No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Eight years after his conviction, and on the heels of two unsuccessful federal habeas actions, Alquandre Turner moved to amend his state judgment of conviction to correct a clerical error and add 154 days of credit for time served prior to sentencing. The state district court summarily granted the motion and amended the judgment, but left Turner's original conviction and corresponding sentence undisturbed.

Following entry of the amended judgment, Turner filed a third federal habeas petition. The district court dismissed the petition as an unauthorized successive petition pursuant to 28 U.S.C. 2244(b). Turner accordingly sought leave to file a successive petition from the Ninth Circuit Court of Appeals, while also arguing that his petition was actually a first petition challenging a new judgment. A Ninth Circuit panel agreed, and transferred the case to the district court with instructions to consider the petition as a first petition.

The questions presented are:

1. Whether an amended judgment of conviction containing only nominal changes—that do not disturb the original conviction and sentence—should be considered a new judgment that renews a state inmate's ability to challenge his conviction and sentence.

2. Whether, if a new judgment of conviction is entered, a petitioner who already sought federal habeas relief must obtain authorization to file a second or successive petition under 28 U.S.C. § 2244(b), in order to challenge undisturbed elements of the original judgment.

PARTIES TO THE PROCEEDING

Petitioner Renee Baker is the warden of Lovelock Correctional Center. Respondent Alquandre H. Turner is an inmate at Lovelock Correctional Center.

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This case squarely presents the Court with the opportunity to address two crucial issues left undecided in *Magwood v. Patterson*, 561 U.S. 320 (2010). In the nine years since *Magwood*, the circuit courts have grappled with the extent of its application, resulting in deep, irreconcilable splits on *when* and *how* to apply the limitations on second or successive federal habeas petitions. In this case, the Ninth Circuit has erroneously extended *Magwood*'s application to circumstances far beyond those sanctioned by this Court. In doing so, the Ninth Circuit has widened the split between itself and its sister circuits and compounded the confusion among the circuits as to *Magwood's* appropriate application.

In *Magwood*, this Court concluded that a federal habeas petitioner who had previously obtained federal habeas relief with respect to his sentence need not obtain authorization to file a subsequent federal habeas petition challenging his new sentence. This Court did not, however, provide further guidance on whether other, lesser, changes to a judgment render the judgment new. Nor did this Court address whether a petitioner who obtains a new judgment needs authorization to file a subsequent petition challenging only the undisturbed portions of his judgment.

Two significant splits of authority have emerged from the issues left unaddressed by *Magwood*. First, circuit courts have adopted at least four identifiable variations on how to determine when a judgment is new. Second, the circuit courts disagree as to whether a petitioner receiving a new, intervening judgment

must receive authorization to challenge undisturbed aspects of his original judgment. Five circuits hold the entry of a new judgment permits a petitioner to challenge any aspect of the new judgment, while three circuits hold a petitioner, like Turner, must obtain authorization under 28 U.S.C. § 2244(b) to challenge undisturbed portions of the original judgment.

This case cleanly presents the Court with the opportunity to resolve one or both of the aforementioned issues. The district court in this case, noting Turner's two prior unsuccessful federal habeas petitions,[1] dismissed Turner's third habeas petition as an improper, successive petition. The Ninth Circuit reversed, concluding that Turner's petition constituted a first petition challenging a "new" judgment. The Ninth Circuit remanded the case to the district court with instructions to consider Turner's petition a first habeas petition.

The state court amendment of Turner's judgment of conviction consisted of only two nominal changes, both non-discretionary—the correction of a clerical error and the addition of presentence credit for time served. As a result, the only aspects of Turner's amended judgment subject to federal habeas review are his undisturbed conviction and sentence. The Ninth Circuit's holding, that Turner may seek federal habeas relief on his entire, undisturbed conviction and sentence, years after his original conviction, and following the dismissal of

[1] The district court dismissed a 2009 petition without prejudice for failure to pay the filing fee, and a 2014 petition with prejudice as untimely.

two previous federal habeas petitions, improperly applies *Magwood* and widens its pre-existing conflict with the already conflicted decisions of its sister circuits. This case and the issues it presents cry out for resolution by this Court.

OPINIONS BELOW

The original, published decision of the Ninth Circuit directing the federal district court to consider Turner's petition as a first habeas action is reported at 912 F.3d 1236 (9th Cir. 2019). The order and judgment of the United States District Court for the District of Nevada dismissing Turner's third federal petition as an improper successive petition is unreported. App. 12-14.

JURISDICTION

The Ninth Circuit remanded Turner's petition to the district court on January 15, 2019. App. 1-11. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides, in part, that:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Section 2244 of Title 28 of the United States Code provides, in part, that:

> (b)
>
> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)
> >
> > > (I) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> > >
> > > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonably factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

In 2006, a Nevada jury convicted Turner of multiple felony offenses, including sexual assault with a deadly weapon. App. 4. The Clark County District Court sentenced Turner to life in prison with the possibility of parole after 10 years for the sexual assault conviction, and imposed a consecutive sentence of 10 years to life for the deadly weapon enhancement. *Id.* The court did not grant Turner credit against his life sentence for time he spent in custody prior to sentencing. Additionally, the written judgment contained a clerical error on the deadly weapon enhancement sentence, stating Turner was sentenced to "ten (20) years minimum." *Id.* Turner did not immediately correct these issues with his judgment.

The Nevada Supreme Court affirmed Turner's conviction and sentence on direct appeal. Turner then filed a federal petition for writ of habeas corpus, but ignored the district court's order directing Turner to pay the $5.00 filing fee. App. 13. With no filing fee received, the district court dismissed Turner's petition in 2009, without prejudice to refiling. *Id.*

Turner returned to federal court in 2013, with an untimely petition. App. 13. This time the district court dismissed Turner's action with prejudice and the Ninth Circuit denied Turner's request for a certificate of appealability. *Id.*

Following dismissal of his untimely petition, Turner moved the state district court to amend his judgment of conviction on two grounds. App. 4. First, Turner correctly noted the deadly weapon enhancement to his

sexual assault conviction erroneously memorialized the minimum term as "Ten (20) Years" instead of "Ten (10) Years." Second, Turner requested 154 days of credit against his sentence for time he spent in jail prior to sentencing. *Id.* at 5; *see* Nev. Rev. Stat. 176.055.

Without conducting a hearing or ordering additional briefing, the district court granted Turner's motion to amend. App. 5. The Nevada Supreme Court affirmed Turner's amended judgment. *Id.* Remittitur issued on July 6, 2015. *Id.*

Nearly two years later, Turner filed his third federal habeas petition, challenging his original, undisturbed conviction and sentence. App. 5. The district court dismissed Turner's third petition as successive, noting Turner's two prior federal habeas actions. App. 12-14. Turner then sought leave from the Ninth Circuit to file a second or successive petition, pursuant to 28 U.S.C. § 2244(3)(A). App. 5. As the Ninth Circuit noted, "the title of [Turner's] application [was] deceiving." App. 3. Rather than request leave to file a successive petition, Turner instead claimed his petition constituted a first petition challenging his "new" amended judgment of conviction. *Id.*

Relying on this Court's decision in *Magwood*, the Ninth Circuit considered whether Turner's amended judgment awarding him presentence credit constituted a new intervening judgment between his second and third habeas actions. Recognizing that this Court "did not provide a comprehensive answer" to the question presented in Turner's case, the Ninth Circuit considered "how significant the change to a judgment must be to create a new judgment." App. 7.

Reviewing Nevada statutory law and case law, the Ninth Circuit concluded "that judgments [in Nevada] that do not include a defendant's credit for time served are invalid." App. 10. As Turner's original judgment did not contain credit for time served, the Ninth Circuit found the original judgment invalid, rendering the amended judgment a "new" judgment under which Turner could seek federal habeas relief. *Id.* The Ninth Circuit denied Turner's application for leave to file a successive petition as unnecessary and transferred the petition to the district court "with instructions to consider it as a first habeas petition." App. 11.

REASONS FOR GRANTING THE PETITION

States are entitled to the assurance that at some point, after the conclusion of timely post-conviction proceedings, challenges to the criminal judgments from their courts must end. The Ninth Circuit's decision in this case undermines that assurance, rendering even minimally altered judgments subject to an entirely new round of federal habeas challenges, years after the original sentencing. Other circuit courts disagree, both with the Ninth Circuit, and with each other, as to when and how AEDPA's limits on second and successive habeas petitions should be applied.

The language of AEDPA supports finality. Federal courts need not consider a state inmate's second or successive federal habeas petition "if it appears that the legality of [the petitioner's] detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus." 28 U.S.C. § 2244(a); *see also* 28 U.S.C. § 2244(b) (limiting review of second or successive petitions). The time is

right for this Court to resolve the split among the circuit courts as to when and how these limits apply.

I. The Circuits Are Split as to What Constitutes a New Judgment.

Magwood presented this Court with the question of whether a petitioner who obtains federal habeas relief, and is resentenced as a result, needs authorization to file a second federal petition challenging the new sentence. Magwood prevailed in a federal habeas proceeding by showing the State failed to consider mitigating evidence of Magwood's mental state when it imposed a capital sentence. As a result, Magwood returned to state court for resentencing. *Magwood*, 561 U.S. at 326. At the new sentencing hearing, the Alabama court considered Magwood's mental state evidence and then once again sentenced Magwood to death. *Id*.

Magwood then sought federal habeas relief again, challenging only his new sentence. *Id*. at 327. Before addressing the petition, the district court *sua sponte* questioned whether Magwood needed to satisfy 28 U.S.C. § 2244(b) and concluded that he did not. *Id*. at 328. The Eleventh Circuit reached the opposite conclusion on appeal. *Id*. 329. But this Court agreed with the district court, concluding Magwood's second-in-time petition was not "second or successive" because it challenged a new judgment. *Id*. at 330-42.

In reaching that conclusion, this Court focused on the statutory language of 28 U.S.C. § 2244, which limits "applications" challenging a "judgment." *Magwood*, 561 U.S. at 331-33. As a result, an application challenging a "new judgment" issued in a criminal case is not "second or successive." *Id.*

Beyond the straightforward factual scenario presented in *Magwood*, this Court provided little guidance on when a judgment is new. The facts in *Magwood* left no doubt the petitioner received a new sentence that resulted in a new judgment. Magwood received a conditional grant of habeas relief invalidating his state death sentence. *Magwood*, 561 U.S. at 323. The conditional relief necessitated a new sentencing hearing and full reconsideration of the appropriate punishment for Magwood's crimes. Following resentencing, he challenged the new sentence in a second federal habeas action. *Id.* This Court concluded that Magwood's habeas action constituted a first challenge to his new judgment and, therefore, was outside the limitations on second or successive petitions. *Id.* at 323-324.

But this Court went no further than concluding that Magwood could challenge his new sentence, expressly refusing to consider Alabama's argument that a ruling in Magwood's favor would open the door to challenging his "*undisturbed* conviction." *Id.* at 342 (emphasis in original). In so holding, this Court did not provide any direction on when a judgment is "new," leaving the individual circuit courts to flesh out the term's definition.

With a largely blank canvas, many circuits have grappled with how to fill the gaps while still complying with the dictates of *Magwood*. Varying approaches have developed, resulting in the split of authority identified below.

A. The Ninth Circuit Defines New Judgment Much More Broadly than Other Circuits.

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) (citing *Burton v. Stewart*, 549 U.S. 147, 156 (2007) ("the sentence is the judgment" in a criminal case)). As a result, even minor or inconsequential changes to a judgment can resurrect federal habeas rights in an otherwise final criminal conviction.

In *Turner*, other than correcting a clerical error, the trial court merely added presentence credit for time served prior to the judgment. Turner's convictions and the underlying sentences imposed by the trial court remained unchanged. However, the Ninth Circuit determined that the addition of the presentence credit resulted in the entry of a new, intervening judgment that allowed Turner to challenge the unchanged convictions and sentences anew.

B. Other Circuits Further Split on the Degree of Change Necessary to Result in a New Judgment.

The Ninth Circuit's analysis is squarely at odds with rules applied in the other circuits. But the rulings of those circuits are also in conflict with each other.

The outcome of cases with facts identical to Turner's will thus differ from circuit to circuit.

While the other circuits that have addressed this issue recognize the need to qualify what constitutes a "new judgment," their approaches to determining whether a judgment is new differ in degree. The 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." *Marmolejos v. United States*, 789 F.3d 66, 70 (2d. Cir. 2015) (emphasis added).

The Fifth Circuit goes a step further than the Second Circuit, defining a "new judgment" as when "a new sentence has been imposed." *In re Lamptom*, 667 F.3d 585, 588 (5th Cir. 2012) (citing *Burton*, 549 U.S. at 156 (2007). However, a new sentence does not mean any change to the sentence. Vacating convictions or reducing an otherwise valid sentence do not automatically render the sentence new. *Id.* at 589; *United States v. Jones*, 796 F.3d 483, 486 (5th Cir. 2015). Thus, contrary to the Second Circuit, a trial court could reconsider an inmate's sentence, but amend it in a way that does not result in entry of a new judgment that relieves the petitioner of the burden to satisfy 28 U.S.C. § 2244(b).

Building on the Fifth Circuit's definition, the Sixth Circuit has gone another step further by concluding that a "new judgment" is a judgment that imposes a "worse-than-before sentence." *Crangle v. Kelly*, 838 F.3d 673, 678-679 (6th Cir. 2016). Under the Sixth Circuit's approach, a sentence can undergo some

changes, but if the inmate is not negatively impacted, the changes are not considered "new" for purposes of federal habeas review.[2]

Similar definitions are utilized, either explicitly or inherently, by the Seventh, Eighth, and Eleventh Circuits. *See Suggs v. United States*, 705 F.3d 279 (7th Cir. 2013) (affirming dismissal of challenge to conviction when change to judgment resulted from resentencing); *Dyab v. United States*, 855 F.3d 919, 923 (8th Cir. 2017) (concluding that changes to restitution payees and the addition of a jointly and severally liable co-conspirator did not result in a new judgment); *Mosier v. Sec'y, Fla. Dep't of Corr.*, 719 Fed.Appx. 906, 908 (11th Cir. 2017) (concluding that the addition of one day of credit for time served did not result in entry of a new judgment).[3]

This Court's intervention is necessary to establish nationwide uniformity on when a judgment is new for purposes of applying *Magwood*.

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[2] Here, the district court amended Turner's judgment in his favor.

[3] In a related context, the Tenth Circuit held that resentencing does not reset finality of the underlying conviction when calculating the statute of limitations under 28 U.S.C. § 2244(d)(1)(A). *Burks v. Raemisch*, 680 Fed.Appx. 686 (10th Cir. 2017) (citing *Pendergast v. Clements*, 699 F.3d 1182 (10th Cir. 2012)).

II. The Circuits Are Split on Whether Mere Entry of a New Judgment Authorizes a Second Federal Petition Challenging the Undisturbed Portions of the Original Judgment.

Magwood also left open the question whether "a petitioner who obtains a conditional writ as to his sentence [can] file a subsequent application challenging not only his resulting, new sentence, but also his original, undisturbed conviction." 561 U.S. at 342 (italics omitted). This issue presents a clear divide between two positions.

The Second, Third, Fourth, Sixth, and Eleventh Circuits, join the Ninth Circuit in concluding that a petitioner may challenge any aspect of a new judgment without limitation. *See Johnson v. United States*, 623 F.3d 41 (2d Cir. 2010); *Zavala v. Attorney General of the United States*, 655 Fed.Appx. 927 (3d Cir. 2016); *In re Gray*, 850 F.3d 139 (4th Cir. 2017); *King v. Morgan*, 807 F.3d 154 (6th Cir. 2015); *Wentzell v. Neven*, 674 F.3d 1124 (9th Cir. 2012); *Insignares v. Sec'y of Fla. Dep't of Corr.*, 755 F.3d 1273 (11th Cir. 2014).

The Fifth, Seventh, and Tenth Circuits disagree. Each of those courts has concluded that a petitioner must obtain prior authorization under 28 U.S.C. § 2244(b) to challenge undisturbed portions of a prior judgment following the entry of an intervening, new judgment. *See In re Lamptom*, 667 F.3d 585 (5th Cir. 2012); *Suggs v. United States*, 705 F.3d 279 (7th Cir. 2013); *Burks*, 680 Fed.Appx. 686.

III. This Case Cleanly Presents One or Both of the Questions Presented.

This case is a good vehicle for addressing the issues that arise from this Court's decision in *Magwood*. First, the facts of this case illustrate the divergent results of the circuit courts' varied analyses as to whether a judgment of conviction qualifies as new for habeas purposes. The Ninth Circuit's decision in this case, while an extreme outlier, joins widespread disagreement among the circuits as to this analysis. The Ninth Circuit's broad ruling makes Turner's judgment new. In contrast, the scope of the rule as applied by the other circuits does not. Under their analysis, the scope of the rule narrows—from the Second Circuit's requirement for substantive proceedings that reconsider guilt or proper punishment, to the Sixth Circuit's requirement that the new sentence be "worse than before."

As the law currently stands, a habeas petitioner's need to satisfy 28 U.S.C. § 2244(b)'s requirements—and the resulting determination of whether his petition should be dismissed—depends on where in the country his petition is filed. This split of authority needs resolution, and the facts of this case present this Court with an opportunity to draw a clear line as to when a habeas petitioner should be permitted to challenge an amended judgment as a new judgment.

If the Court grants review and concludes that Turner's judgment is not new, it need not determine whether his petition may challenge the undisturbed portions of his original conviction and sentence. If the

amended judgment is not new, then there is no dispute—28 U.S.C. § 2244(b) applies.

If the Court concludes that the judgment is new, then this Court is squarely presented with the issue of whether Turner must satisfy 28 U.S.C. § 2244(b) before challenging undisturbed elements of his judgment of conviction. Because the state district court only corrected a clerical error and added presentence time credits, Turner's underlying conviction and sentence remain undisturbed. With Turner's motion to amend the judgment resulting in a favorable outcome, the only reason for Turner to file a federal petition at this stage is to challenge the validity of the undisturbed conviction or sentence he unsuccessfully challenged in his prior untimely federal petition.

CONCLUSION

This case squarely presents the Court with an opportunity to resolve the unanswered questions in *Magwood*. These questions have been simmering for years in the circuit courts, with more and more conflict and confusion arising as the years pass. Here, the Ninth Circuit has interpreted *Magwood* in a manner that strains its reasonable boundaries and widens the split among the circuit courts. Petitioners respectfully request that this Court resolve that split and answer the questions left unanswered in *Magwood*: what constitutes a new judgment; and can a petitioner challenge undisturbed portions of a new judgment without satisfying the requirements of 28 U.S.C. § 2244(b).

This case presents the Court with a clean framework to clearly answer one or both of these questions. This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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