ORIGINAL

No. 12-352

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

D.W. Neven, Warden, et al., Petitioners

v.

Christopher Noel Wentzell, Respondent.

On Petition For A Writ of Certiorari
To the United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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D.W. Neven, Warden, Petitioners,

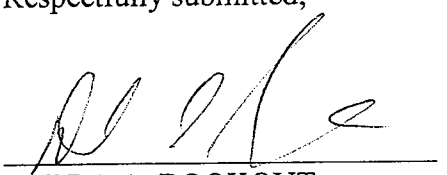
v.

Christopher Noel Wentzell, Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Christopher Noel Wentzell, asks for leave to file the attached Brief in Opposition to Petition for Writ of Certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed in the District Court and in the United States Court of Appeals. No affidavit is attached, inasmuch as the Ninth Circuit Court of Appeals appointed counsel for Respondent under the Criminal Justice Act of 1964.

Respectfully submitted,



DEBRA A. BOOKOUT
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Counsel for Respondent

QUESTION PRESENTED

1. Where, after the conclusion of his federal habeas proceedings, a petitioner obtains a new, amended judgment of conviction reflecting a new sentence with a reduced number of convictions, is the current petition "second or successive" where it challenges the new, amended judgment of conviction?

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I.

OPINION BELOW

The opinion of the Ninth Circuit reversing the district court's order dismissing Wentzell's habeas petition as second or successive is reported as Wentzell v. Neven, 674 F.3d 1124 (9th Cir. 2012. (App. 1-8.) The district court's order dismissing Wentzell's habeas petition is unpublished. (App. 9-13.)

II.

JURISDICTION

The opinion of the Court of Appeals was entered on April 2, 2012. (App. 1-8.) The Court of Appeals denied the motion for rehearing or rehearing en banc on June 22, 2012. (App. 26-27.) The petition for writ of certiorari was filed on May 29, 2012. Petitioner Neven invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

III.

STATEMENT OF THE CASE

Wentzell entered a plea of guilty to the three counts alleged in the information: Count I, solicitation to commit murder, Count II, principal to attempt murder, and Count III, principal to theft. (EOR 490-96, 497-04.)[1] The trial court sentenced Wentzell on April 29, 1996 to ten (10) years on Counts I and III and twenty (20) years on Count II. All sentences were imposed to run consecutively for a total of forty (40) years in prison. (App. 24-25.) The judgment of conviction was entered on April 29, 1996. (Id.)

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[1] Citations to "EOR" refer to the excerpts of record in the court of appeals which were not included in the Petitioner's Appendix (App.).

After several unsuccessful attempts to obtain relief from his judgment and sentence in the state courts, Wentzell filed a federal petition on February 11, 1998. (EOR 325-45.) The State contended that the Petition was untimely. (EOR 306-78.) The magistrate court agreed. (EOR 52-54.) The district court adopted the Report and Recommendation (EOR 48-49, 50) and denied the request for a Certificate of Appealability (COA). (EOR 209.) The Ninth Circuit Court of Appeals denied Wentzell's request for a COA (EOR 32) and his Motion for Reconsideration. (EOR 31.)

Wentzell returned to state court where the trial court granted his habeas petition, in part, finding that state law barred Wentzell's conviction for both Solicitation to Commit Murder (count I) and Principal to Attempted Murder (Count II). (App. 24-25.) The trial court issued the Amended Judgment of Conviction on June 30, 2009 which reflected a conviction on only two counts (Count I - principal to attempt murder and Count II - principal to theft). (App. 16-18.) The Amended Judgment also reflected a new sentence of thirty (30) years instead of forty (40) years in prison. (Id.)

Wentzell appealed the trial court's decision. (EOR 864-71, 872-74.) The Nevada Supreme Court found that it had no jurisdiction because Wentzell was not an aggrieved party. (App. 14-15.) Wentzell filed a federal habeas petition on June 23, 2010, within one year of the entry of the Amended Judgment. (EOR 59-202.) The district court denied the petition finding that it was untimely and a second or successive petition. (App. 9-13.) The court further denied a COA. (Id.) Wentzell timely appealed. (EOR 55-58.)

The Ninth Circuit granted Wentzell a COA on two issues and appointed counsel to represent him in the appeal. (EOR 1-2.) The Circuit Court granted a COA on the following issues:

1. Whether the district court erred in summarily denying Wentzell's federal petition as untimely filed without first providing him an opportunity to justify the facially untimely filing.

2. Whether Wentzell's petition was properly dismissed on alternative grounds as an unauthorized second or successive petition in light of an amended judgment.

Following Oral Argument, the Ninth Circuit reversed the district court. Wentzell v. Neven, 674 F.3d 1124 (9th Cir. 2012) (App. 1-8.) Relevant to these proceedings, the Court of Appeals found as follows:

> The State argues that Wentzell's petition is "second or successive" notwithstanding the intervening judgment of conviction because his amended judgment left the convictions and sentences on the remaining counts unchanged, and the second petition challenges those unaltered components of the judgment. With regard to this argument, we find the Second Circuit's analysis in *Johnson v. United States*, 623 F.3d 41, 44 (2d Cir. 2010), persuasive. *Johnson* held that "where a first habeas petition results in an amended judgment, a subsequent petition is not successive," even if its claims could have been raised in a prior petition or the petitioner "effectively challenges an unamended component of the judgment." Id. At 46. The court reasoned that "[i]n light of *Magwood*, we must interpret successive applications with respect to the judgment challenged and not with respect to particular components of that judgment." Id. (citing *Magwood*, 130 S. Ct. at 2797, 2802).

Wentzell v. Neven, 674 F.3d at 1127 (App. 6-7.)

Neven requested a rehearing and rehearing en banc. (App. 114-33.) The Ninth Circuit denied the request on June 22, 2012. (App. 26-27.)

IV.

REASONS FOR DENYING THE WRIT

A. THIS COURT'S CERTIORARI REVIEW IS NOT WARRANTED BECAUSE THERE IS NOT A CLEAR CONFLICT AMONG THE CIRCUITS AND THE NINTH CIRCUIT'S DECISION IN WENTZELL V. NEVEN WAS CLEARLY CORRECT.

Neven urges this Court to grant certiorari in this case on the basis of a conflict among the Circuits. Supreme Court Rule 10 provides that review on a writ of certiorari is not a matter of right but of discretion and will only be granted for compelling reasons. Sup. Ct. R. 10. The Court may

consider certiorari review if a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]" Id. Neven contends that the Ninth Circuit's decision in Wentzell v. Neven is in direct conflict with decisions from the Fifth[2] and Tenth[3] Circuits. (Cert. Pet. at 6.) This Court should not grant certiorari because this case, in addition to being properly decided by the court below, does not present the Court with a genuine circuit split. Neither the Fifth Circuit nor the Tenth Circuit decisions conflict with the Ninth Circuit's opinion in Wentzell which was properly decided pursuant to Magwood v. Patterson, 130 S. Ct. 2788 (2010).

Moreover, this case does not present any compelling reason for this Court's review. Although there may be some disagreement among the courts of appeal regarding the question left unanswered in Magwood, i.e., whether an application for post-conviction relief which challenges an undisturbed conviction is second or successive following a grant of habeas relief as to the sentence, this issue has not yet had time to make its way through the courts of appeals to allow for a consensus to develop. Wentzell contends that to address the issue at this time would be premature.

1. The Ninth Circuit's Decision in Wentzell Does Not Present this Court with a Genuine Circuit Split.

A conflict has not arisen merely because different courts have interpreted Magwood differently on different facts or because different courts have come to different conclusions. See e.g. Gressman, Geller, Shapiro, Bishop & Hartnet, Supreme Court Practice, Section 4.3 (9th ed. 2007)("Still, there must be a real or "intolerable" conflict on the same matter of law or fact, not

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2 In re Lampton, 667 F.3d 585 (5th Cir. 2012).

3 In re Martin, 398 Fed. Appx. 326 (10th Cir. 2010)(unpublished).

merely an inconsistency in dicta or in the general principles utilized.") The different conclusions made by the courts of appeals do not equate with a "real or intolerable" conflict to warrant this Court's review.

In Magwood v. Patterson, 130 S. Ct. 2788 (2010), the petitioner was granted a new sentencing hearing by the district court in his first 28 U.S.C. § 2254 case. The state trial court resentenced Magwood to death and entered a new judgment of conviction. Id. at 2793. After exhausting his claims in state court, Magwood filed a second § 2254 petition challenging the newly imposed death sentence. Id. at 2794. The district court conditionally granted the petition challenging the new death sentence, finding that it was not a second or successive petition. Id. The Eleventh Circuit reversed, in part, and this Court granted certiorari to address whether "Magwood's application challenging his [new] death sentence, imposed as part of re-sentencing .... is subject to the constraints that § 2244 (b) imposes on the review of "second or successive" habeas applications." Id. at 2795.

This Court held that § 2254 (b)(1) provides for the "application for a writ of habeas corpus on behalf of a person in custody pursuant to the **judgment of a State court** ..." § 2254 (b)(1). Id. at 2797 (emphasis added). "The reference to a state-court judgment in § 2254 (b) is significant because the term "application" cannot be defined in a vacuum. A § 2254 petitioner is applying for something: His petition 'seeks *invalidation* (in whole or in part) *of the judgment* authorizing the prisoner's confinement[.]'" Id. (emphasis in original)(citing Wilkinson v. Dodson, 544 U.S. 74, 83 (2005). Therefore, both the text and the relief provided by § 2254 (b) indicate that § 2244 (b)'s phrase "second or successive" must be interpreted to refer to the judgment challenged. Id.

Relying on Magwood, the Ninth Circuit properly determined that Wentzell's petition was not a second or successive petition because his current petition was challenging the intervening judgment.

After the conclusion of his first § 2254 petition, Wentzell obtained relief, in state habeas proceedings, in the form of a dismissal of one of his counts and the reduction of ten years off his sentence. (App. 16-18; 19-23.) The state court issued a new judgment of conviction to reflect the change to both Wentzell's convictions and sentence.

The cases on which Neven relies in asserting a circuit split are factually distinguishable and do not establish a true circuit split. In re Lampton is a 28 U.S.C. § 2255 case in which the relief Lampton obtained in his first § 2255 petition did not result in the imposition of a new judgment. 667 F.3d 585, 587-88. In Lampton's first § 2255 petition, the district court vacated one of Lampton's convictions and a current life sentence imposed on that count. Id. Lampton filed a second § 2255 petition arguing that this petition was not successive because it challenged the district court's judgment rendered in his first § 2255 proceedings. Id. The district court found that the motion was successive and transferred it to the Fifth Circuit. Id.

The Fifth Circuit interpreted Magwood's definition of a new judgment to mean a new sentence. The Fifth Circuit found

> Whether a new judgment has intervened between two habeas petitions, such that the second petition can be filed without this Court's permission, **depends on whether a new sentence has been imposed**. In Magwood, the granting of the petitioner's first petition resulted in him being re-sentenced after a second round of state-court proceedings.

677 F.3d at 588. (internal footnotes omitted)(emphasis added)(citing Magwood, 130 S. Ct. 2788, 2793). The court further relied on an earlier Fifth Circuit decision in which it determined that a "new sentence constitutes a new judgment." Id. The court found, based on long held circuit law, that "when a first habeas petition results in vacatur of the conviction and sentence associated with one of a multi-count conviction, the district court is not required to enter a new judgment as to the remaining

counts." Id. at 589. Lampton's first § 2255 petition did not result in the issuance of a new judgment of conviction. Id. Accordingly, the Fifth Circuit held that "there [was] no new, intervening judgment to trigger the operation of Magwood" thus, Lampton's petition was second or successive. Id.

Unlike In re Lampton, the state court in Wentzell issued a new judgment of conviction. Wentzell's Amended Judgment reflected a conviction for two offenses (instead of three) and reduced his sentence from forty (40) years to thirty (30) years in prison. (App. 16-28.) Accordingly, Wentzell received both a new judgment and a new sentence after the conclusion of his first federal petition.

The Fifth Circuit's decision in Lampton does not reflect a genuine conflict with the Ninth Circuit's decision in Wentzell. The Fifth Circuit specifically held in Lampton that the district court was not required to enter a new judgment as to the remaining counts nor did the decision, in the first § 2255 proceedings, yield a new judgment of conviction. 667 F.3d at 589. Yet, the state court, in Wentzell, was compelled to enter a new judgment to reflect both the reduction in sentence and the change to the convictions. Accordingly, there is no conflict between these two decisions.

Moreover, there is a significant distinction between § 2255 and § 2254 cases. Section 2255 provides that a petitioner "in custody under **sentence** of a court established by Act of Congress claiming the right to be released . . . may move the court which imposed the sentence to vacate, set aside or correct the **sentence**." 28 U.S.C. § 2255 (a) (emphasis added). In contrast, § 2254 provides that a petitioner may bring a petition for writ of habeas corpus if he is "in custody pursuant to the **judgment** of a State court only on the ground that he is in custody in violation of the Constitution . . . " 28 U.S.C. § 2254 (a) (emphasis added). The principles of comity and federalism, a goal of § 2254, have no bearing in the determination of a petition brought pursuant to § 2255. Another significant distinction between § 2254 and § 2255 petitions is the fact that there are different

This Court should not grant certiorari in this case because there is no basis for the Court's jurisdiction. Neven cannot show that the Ninth Circuit's decision in Wentzell v. Neven is in real or intolerable "conflict with the decision of another United States court of appeals on the same important matter[.]" Sup. Ct. R. 10.

2. This Case Is Not Appropriate for Certiorari Review Because the Ninth Circuit's Decision Was Clearly Correct.

The Ninth Circuit correctly applied this Court's simple and straightforward rule from Magwood when it held that "the latter of two petitions is not "second or successive" if there is a 'new judgment intervening between the two habeas petitions.'" (App. 6.); 674 F.3d 1124, 1127 (citing Magwood, 130 S. Ct. at 2802). The Ninth Circuit acknowledged the Fifth Circuit's decision in Lampton but held that this Court's "discussion in Magwood indicates that procedural default rules - rather than the rules governing "second or successive" petitions - are more appropriate tools for sorting out new claims from the old." Wentzell, 674 F.3d at 1127 (citing Magwood, 130 S. Ct. at 2801-02) (App. 7-8.) The Ninth Circuit's holding was clearly correct.

The Ninth Circuit pointed out that, in Lampton, the district court was not required to enter a new judgment of conviction with regard to the remaining counts, where in Wentzell's case, the state court did enter an amended judgment which altered both the convictions and the sentence. (App. 7.) Furthermore, the Ninth Circuit found that this Court had rejected Neven's "one opportunity rule" argument in Magwood. (App. 8.) The Ninth Circuit held that "[i]n the context of finality, we treat the judgment of conviction as one unit, rather than separately considering the judgment's components, i.e., treating the conviction and sentence for each count separately." (Id.)

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Unlike § 2255 petitions, which challenge the "sentence of a court established by an Act of Congress", section § 2254 petitions challenge "the judgment of a State Court[.]" 28 U.S.C. 2255 (a) and § 2254 (a). Thus, AEDPA's goal of promoting comity and federalism is satisfied under the Ninth Circuit's decision in Wentzell. Despite Neven's attempts to characterize the amended judgment in Wentzell's case as something other than a new intervening judgment, the fact is, that Wentzell obtained a new judgment of conviction with a new sentence and a reduced number of convictions. Wentzell challenged the amended judgment in state court and he is now entitled to bring his challenge to the new, amended judgment in federal court pursuant to § 2254. This is clearly in line with this Court's statutory construction rule outlined in Magwood.

As this Court stated in Magwood, both the text and the relief provided by § 2254 (b) indicate that § 2244 (b)'s phrase "second or successive" must be interpreted to refer to the judgment challenged. Magwood, 130 S. Ct. 2788, 2797. Wentzell's challenge is to the new, intervening judgment which was issued to reflect both a new sentence and reduced charges. The federal district court has not had the opportunity to review claims raised with regard to this new judgment. Whether the claims Wentzell has raised in the current petition could have been raised before, is a matter for the district court to decide should Neven raise procedural defenses to the claim. See Magwood, 130 S. Ct. at 2801-02. However, even if Wentzell's claims could have been raised in the prior petition, that does not alter the fact that his current petition challenges a new judgment, not previously challenged. Id. Accordingly, the Ninth Circuit's decision finding that Wentzell's petition was not second or successive is clearly correct.

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3. There are no compelling reasons for this Court's Review because There Is Not a Mature Conflict.

Finally, there is simply no compelling reason for this Court's review in this case. It is true that Magwood left unanswered the question whether the Court's decision would allow "a petitioner who obtains a conditional writ as to his sentence to file a subsequent application challenging not only his resulting, **new** sentence, but also his original, **undisturbed** conviction." Magwood, 130 S. Ct. at 2802 (emphasis in original). However, the fact that there is some disagreement among the courts of appeals regarding this unanswered question (and other related issues) does not give rise to a mature conflict nor provide a compelling reason for this Court's review. Addressing the issue at this time would be premature.[4]

The courts of appeals have had only a limited opportunity to address this issue since the Magwood decision. The courts of appeals should be allowed to resolve any related issues left unanswered in Magwood and, if irreconcilable conflicts arise, then the Court can resolve them. The Court would benefit from further development in the circuits on those related issues. Moreover, such development could produce a consensus or lead to a satisfactory majority view among the circuits. Such a consensus or majority view has not had the opportunity to develop. Until such time as the issue has made its way through the courts of appeals to allow for a consensus to develop, it would be premature for the Court to intercede.[5]

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[4] See also Brief for the United States in Opposition at 14-15 Harris v. U.S., No. 12-6111 (filed August 23, 2012).

[5] It bears noting that the specific factual circumstances which arose in Wentzell's case are highly unusual. Most petitioners do not obtain relief in the state court after the conclusion of their federal petitions. It is not likely that a case like Wentzell's will come up that often. Thus, this case does not warrant this Court's certiorari review, especially in light of the fact that the Ninth Circuit's application of the rule announced in Magwood was clearly correct.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 3,450 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 4, 2013.

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February 4, 2013

Via U.P.S.

Clerk
Supreme Court of the United States
One First Street N.E.
Washington, D.C. 20543

Re: Brief in Opposition to Petition for Writ of Certiorari;
CHRISTOPHER NOEL WENTZELL

Dear Clerk:

Please find enclosed the original and ten (10) copies of the Motion for Leave to Proceed in Forma Pauperis and ten (10) copies of the Opposition to Petition for Writ of Certiorari for filing in the above matter.

A copy has been served on counsel for petitioner, Robert Wieland, Senior Deputy Attorney General, 100 North Carson Street, Carson City, NV 89701, and the Solicitor General of the United States.

I am enclosing an extra copy of the opposition to be file-stamped and returned to our office in the enclosed, self-addressed, stamped envelope.

Thank you in advance for your time, and please do not hesitate to give our office a call should you have any questions or concerns regarding the foregoing.

Cordially,

Susan Kline, legal secretary to
DEBRA A. BOOKOUT
Assistant Federal Public Defender

/sk
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