. 18-1320

IN THE
SUPREME COURT OF THE UNITED STATES

Renee Baker, Warden, et al.,

Petitioners,

v.

Alquandré H. Turner,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a prisoner seeking to file a "second or successive" habeas petition must obtain authorization from a court of appeals. 28 U.S.C. § 2244(b)(3). In *Magwood v. Patterson*, 561 U.S. 320 (2010), this Court held that a prisoner's second-in-time petition is not "second or successive" under AEDPA if it "challenges a new judgment for the first time." *Id.* at 324. The questions presented are:

1. Whether, when a state court replaces a judgment that is invalid under state law with an amended judgment, the resulting judgment is "new" for purposes of applying AEDPA's limits on second or successive petitions.

2. Whether, if a prisoner is being held in custody pursuant to a new judgment, he may challenge any aspect of that judgment without having his petition deemed second or successive.

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STATEMENT OF THE CASE

1. In 2006, respondent Alquandré Turner was convicted of several offenses in Nevada state court. Pet. App. 4. As relevant here, he was sentenced to two consecutive terms of life in prison with the possibility of parole after 10 years. *Id.* The Nevada Supreme Court affirmed his convictions and sentence. *Id.*

Mr. Turner, proceeding pro se, filed two unsuccessful federal habeas petitions challenging his original judgment. The first was dismissed in 2009 for failure to pay a filing fee. Pet. App. 13. The second was dismissed as untimely in 2014. *Id.*

2. Mr. Turner later filed a motion in state trial court seeking an amended judgment. Pet. App. 4. His original judgment had included "no credit for time served . . . before sentencing." *Id.*; *see* Turner C.A. Reply Br. Ex. A (original judgment). Mr. Turner argued that, under Nevada law, he was entitled to roughly five months of time-served credit. Pet. App. 4-5. The court agreed, granting his motion and issuing a second, amended judgment that included the required credit. *Id.* 5; *see* Turner C.A. Reply Br. Ex. B, at 3 (amended judgment). The Nevada Supreme Court affirmed, and the second judgment became final in 2015. Pet. App. 5.[1]

3. In 2017, Mr. Turner filed a pro se habeas petition in the U.S. District Court for the District of Nevada. Pet. App. 5, 12. He argued, among other things, that he had received ineffective assistance of counsel at his trial and sentencing. Pet. for a Writ of Habeas Corpus at 7, 17, No. 3:17-cv-151 (D. Nev. Mar. 9, 2017).

[1] The amended judgment also corrected a clerical error in the original judgment that had memorialized part of Mr. Turner's sentence as "Ten (20) Years." Pet. App. 4-5. That correction is not at issue here.

The court ordered Mr. Turner to show cause why his petition should not be dismissed as untimely under the one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d)(1). Pet. App. 12.

The district court ultimately did not rule on the order to show cause. Instead, it dismissed Mr. Turner's petition as "second or successive." Pet. App. 12-13. AEDPA requires the dismissal of "second or successive habeas corpus application[s]" except in two narrow circumstances. 28 U.S.C. § 2244(b)(1) and (2). It further provides that a prisoner seeking to file a second or successive petition under one of those exceptions must first obtain authorization from "the appropriate court of appeals." 28 U.S.C. § 2244(b)(3)(A).

In *Magwood v. Patterson*, 561 U.S. 320 (2010), this Court held that a second-in-time habeas petition is not "second or successive" under AEDPA if it challenges a "new judgment" for the first time. *Id.* at 323-24. In this case, the district court concluded that Mr. Turner's petition was second or successive because the court believed that his two earlier petitions had "challeng[ed] the same judgment" he is challenging here. Pet. App. 12-13. In reaching that conclusion, the court did not consider the intervening amended judgment. *Id.*

4. Mr. Turner sought leave from the Ninth Circuit to file a second or successive petition. Pet. App. 5. The court appointed counsel for Mr. Turner and requested a supplemental filing addressing the question whether his amended

judgment qualified as a new judgment under *Magwood*. *Id.* After briefing and argument, the court held that it did.

The Ninth Circuit relied on *Gonzalez v. Sherman*, 873 F.3d 763 (9th Cir. 2017), which had addressed a similar question in the context of California law. In *Gonzalez*, the court explained that, "under California law, only a sentence that awards a prisoner all credits to which he is entitled is a legally valid one." *Id.* at 769. "As a result," the court concluded, a California court's "alteration of the number of presentence credits to which a prisoner is entitled is a legally significant act: it replaces an invalid sentence with a valid one." *Id.* And because the issuance of an amended judgment accurately reflecting Mr. Gonzalez's presentence credits had "removed an invalid basis for incarcerating [him] and provided a new and valid intervening judgment pursuant to which he was then being held in custody," the Ninth Circuit concluded that the judgment was "new" under *Magwood*. *Id.* at 770.

In this case, the Ninth Circuit held that "Nevada law compels the same conclusion." Pet. App. 8, 10. After analyzing the relevant state statutes and Nevada Supreme Court precedent, the court concluded that in Nevada, as in California, "judgments that do not include a defendant's credit for time served are invalid." *Id.* 10. Therefore, as in *Gonzalez*, the court held Mr. Turner's amended judgment constituted a new judgment under *Magwood* because it replaced an invalid basis for his custody with a valid one. *Id.* 10-11.

The Ninth Circuit declined to address the State's alternative argument that Mr. Turner's petition was untimely. Pet. App. 10. The court explained that the

timeliness issue was not properly before it because a court of appeals presented with an application for leave to file a second-or-successive petition may not "assess the cognizability" of the underlying petition. *Id.* (citation omitted). Having "determined that Mr. Turner's petition is a first petition," the court could "proceed no further." *Id.* It denied Mr. Turner's application as unnecessary and transferred his petition to the district court for further proceedings. *Id.* 11.

REASONS FOR DENYING THE PETITION

The State principally seeks review of the Ninth Circuit's holding that the Nevada trial court issued a new judgment when it replaced Mr. Turner's invalid original judgment. The State also asks this Court to resolve a separate question that was neither pressed nor passed upon below: Whether, if Mr. Turner's second judgment is new, his petition can challenge any aspect of that judgment without being deemed second or successive. Neither question warrants this Court's review.

I. The question whether Mr. Turner's second judgment qualified as a new judgment under *Magwood* does not warrant review.

The State asserts that this Court should grant certiorari because the Ninth Circuit "defines new judgment much more broadly than other circuits." Pet. 10 (capitalization altered). But the Ninth Circuit's decision neither conflicts with any decision by another court of appeals nor otherwise warrants further review. The Ninth Circuit correctly applied *Magwood*. Its decision lacks broad effect because it rested on Nevada law. And this interlocutory case would be a poor vehicle in which to consider the question presented in any event.

A. There is no circuit split on this question.

The State contends that the Ninth Circuit's "new judgment" holding conflicts with the decisions of several other courts of appeals. No such conflict exists. The State's asserted split rests on a misunderstanding of both Ninth Circuit precedent and the various other decisions on which the State relies.

1. The Ninth Circuit held that Mr. Turner's amended judgment was new because it replaced a judgment that was invalid under Nevada law. As the Ninth Circuit explained, the second judgment including credit for time served "remove[d] an invalid basis for incarcerating [Mr. Turner], and provide[d] a new and valid intervening judgment." Pet. App. 8 (quoting *Gonzalez v. Sherman*, 873 F.3d 763, 770 (9th Cir. 2017)); *see id.* 10.

The State characterizes the Ninth Circuit's decision as broadly holding that a new judgment results from "even minor or inconsequential changes" to a defendant's sentence. Pet. 10. But the Ninth Circuit has specifically emphasized that "not every change to a criminal sentence creates a new judgment." *United States v. Buenrostro*, 895 F.3d 1160, 1165 (9th Cir. 2018). And it has held that a variety of changes that do not call into question the validity of the original judgment do not result in new judgments under *Magwood*. *See, e.g.*, *id.* at 1165-66 (commutation); *Gonzalez*, 873 F.3d at 773 (correction of a scrivener's error); *Sherrod v. United States*, 858 F.3d 1240, 1242 (9th Cir. 2017) (sentence reduction under 18 U.S.C. § 3582(c)). The decision below, therefore, turned entirely on the Ninth

Circuit's determination that Mr. Turner's original judgment was "invalid" as a matter of Nevada law. Pet. App. 8, 10.

2. Other courts of appeals have likewise concluded that a judgment issued after a prisoner's original judgment is held invalid qualifies as "new" under AEDPA. Courts routinely reach that result when a second judgment is issued after a successful federal habeas petition or motion under 28 U.S.C. § 2255. *See, e.g.*, *Johnson v. United States*, 623 F.3d 41, 45-46 (2d Cir. 2010); *In re Gray*, 850 F.3d 139, 141-42 (4th Cir. 2017); *King v. Morgan*, 807 F.3d 154, 156-57 (6th Cir. 2015); *Suggs v. United States*, 705 F.3d 279, 282-83 (7th Cir. 2013); *Blanco v. Secretary*, 688 F.3d 1211, 1239 (11th Cir. 2012). Courts have reached the same conclusion when a prisoner's original judgment is held invalid in a variety of other proceedings, including a state motion to correct an illegal sentence, *see Insignares v. Secretary*, 755 F.3d 1273, 1278-81 (11th Cir. 2014), other state post-conviction proceedings, *see In re Stansell*, 828 F.3d 412, 414 (6th Cir. 2016), and direct appeals, *see Gonzalez v. United States*, 792 F.3d 232, 233-34 (2d Cir. 2015).

3. The State nevertheless asserts that the "Ninth Circuit's analysis is squarely at odds with rules applied" in the Second, Fifth, and Sixth Circuits. Pet. 10-12. Not so. The Second and Sixth Circuits have not adopted the rules the State attributes to them, and there is no inconsistency between the Ninth Circuit's decision and the Fifth Circuit decisions on which the State relies.

a. The State asserts that "[t]he Second Circuit defines a 'new judgment' as 'when a judgment is entered on account of new *substantive proceedings* involving

reconsideration of either the defendant's guilt or his appropriate punishment.'" Pet. 11 (quoting *Marmolejos v. United States*, 789 F.3d 66, 70 (2d Cir. 2015)) (State's emphasis). The Second Circuit certainly has acknowledged that such proceedings can be sufficient to create a new judgment, as they were in *Magwood*. *Marmolejos*, 789 F.3d at 70. The quoted portion of the court's opinion is, in fact, a summary of *Magwood*. *Id.* But the Second Circuit by no means held that substantive reconsideration of guilt or punishment is necessary for a new judgment. To the contrary, it explicitly refrained from "delineat[ing] all situations in which a second habeas petition is not second or successive." *Id.* Instead, it held "only that the amendment of a judgment pursuant to Criminal Rule 36," which allows a court to "correct a clerical error," does not constitute a new judgment. *Id.* The Ninth Circuit agrees—indeed, it has cited *Marmolejos* with approval and emphasized that the rule applied here and in *Gonzalez* is consistent with the decisions of other courts of appeals that have "concluded that corrections to scrivener's errors do not give rise to a new, intervening judgment." *Gonzalez*, 873 F.3d at 772 n.4; *see* Pet. App 7.

The State next asserts that the Sixth Circuit will treat a judgment as new only if it "imposes a 'worse-than-before sentence.'" Pet. 11 (quoting *Crangle v. Kelly*, 838 F.3d 673, 678-79 (6th Cir. 2016)). Such a rule would flatly contradict *Magwood*, where this Court held that there was a new judgment even though the prisoner's sentence was identical both before and after his resentencing. 561 U.S. at 325-26, 342. Unsurprisingly, therefore, *Crangle* did not establish the rule the State describes. In *Crangle*, the trial court entered an amended judgment because a

recent Ohio Supreme Court decision had established that the prisoner's original judgment was "void" as a matter of state law. 838 F.3d at 675-76. The Sixth Circuit concluded that the amended judgment was "new" under *Magwood*, *id.* at 679—just as the Ninth Circuit would have. The "worse-than-before" statement the State quotes did not purport to be a comprehensive definition of "new" judgment, but rather served to distinguish sentence reductions that "do not disturb the underlying initial judgment," such as "proceeding[s] under 18 U.S.C. § 3582(c) or Criminal Rule 35(b)." *Crangle*, 838 F.3d at 678. And precisely because those proceedings do not affect the validity of the original judgment, the Ninth Circuit agrees that they do not produce new judgments. *See, e.g.*, *Sherrod*, 858 F.3d at 1242 (Section 3582(c)).[2]

b. The State cites two Fifth Circuit decisions holding that "vacating convictions or reducing an otherwise valid sentence do not automatically render the sentence new." Pet. 11. Neither decision is inconsistent with the decision below.

In *United States v. Jones*, 796 F.3d 483 (5th Cir. 2015), the Fifth Circuit held that a sentence reduction under 18 U.S.C. § 3582(c)(2) did not result in a new judgment. *Id.* at 484. Again, the Ninth Circuit agrees—indeed, it has cited *Jones* with approval. *Sherrod*, 858 F.3d at 1242. And that result is entirely consistent with

[2] In *Crangle*, moreover, the new-judgment question arose in the context of AEDPA's statute of limitations, 28 U.S.C. § 2244(d), not the second-or-successive provision at issue here. 838 F.3d at 677-78. The panel in *Crangle* stated that *Magwood* "applies with equal force" in the statute-of-limitations context. *Id.* at 678. But a subsequent Sixth Circuit panel has questioned the extent to which decisions applying *Magwood* govern in the statute-of-limitations context. *Stansell*, 828 F.3d at 418. The State has not cited—and Mr. Turner has not found—a case in which the Sixth Circuit has relied on *Crangle* in the second-or-successive context.

the decision below, because a Section 3582(c)(2) sentence reduction does not cast any doubt on the validity of the original judgment. *Id.* Instead, Section 3582(c)(2) "authorize[s] only a limited adjustment to an otherwise final sentence," *Dillon v. United States*, 560 U.S. 817, 826 (2010), by giving a district court "discretion to determine whether, and to what extent, to reduce a term of imprisonment" based on a retroactive amendment to the Sentencing Guidelines, U.S. Sentencing Guidelines Manual § 1B1.10, cmt. n.3.

In re Lampton, 667 F.3d 585 (5th Cir. 2012), involved a prisoner who was originally convicted of both conspiracy and participation in a continuing criminal enterprise. *Id.* at 586-87. The district court granted a Section 2255 motion and vacated the conspiracy conviction on the grounds that convicting the prisoner of both offenses "violated the constitutional prohibition against double jeopardy." *Id.* at 587. The Fifth Circuit held that this partial vacatur did not result in a new judgment under *Magwood*. *Id.* at 589. It emphasized that the prisoner's other "convictions and sentences, as well as the judgment imposing them, remain[ed] undisturbed." *Id.* at 589. Therefore, he was "still serving the same life sentence" imposed by the original judgment. *Id.* Mr. Turner, in contrast, had his original judgment invalidated and replaced with a second judgment imposing a substantively different sentence.

4. The State briefly asserts that the Ninth Circuit's decision conflicts with decisions by the Seventh, Eighth, and Eleventh Circuits. Pet. 12. Again, it is mistaken.

In the Seventh Circuit decision on which the State relies, the petitioner had been resentenced after he obtained relief in a Section 2255 motion. *Suggs*, 705 F.3d at 281. That resentencing plainly resulted in a new judgment under *Magwood*, and the Seventh Circuit did not suggest otherwise. *Id.* at 282.[3]

In *Dyab v. United States*, 855 F.3d 919 (8th Cir. 2017), the Eighth Circuit held that no new judgment resulted when a district court granted the government's motion to modify the defendant's restitution order to make clerical changes and to note that one of his co-conspirators had been made "jointly and severally liable for some of the losses." *Id.* at 923-24. None of those changes reflected any invalidity in the original judgment. And the Eighth Circuit also emphasized that the order "did not alter the amount of [the defendant's] restitution obligation or otherwise change [his] sanction." *Id.* at 923. Here, in contrast, the amended judgment altered Mr. Turner's sanction by changing the time he is required to serve in prison before becoming eligible for parole. Pet App. 5, 8; *see* Nev. Rev. Stat. §§ 213.120; 213.1213.

Finally, in *Mosier v. Secretary*, 719 Fed. Appx. 906 (11th Cir. 2017), the Eleventh Circuit concluded that a Florida state court did not enter a new judgment when it granted a prisoner's motion "seeking one additional day of jail time credit." *Id.* at 907. The court emphasized that, under Florida law, the addition of jail time credit "did not result in a new judgment." *Id.* To the contrary, the state court had

[3] The Seventh Circuit held that the petition in *Suggs* was second or successive because it challenged the prisoner's conviction, rather than an aspect of the resentencing that produced the new judgment. 705 F.3d at 285. That holding is relevant to the State's second question presented, but has no bearing on the first.

"denied [the prisoner's] motion for a new judgment." *Id.* His original judgment thus "remain[ed] the only order that command[ed] the [state] to imprison him." *Id.* at 908 (brackets and citation omitted). Here, in contrast, the trial court's failure to include Mr. Turner's time-served credit rendered his original judgment invalid. Pet. App. 10. Nevada law thus required the court to enter a new, amended judgment—and it is that new judgment that now "commands" the state to imprison him, *Mosier*, 719 Fed. Appx. at 908. The different outcomes in this case and in *Mosier* reflect differences in the relevant state law, not any inconsistency in the Ninth and Eleventh Circuits' understanding of AEDPA. And in any event, the nonprecedential decision in *Mosier* could not create a conflict warranting this Court's review.[4]

* * *

In sum, the State has not shown that any other circuit would have resolved this case differently than the Ninth Circuit. And it also has not cited any case, from any circuit, in which a prisoner's original judgment was held to be invalid but the resulting amended judgment was not considered "new" under *Magwood*.

[4] The same is true of the Tenth Circuit's unpublished decision in *Burks v. Raemisch*, 680 Fed. Appx. 686 (10th Cir. 2017), which the State cites in a footnote. Pet. 12 n.3. That decision is also far afield from the question presented here. It dealt with AEDPA's statute of limitations, not the second-or-successive bar, and it rested on the explicit premise that *Magwood*'s rule concerning new judgments does not "extend[]" to that provision. *Id.* at 691. *Burks* therefore sheds no light on how the Tenth Circuit defines a new judgment in the second-or-successive context.

B. The Ninth Circuit's decision is correct.

The Ninth Circuit correctly held that Mr. Turner's application was not "second or successive" under AEDPA.

1. In *Magwood*, this Court held that Section 2244(b) "appl[ies] only to a 'second or successive' application challenging the *same* state-court judgment." 561 U.S. at 331 (emphasis altered). By definition, the judgment challenged in a habeas petition is the one pursuant to which the petitioner is being held in custody. *See* 28 U.S.C. § 2254(a) (authorizing a petition filed by a person "in custody pursuant to the judgment of a State court"). And when a prisoner's original judgment is held invalid, the state necessarily must obtain a new judgment to authorize his continued custody. In *Magwood*, for example, this Court explained that a habeas petition "seeks *invalidation* (in whole or in part) *of the judgment* authorizing the prisoner's confinement"—which means that if the prisoner prevails, the state must "seek a *new* judgment" to continue to hold him. 561 U.S. at 332 (citation omitted).

Here, too Mr. Turner's original judgment was held to be invalid. Pet. App. 8-10. Here, too, therefore, the state was required to obtain "a new and valid intervening judgment" to continue to hold him in custody. *Id.* 8 (quoting *Gonzalez*, 873 F.3d at 770). Mr. Turner's present habeas petition is his first challenging that new judgment. Accordingly, it is not second or successive.

2. In reaching that conclusion, the Ninth Circuit was careful to emphasize that not every "change to a judgment" constitutes a "new judgment." Pet. App. 7. For example, the court reiterated that "an amended judgment correcting a

scrivener's error has no legal consequences, and thus is not a new judgment." *Id.* The Ninth Circuit thus would not have deemed Mr. Turner's second judgment "new" if the only change had been the correction of the clerical error memorializing his minimum sentence as "Ten (20) years." *Id.* 4, 7; *see Gonzalez*, 873 F.3d at 773. Instead, the Ninth Circuit relied on the addition of time-served credit, which meant that the second judgment replaced an invalid basis for Mr. Turner's custody with a valid one. It also substantively changed Mr. Turner's sentence, making him eligible for parole five months earlier. Nev. Rev. Stat. §§ 213.120, 213.1213. The second judgment thus changed the most important thing about a criminal judgment: when the defendant is eligible to be released.

3. The State does not challenge the Ninth Circuit's holding that a new judgment results when a second judgment is issued to replace an original judgment that was invalid under state law. Indeed, the State conceded that point below. Oral Argument at 18:40, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014824. And the State has now abandoned its prior contention that Mr. Turner's original judgment was valid under Nevada law—a state-law question that would not warrant this Court's review in any event.

Indeed, the State offers almost no response to the Ninth Circuit's legal analysis. Instead, it asserts in passing that the Ninth Circuit's decision affords insufficient respect to states because it undermines the finality of their criminal judgments. Pet. 7. But a state has no legitimate expectation of finality in a judgment that its own courts have held to be invalid as a matter of state law. And

the Ninth Circuit's approach—which "look[s] to state law to determine whether a state court action constitutes a new, intervening judgment," *Gonzalez*, 873 F.3d at 769—is entirely consistent with principles of federalism and comity.

C. The Ninth Circuit's decision has limited consequences.

The Ninth Circuit's holding rested on a state-specific inquiry into the legal effect of a change to a prisoner's judgment. In California and Nevada, judgments that do not include time-served credit are invalid, and a new judgment must be issued to cure the invalidity. Pet. App. 8, 10. But states are free to determine which judgments are invalid under their own law, and other states may adopt different approaches with different consequences under AEDPA. In Oregon, for example, time-served credits can be accounted for by the Department of Corrections, without any change to the judgment or other involvement of the courts. *See State v. Phaneuf*, 184 P.3d 1136, 1138 (Or. Ct. App. 2008). And in Texas, the failure to include time served is treated as a clerical error that can be corrected through a *nunc pro tunc* order—a procedure that, under Texas law, does not establish the invalidity of the original judgment. *See Ex Parte Ybarra*, 149 S.W.3d 147, 148 (Tex. Crim. App. 2004); *State v. Bates*, 889 S.W.2d 306, 309 (Tex. Crim. App. 1994) (en banc); *see also Blanton v. State*, 369 S.W.3d 894, 898 (Tex. Crim. App. 2012).

Even in Nevada and California, moreover, the State has produced no evidence that courts issue a substantial number of amended judgments correcting time-served errors like the one at issue here—much less that the Ninth Circuit's

holdings addressing such judgments will materially increase the number of petitions that are able to bypass AEDPA's second-or-successive restrictions.

D. This interlocutory case would be a poor vehicle for considering this question.

The State's petition is interlocutory: The Ninth Circuit declined to address the cognizability of Mr. Turner's habeas petition, and instead transferred it to the district court. This Court ordinarily awaits a final judgment before exercising its certiorari jurisdiction. *See Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari). If the State prevails in the district court, then the questions presented here will be moot. And if it does not, then the State can raise those questions—along with any others that may arise—in a single certiorari petition following a final judgment.

The interlocutory posture of this case also means that it could require this Court to confront a novel jurisdictional question. Under 28 U.S.C. § 2244(b)(3)(E), "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application . . . shall not be the subject of a petition for rehearing or for a writ of certiorari." That provision "precludes [this Court] from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition." *Felker v. Turpin*, 518 U.S. 651, 661 (1996). In this case, the Ninth Circuit "den[ied]" Mr. Turner's application to file a second or successive petition as unnecessary. Pet. App. 11. The State's petition seeking review of that judgment falls squarely within Section 2244(b)(3)(E)'s plain text.

To be sure, in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), this Court determined that it had jurisdiction to review the Ninth Circuit's dismissal of a prisoner's application as unnecessary. *Id.* at 641-42. But the Court held that it had jurisdiction in that case only because it ultimately agreed with the Ninth Circuit that the petition at issue was not, in fact, second or successive—and thus was not subject to Section 2244(b)(3)(E) at all. *See id.* at 642 ("We conclude today that the Court of Appeals reached the correct result in this case, and that we therefore have jurisdiction to consider petitioners' petition."). Of course, Mr. Turner's position is that the same is true here—that is, that his petition is not second or successive either. But the State takes the opposite view, and the implication of the jurisdictional holding in *Martinez-Villareal* is that the Court might lack jurisdiction if it agrees with the State. Even if the Court concluded that this question otherwise warranted review, it should await a case that does not involve this jurisdictional complexity—for example, one in the same posture as *Magwood*, which arose from a final judgment granting habeas relief. *See* 561 U.S. at 327-30.

II. The question whether a petition is "second or successive" if it challenges an aspect of a new judgment that also appeared in the original judgment does not warrant review.

The State separately contends that this Court should decide whether a habeas petition challenging a new judgment is nonetheless second or successive if it challenges some aspect of that judgment that also appeared in the original. The Court has recently and repeatedly denied petitions for writs of certiorari raising that question and asserting similar circuit conflicts—including several petitions

filed by other states.[5] The same result is warranted here. Indeed, this case would be a particularly bad vehicle in which to consider this question because the State failed to raise the issue below, and the Ninth Circuit thus did not address it.

A. This case is not an appropriate vehicle to resolve this question.

This Court's "traditional rule . . . precludes a grant of certiorari" when "'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992) (citation omitted). At no prior stage in these proceedings has the State argued that Mr. Turner's petition is second or successive because it includes challenges unrelated to the proceedings that led to his amended judgment. And because that issue was not raised, the Ninth Circuit did not address it. Instead, the Ninth Circuit held only that Mr. Turner's amended judgment qualified as "new." Pet. App. 3-4, 10. The State provides no reason for the Court to depart from its usual practice by taking up a question that was neither pressed nor passed upon below.[6]

B. There is no circuit conflict warranting this Court's review.

As the repeated denials of other petitions raising the same question indicate, the State's second question presented is not the subject of any circuit conflict warranting this Court's intervention.

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[5] *See Westbrooks v. Allen*, 138 S. Ct. 648 (2018) (No. 17-445); *Kramer v. United States*, 136 S. Ct. 1493 (2016) (No. 15-787); *Jones v. Thompson*, 136 S. Ct. 1166 (2016) (No. 15-689); *Neven v. Wentzell*, 569 U.S. 989 (2013) (No. 12-352); *Suggs v. United States*, 569 U.S. 972 (2013) (No. 12-978).

[6] In addition, the State's second question presented suffers from the same vehicle problems as the first. *See supra* Part I.D.

1. All but one of the courts of appeals that have considered the question have held that where a resentencing or other proceeding results in a new judgment, a petition challenging that judgment is not second or successive even if it attacks an aspect of the judgment that has not changed. *See, e.g.*, *Johnson v. United States*, 623 F.3d 41, 45-46 (2d Cir. 2010); *In re Gray*, 850 F.3d 139, 142-43 (4th Cir. 2017); *King v. Morgan*, 807 F.3d 154, 157 (6th Cir. 2015); *Wentzell v. Neven*, 674 F.3d 1124, 1127 (9th Cir. 2012); *Insignares v. Secretary*, 755 F.3d 1273, 1281 (11th Cir. 2014); *see also Zavala v. Att'y Gen.*, 655 Fed. Appx. 927, 930 (3d Cir. 2016).

2. The State asserts that the Fifth, Seventh, and Tenth Circuits have held that a petition challenging a new judgment may not challenge aspects of that judgment that also appeared in the original. Pet. 13. But the Fifth and Tenth Circuits have not decided the question, and the Seventh Circuit may reconsider its outlier position if the issue arises again.

The Fifth Circuit's decision in *In re Lampton*, 667 F.3d 585 (5th Cir. 2012), does not speak to this question because court held that there was no new judgment *at all*. *Id.* at 589. Instead, the court held that the petition was second or successive because it "challenge[d] the *same judgment*." *Id.* (emphasis added). The Fifth Circuit thus had no occasion to consider the scope of the claims that could have been raised had there been a new judgment.

The State's reliance on the Tenth Circuit's unpublished decision in *Burks v. Raemisch*, 680 Fed. Appx. 686 (10th Cir. 2017), is also misplaced. *Burks* concerned whether a resentencing restarts AEDPA's statute of limitations—a question to

which the Tenth Circuit has explicitly declined to apply *Magwood*'s new-judgment rule. *Id.* at 689-91. *Burks* thus does not speak to the State's second question presented either.

The Seventh Circuit has addressed that question only once, in *Suggs v. United States*, 705 F.3d 279 (7th Cir. 2013). The panel majority in that case noted that this Court's decision in *Magwood* had stated that it had "no occasion to address" the scope of the claims that can be raised in a petition challenging a new judgment. *Id.* at 284 (quoting *Magwood v. Patterson*, 561 U.S. 320, 342 (2010)). The majority therefore felt bound to follow pre-*Magwood* circuit precedent holding that a petition following a new judgment is second or successive to the extent it raises claims unrelated to the proceedings that produced the new judgment. *Id.* (noting it would be "premature to depart" from circuit precedent). But Judge Sykes disagreed, explaining that the logic of this Court's decision in *Magwood* had "displaced" the circuit precedent on which the majority relied. *Id.* at 285 (Sykes, J., dissenting).

The petitioner in *Suggs* did not seek rehearing en banc, and the Seventh Circuit has not since had the opportunity to revisit the panel's determination. In the one case in which the court has applied *Suggs* in the second-or-successive context, it went out of its way to acknowledge that "Judge Sykes' well-reasoned dissent thoroughly presented why *Magwood* could be read to have displaced [the court's] prior precedent." *Kramer v. United States*, 797 F.3d 493, 502 (7th Cir. 2015). But because the prisoner did "not ask [the court] to revisit [its] opinion in [*Suggs*]," the

panel did not do so. *Id.* And as in *Suggs*, the prisoner in *Kramer* did not seek rehearing en banc.

At least unless and until the Seventh Circuit reaffirms *Suggs* in a future case, the conflict created by that outlier decision does not warrant this Court's review. That is especially so because the Seventh Circuit has recognized that its "status as an outlier" on a legal question provides a "compelling reason to overrule" circuit precedent. *United States v. Wahi*, 850 F.3d 296, 303 (7th Cir. 2017); *see Gray*, 850 F.3d at 143 n.3 (noting that Seventh Circuit is the "lone outlier" on this issue).

C. A habeas petition challenging a new judgment is not second or successive, regardless of what aspect of the judgment it challenges.

Where, as here, a prisoner is being held in custody under a new judgment, a petition challenging that judgment is not second or successive—regardless of the nature of the claims it raises.

1. Although *Magwood* left the question open, *see* 561 U.S. at 323-24, the vast majority of the courts of appeals to consider the issue have correctly recognized that this Court's reasoning dictates that a prisoner with a new judgment may challenge any aspect of that judgment, even one that carried over from the original. In *Magwood*, this Court held that where "there is a 'new judgment intervening between the two habeas petitions,'" the petition challenging that new judgment for the first time is "not 'second or successive' at all." 508 U.S. at 341-42 (citation omitted). The Court thus emphasized that "the existence of a new judgment is dispositive" of the second-or-successive issue. *Id.* at 338. It necessarily follows that

when a prisoner is being held in custody pursuant to a new judgment, a petition challenging that judgment is not second or successive—no matter what aspect of the judgment it challenges.

In holding otherwise, the *Suggs* panel majority sought to divide a judgment into component parts—assuming, for example, that a resentencing like the one in *Magwood* produces a "new" judgment with respect to the sentence but not with respect to the conviction. *Suggs*, 705 F.3d at 282-83. But it is axiomatic that "[a] judgment of conviction includes both the adjudication of guilt and the sentence." *Deal v. United States*, 508 U.S. 129, 132 (1993). Thus, as Judge Sutton explained for the Sixth Circuit, "[e]ven when the only change in the state-court proceeding relates to the sentence, the new judgment will reinstate the conviction and the modified sentence." *King*, 807 F.3d at 158. Where there is a new judgment, a second-in-time petition challenging that judgment is not successive "at all," *Magwood*, 561 U.S. at 341-42, either with respect to the conviction or the sentence.

No other outcome can be squared with *Magwood*'s specific rejection of a claim-by-claim approach to the "second or successive" bar. Suppose, for example, that the petitioner in *Magwood* had filed an application asserting claims challenging both his conviction and sentence, rather than his sentence alone. Under the State's proposed rule, the claims challenging his conviction would be second or successive, but the claims challenging his sentence would not—even though all of them were contained in a single application challenging one judgment. Yet in *Magwood*, the Court explained that the phrase "second or successive" modifies the

"application" for a writ of habeas corpus—and that whether an application is second or successive "must be interpreted with respect to the judgment challenged," not with respect to the genesis of any given "claim." 561 U.S. at 332-35. Like the approach rejected in *Magwood*, the State's approach would "elide the difference between an 'application' and a 'claim.'" *Id.* at 334 (brackets and citation omitted).

2. Furthermore, the State's proposed rule is contrary to "AEDPA's purpose of preventing piecemeal litigation." *Magwood*, 561 U.S. at 334. Habeas petitioners sometimes have single claims that challenge both their convictions and sentences. For example, if "the same judge presided over the original conviction and handled the resentencing," a claim of judicial bias would challenge all aspects of the judgment. *King*, 807 F.3d at 158. So would a claimed *Brady* violation that continued from trial through resentencing. *Id.* The State's proposal would force prisoners with such claims to seek authorization from the court of appeals to pursue the challenges to their convictions while allowing them to proceed directly in district court on the overlapping challenges to their sentences. Such an approach "would make little sense and would be difficult to implement." *Id.*

Magwood's simple, bright-line rule avoids those complexities. To determine whether a habeas petition is second or successive, a court need ask only whether it challenges a new judgment. And although adhering to *Magwood*'s judgment-based approach allows more habeas petitions to bypass AEDPA's second or successive gate, this Court has emphasized that courts have ample tools to quickly dispose of those petitions if they prove meritless. *Magwood*, 561 U.S. at 340 & n.15. There is

no reason to revive the sort of claim-based approach that *Magwood* held to be foreclosed by AEDPA's text.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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