No. 18-1320

In the
Supreme Court of the United States

RENEE BAKER, WARDEN, ET AL.,
Petitioners,
v.

ALQUANDRE H. TURNER,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF OF PETITIONERS

As the Seventh Circuit has noted, this Court "took pains to limit its holding" in *Magwood v. Patterson*, 561 U.S. 320 (2010). *Suggs v. United States*, 705 F.3d 279, 284 (7th Cir. 2013). In contrast to the limited view of *Magwood* espoused by courts including the Seventh Circuit, the Ninth Circuit has expansively applied *Magwood*, extending the opinion's rationale beyond its intended scope.

Magwood held that a habeas petitioner who had previously prevailed in a federal habeas action challenging his capital sentence could file a second federal habeas petition challenging his *new sentence* without needing to satisfy the strict limitations on filing second or successive petitions. But *Magwood* gave no guidance on determining when a judgment will be new beyond the specific circumstances of that case, and the Court expressly left open the question whether its holding allows petitioners to challenge an undisturbed provision of the judgment without satisfying the requirements for filing a second or successive petition. A decade of circuit court decisions applying the principles of *Magwood* to factual circumstances that extend beyond *Magwood*'s express limits has led to the development of two crisp splits of authority that are squarely presented in this case and ripe for this Court's review.

Respondent Alquandre Turner's opposition supports the need for this Court's intervention rather than undermining it. Turner's challenge to Petitioners' first question presented is rife with contradiction and ultimately undermines Turner's argument that there

is no circuit conflict for this Court to resolve. Additionally, in an unsupported attempt to downplay the split he admits exists with respect to the second question presented—an issue that the Ninth Circuit implicitly passed upon below—Turner emphasizes the split that actually exists with respect to the first question presented.

Finally, Turner's purported "vehicle" problems are non-existent and do not prevent this Court from taking this case. The interlocutory posture of this case emphasizes the importance of 28 U.S.C. § 2244(b)'s gate-keeping function, which protects state interests in finality and federal interests in judicial economy. Turner's attempt to invoke 28 U.S.C. § 2244(b)(3)(E) is misplaced. That statutory provision would only deprive this Court of jurisdiction over this petition if it challenged whether Turner has met the requirements of 28 U.S.C. § 2244(b)(2). But it does not. This case addresses whether Turner needs to make the showing required by 28 U.S.C. § 2244(b)(2) at all—an entirely different question that this Court does have jurisdiction to resolve.

This Court should grant the petition.

I. TURNER'S REPEATED CONTRADICTIONS THOROUGHLY UNDERMINE HIS ARGUMENT THAT NO SPLIT EXISTS ON PETITIONERS' FIRST QUESTION PRESENTED.

Turner argues that no split of authority exists with respect to the first question presented. Opp. at 5-11. The case law does not support his attempts to reconcile the disparate positions of the various circuits, however.

Additionally, Turner contradicts his own arguments in at least three ways. First, he relies on cases addressing *Magwood* when applying the statute of limitations, yet he suggests that Respondents' reliance on cases making the same leap is misplaced. *Compare* Opp. at 8 n.2, 11 n.4, *with* Opp. at 6 (citing *Gonzalez v. United States*, 792 F.3d 232, 235 (2d Cir. 2015)). Second, he confirms the existence of a split of authority on the first question presented in his attempt to downplay the split that exists on the second question presented. Opp. at 18 (citing *In re Lampton*, 667 F.3d 585 (5th Cir. 2012)). Third, he suggests that the Ninth Circuit correctly decided this case because the Nevada courts substantively changed Turner's sentence by reducing the term of imprisonment. He fails, however, to identify any *Nevada* authority suggesting that the addition of credit for time served should be treated differently than a sentence reductions under 18 U.S.C. § 3582(c)(2). Opp. at 12-13.

The Ninth Circuit broadly states that "a change to a defendant's sentence is a change to his judgment." *Gonzalez v. Sherman*, 873 F.3d 763, 769 (9th Cir. 2017) (*quoting Burton v. Stewart*, 549 U.S. 147, 156 (2007)).

Thus, as this case demonstrates, even minor changes to a sentence that work to the petitioner's benefit result in a "new" judgment.

The Second Circuit has been unequivocal in its interpretation of *Magwood*; a judgment is "new" when vacating a criminal judgment leads to additional substantive proceedings before entering an amended judgment. *See*, *e.g.*, *Gonzalez*, 792 F.3d at 235. Minor changes resulting in reduction of an otherwise valid sentence do not make the judgment "new." *Marmolejos v. United States*, 789 F.3d 66, 70-72 (2d Cir. 2015).

The Sixth Circuit, on the other hand, has maintained a view that a judgment is "new" where it adds additional punishment, while distinguishing cases where the sentence is changed to the petitioner's benefit. *In re Stansell*, 828 F.3d 412, 417 (6th Cir. 2016) (permitting second-in-time petition without needing to satisfy 28 U.S.C. § 2244(b)(2) because the amended judgment *added* a term of "post-release control"); *Crangle v. Kelly*, 838 F.3d 673, 678 (6th Cir. 2016) (distinguishing "a line of cases in which a limited resentencing *benefits* the prisoner") (emphasis in original). Although Turner tries to downplay Respondents' reliance on *Crangle* because it is a statute of limitations case, Turner implicitly recognizes the invalidity of that argument, as he himself relies on cases that analyze *Magwood* when applying the statute of limitations. *Compare* Opp. at 8 n.2; *with* Opp. at 6 (citing *Gonzalez*, 792 F.3d at 235).[1]

[1] At least the Ninth and Eleventh circuits have joined the Second and Sixth circuits in making the leap of acknowledging the link between *Magwood*'s reading of the second or successive petition

Turner does not dispute that the Fifth Circuit requires a new sentence to be imposed in order for a judgment to be "new." Opp. at 8-9. He attempts to distinguish this case from cases where the federal courts have determined that a *sentence reduction* under 18 U.S.C. § 3582(c)(2) does not result in a new sentence, however. Turner then suggests that the Nevada courts have held Turner's original judgment to be invalid. Opp. at 8-9. But, as the Ninth Circuit's opinion acknowledged, the Nevada courts have never said that the failure to add credit for time served to a judgment of conviction renders the judgment invalid. Pet. App. at 8-10. The addition of credit for time served does not affect the validity of the sentence imposed, nor does it change the actual length of that sentence.

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bar and the statute of limitations. *Smith v. Williams*, 871 F.3d 684 (9th Cir. 2017); *Insignares v. Secretary*, 755 F.3d 1273, 1281 (11th Cir. 2014). Turner argues that Sixth Circuit has retreated from its position. Opp. at 8 n.2 But his position is unconvincing; *Stansell* calls into question a pre-*Magwood* decision applying the statute of limitations, not the opposite. 828 F.3d at 418. And the link between the two provisions is likely inescapable. The textual analysis of *Magwood* focuses on what *judgment* a petitioner is attacking, 561 U.S. at 332-33, while the default-triggering event for applying the statute of limitations is finality of the *judgment*, 28 U.S.C. § 2244(d)(1)(A). It makes little sense that the word judgment means two different things when applying different subsections of the same statute. *See*, *e.g.*, *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); *but see Burks v. Raemisch*, 680 Fed. Appx. 686, 690-91 (10th Cir. 2017) (finding itself bound by existing circuit precedent applying until the statute of limitations issue is addressed by the Tenth Circuit sitting *en banc* or an opinion of the Supreme Court of the United States).

Instead, the presence of credit for time served within a judgment of conviction plays a very simple and common sense role: it merely tells the Nevada Department of Corrections on what date Turner began serving the period of incarceration imposed by the judgment. *See*, *e.g.*, *Kuykendall v. State*, 926 P.2d 781, 782-83 (Nev. 1996).[2] Such changes to a judgment that do not substantively alter the original sentence or conviction should not open the door to a new round of federal habeas review.

The pronounced split on when a judgment is "new" is cleanly presented by this case. And the factual circumstances presented here leave this Court with an opportunity to draw a clear line that identifies when changes to a judgment will render the judgment "new" for purposes of applying *Magwood*. This Court should grant the petition.

II. TURNER CONCEDES THAT A SPLIT EXISTS ON PETITIONERS' SECOND QUESTION PRESENTED.

Turner asserts—incorrectly—that Petitioners' second question is not adequately preserved for this Court's review. Opp. at 17. He has to acknowledge,

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[2] Turner also argues that the impact of this case is limited because of its reliance on Nevada law. Opp. at 14. Turner's position is unpersuasive. As he acknowledges, the Ninth Circuit has already decided the same issue against California, and Turner cites authority from only one of nine Ninth Circuit states to otherwise support his argument. Opp. at 14. He also cites Texas authority as an example of a state that would not be adversely affected by the Ninth Circuit's ruling, Opp. at 14, but Texas is in the Fifth Circuit, which is on the other side of the split.

however, that this Court is free to review a question that was passed upon below. *Id.* at 17 (citing *United States v. Williams*, 504 U.S. 36, 41 (1992)). Contrary to Turner's contention, the Ninth Circuit implicitly passed on the issue of whether a petitioner may challenge an undisturbed portion of a new judgment.

Turner's federal habeas petition must challenge his custody under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). And his petition must challenge something other than the amendments Turner asked the trial court to make to his judgment. The doctrine of invited error precludes Turner from inviting the state courts to make errors in order to open the doors of the federal courthouse. *Marcelis v. Wilson*, 235 U.S. 579, 583 (1915) ("[T]he appellants cannot be heard to complain of the court's action in granting their own motion.). Thus, the Ninth Circuit had to understand that Turner's petition would challenge something other than amended provisions of the judgment of conviction.

Turner concedes that a split of authority exists on this issue and attempts to downplay the split. In the process, he emphasizes the Fifth Circuit's opinion that creates part of the split on Petitioners' first question presented. Opp. at 18 (citing *Lampton*). He then frames the Seventh Circuit's position as an outlier that will likely correct itself and tries to distinguish a Tenth Circuit case that addresses *Magwood* when applying the statute of limitations. The case law, however, does not suggest that the Seventh Circuit believes it is an outlier on this issue. *Kramer v. United States*, 797 F.3d 493, 502 (7th Cir. 2015) (citing *Lampton*, 667 F.3d at

589-90 and noting that the “almost identical” circumstances in *Lampton*). And Turner’s own reliance on cases applying the statute of limitations undercuts his view that such cases are not relevant here.

The pronounced split on this issue is squarely presented in this case. And the factual circumstances presented here, where a petitioner invited the state court to make changes to his judgment of conviction that do not substantively alter the sentence or conviction, leave this Court with the opportunity to draw a clear line establishing whether a petitioner may file a second habeas petition challenging undisturbed portions of the amended judgment without obtaining authorization to pursue a second or successive petition. This Court should grant the petition.

III. BOTH QUESTIONS PRESENTED ARE RIPE FOR DETERMINATION.

Turner argues this case makes a poor vehicle for this Court to review the questions presented by the petition because of the interlocutory posture of the case. He also argues that ruling in Respondents’ favor will require this Court to resolve a jurisdictional question under 28 U.S.C. § 2244(b)(3)(E). Opp. at 15-16, 17 n.6. Turner’s arguments are unpersuasive and irrelevant to this Court’s determination of whether to accept this case for consideration.

While this Court typically declines to engage in interlocutory review of a case; the interlocutory posture of this case emphasizes the gate-keeping function of 28 U.S.C. § 2244(b)(2). Permitting a case that ought to be barred by 28 U.S.C. § 2244(b)(2) to linger in the federal

court system will undermine state interests in finality and federal interests in judicial economy. And any additional factual development that would result from allowing this matter to proceed to a final judgment will not aid this Court's ability to resolve the legal issues that are properly presented by this case. As a result, the interlocutory posture of the case is no bar to this Court's review of the procedural questions presented by this case. *See*, *e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 478-79 (1988).

Turner's reliance on 28 U.S.C. § 2244(b)(3)(E) is also unavailing. That statutory provision precludes a challenge to a circuit court's decision on whether a petitioner has met the requirements of 28 U.S.C. § 2244(b)(2); it does not preclude review of the questions presented here, which focus on whether Turner must satisfy the conditions of 28 U.S.C. § 2244(b)(2) at all.

CONCLUSION

Magwood left the questions presented in this case open to debate. The Circuit Courts are irreconcilably divided on how to resolve those questions. The time has come for this Court to resolve the conflict. This Court should grant the petition.

Respectfully submitted,

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