No. 12-_____

In The
Supreme Court of the United States

ALONZO SUGGS,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Robert J. Palmer
MAY OBERFELL LORBER
4100 Edison Lakes Pkwy.
Suite 100
Mishawaka, IN 46545
(574) 243-4100

Amit Kurlekar
AKIN GUMP STRAUSS HAUER & FELD LLP
580 California Street
Suite 1500
San Francisco, CA 94104
(415) 765-9500

Christopher M. Egleson
AKIN GUMP STRAUSS HAUER & FELD LLP
One Bryant Park
New York, NY 10036
(212) 872-1000

Patricia A. Millett
Counsel of Record
Ruthanne M. Deutsch
James E. Tysse
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave. N.W.
Washington, D.C. 20036
(202) 887-4000
pmillett@akingump.com

John B. Capehart
AKIN GUMP STRAUSS HAUER & FELD LLP
1700 Pacific Ave.
Suite 4100
Dallas, TX 75201
(214) 969-2800

Counsel for Petitioner

QUESTION PRESENTED

Whether, when a prisoner's first federal habeas motion results in the entry of a new sentencing judgment, a subsequent habeas motion is "second or successive," within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2244 and 2255(h), when it challenges the underlying conviction rather than the terms of the new sentence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

In The
Supreme Court of the United States

No. 12-_____

ALONZO SUGGS,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alonzo Suggs respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a), while not yet reported, is scheduled for publication and is currently available at 2013 WL 173969. The district court's opinion (App., *infra*, 27a-31a) is not reported.

JURISDICTION

The court of appeals entered its judgment on January 17, 2013. App., *infra*, 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title I, 110 Stat. 1217, are reproduced at App., *infra*, 87a-91a.

STATEMENT OF THE CASE

1. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Title I, 110 Stat. 1217, a federal prisoner may file a motion to "vacate, set aside or correct" his sentence on "the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).[1]

---

[1] State prisoners may obtain similar relief pursuant to 28 U.S.C. § 2254. Like this Court, this petition uses habeas "petition" to refer to applications for relief under both Section 2255(a) and Section 2254. *See, e.g.*, *Magwood v. Patterson*, 130 S. Ct. 2788, 2792 n.1 (2010); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

AEDPA further provides that any "second or successive" motion for relief under Section 2255(a) is barred unless the appropriate court of appeals first certifies that the motion involves either (i) "newly discovered evidence" that "would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense," 28 U.S.C. § 2255(h)(1), or (ii) "a new rule of constitutional law *** that was previously unavailable," 28 U.S.C. § 2255(h)(2).

2. In 2001, Petitioner Alonzo Suggs was convicted of conspiracy to possess cocaine with intent to distribute it and was sentenced to 300 months of imprisonment. App., *infra*, 73a-75a. In October 2004, Petitioner filed a timely motion under Section 2255(a) in which he continued to assert his innocence of the drug charge and challenged both his conviction and his sentence on multiple grounds. Motion to Vacate, Set Aside or Correct Sentence, *Suggs v. United States*, No. 3:04-cv-00730 (S.D. Ill. Oct. 14, 2004), ECF No. 1; App., *infra*, 51a-52a, 62a. The Seventh Circuit rejected the challenges to his conviction, but granted vacatur of his sentence on the ground that Petitioner had received ineffective assistance of counsel regarding his Sentencing Guidelines calculation. App., *infra*, 41a-49a. In April 2008, the district court imposed a new sentence of 240 months' imprisonment. App., *infra*, 40a.

Petitioner subsequently learned that the "government's primary witness" against him at trial had recanted his testimony. App., *infra*, 35a, 92a-96a. That same witness also represented that his first statement to law enforcement had not tied Petitioner to the crime, and that he had implicated

Petitioner only after Petitioner's name was proposed as a "convenient alternative *** by the investigating officers." App., *infra*, 94a. The prosecution had never disclosed those exculpatory facts to Petitioner as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). *See* Pet. C.A. Br. 11-15; App., *infra*, 3a.

Petitioner asked the United States Court of Appeals for the Seventh Circuit to certify that the new evidence that "he is actually innocent" of the drug crime for which he was convicted, App., *infra*, 35a, satisfied the requirements of Section 2255(h)(1) for the filing of a new Section 2255(a) motion. The Seventh Circuit denied certification. App., *infra*, 34a.

3. In September 2009, Petitioner filed a motion under Section 2255(a) in the United States District Court for the Southern District of Illinois, challenging his conviction on the ground that new evidence established a prejudicial *Brady* error that invalidated his conviction. *See* App., *infra*, 35a; Motion to Vacate, Set Aside or Correct Sentence, *Suggs v. United States*, No. 3:09-cv-00775 (S.D. Ill. Sept. 21, 2009), ECF No. 1. Petitioner explained that certification by the court of appeals under Section 2255(h) was not required because this motion was the first to challenge the new sentence and judgment imposed in April 2008 and thus was not a "second or successive" motion under Section 2255(h). App., *infra*, 3a-4a.

Applying the Seventh Circuit's decision in *Dahler v. United States*, 259 F.3d 763 (7th Cir. 2001), the district court ruled that the motion was second or successive because it attacked the underlying

conviction rather than the terms of the newly imposed sentence. App., *infra*, 29a-30a. The district court also denied a certificate of appealability. App., *infra*, 25a.

4. a. The Seventh Circuit subsequently granted a certificate of appealability on the ground that Petitioner "has made a substantial showing of the denial of a constitutional right as to whether the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963)." App., *infra*, 22a-23a. The court appointed counsel for Petitioner and also directed briefing on whether, after *Magwood v. Patterson*, 130 S. Ct. 2788 (2010), Petitioner's Section 2255 motion filed after imposition of a new sentence and judgment was second or successive within the meaning of AEDPA. App., *infra*, 22a-23a.

In its brief to the court of appeals, the United States acknowledged that, but for the barriers to second or successive petitions posed by 28 U.S.C. 2255(h), "the evidence that [Petitioner] presented would be enough to require at least an evidentiary hearing on the *Brady* claim." App., *infra*, 3a; *see* U.S. C.A. Br. 12 n.3; App, *infra*, 21a (Sykes, J., dissenting).

b. A divided court of appeals affirmed. App., *infra*, 1a-21a. The majority noted that, in *Magwood*, this Court held that a federal habeas corpus application, under 28 U.S.C. § 2254, filed after an earlier successful application had resulted in the entry of a new sentencing judgment was not "second or successive." Because the newly imposed sentence constituted a new criminal judgment, Magwood's post-resentencing habeas petition was the first

application challenging that judgment. App., *infra*, 9a (citing 130 S. Ct. at 2797-2801).

The majority "recognize[d] that the reasoning in *Magwood* casts some doubt about the continued viability of *Dahler*" as binding circuit precedent mandating the treatment of Petitioner's motion as second or successive. App., *infra*, 2a. The majority further noted that this Court expressly reserved in *Magwood* the question of whether "a subsequent [habeas] application challenging not only [a state prisoner's] resulting, *new* sentence, but also his original, *undisturbed* conviction" would be deemed "second or successive." App., *infra*, 10a (citing 130 S. Ct. at 2802-2803). The majority then held that, "[b]ecause the question before us is settled in our circuit [by *Dahler*] and the Supreme Court considered the question but expressly declined to answer it, we follow our circuit's precedents and hold that [Petitioner's] motion is second or successive." App., *infra*, 11a.

In so ruling, the majority acknowledged that its "reading of *Magwood* differs from the approach taken by other circuits," which "found *Magwood*'s teaching sufficiently clear to extend it." App., *infra*, 11a (citing *Wentzell v. Neven*, 674 F.3d 1124 (9th Cir. 2012), *petition for cert. pending*, 81 U.S.L.W. 3275 (No. 12-352) (filed Sept. 18, 2012); *Johnson v. United States*, 623 F.3d 41 (2d Cir. 2010)).

c. Judge Sykes dissented. App., *infra*, 13a-21a. She agreed with the Second and Ninth Circuits that the distinction "'between challenges to events that are novel to the resentencing (and will be treated as initial collateral attacks) and events that predate[]

the resentencing (and will be treated as successive collateral attacks)'" did not survive *Magwood*. App., *infra*, 15a-16a (quoting *Dahler*, 259 F.3d at 765) (alteration in original). "*Magwood* specifically rejected th[at] distinction," she explained, by holding that Magwood's habeas application was not "second or successive" even though "he could have raised [his claim] in his first petition but did not." App., *infra*, 16a-17a (citing *Magwood*, 130 S. Ct. at 2796). Judge Sykes acknowledged that *Magwood* reserved the question of post-resentencing challenges to the underlying conviction, but noted that any such reservation was "not a limitation on the Court's reasoning or its interpretation of § 2244(b)." App., *infra*, 18a.

Judge Sykes also echoed the majority's recognition that its decision conflicted with the law of the Second and Ninth Circuits, App., *infra*, 18a-19a, noting in particular that the Second Circuit had found *Magwood* sufficiently clear to compel departure from its own circuit precedent. App., *infra*, 19a. "[S]atisfied that *Magwood*'s interpretation of § 2244(b) is clear enough to require a departure from" *Dahler*, Judge Sykes concluded that she would reverse and remand to provide petitioner an evidentiary hearing on his *Brady* claim. App., *infra*, 20a-21a.

REASONS FOR GRANTING THE WRIT

In acknowledged conflict with other federal courts of appeals, the Seventh Circuit has cemented the divide in circuit law over a question specifically reserved by this Court in *Magwood v. Patterson*, 130 S. Ct. 2788 (2010): whether, after a prisoner

succeeds in federal habeas in vacating his sentence, a habeas petition filed after imposition of a new sentencing judgment that challenges the underlying conviction is "second or successive" within the meaning of AEDPA. *See* 130 S. Ct. at 2802-2803. The Seventh Circuit has now joined the Fifth Circuit in holding that habeas applications challenging those aspects of a conviction or sentence that were reinstated in a new sentencing judgment are second or successive. *See In re Lampton*, 667 F.3d 585 (5th Cir. 2012). The Tenth Circuit reached the same result in an unpublished decision. *In re Martin*, 398 F. App'x 326, 327 (10th Cir. 2010). But, as the Seventh Circuit acknowledged, App., *infra*, 11a, the Second and Ninth Circuits have ruled exactly the opposite. *See Wentzell v. Neven*, 674 F.3d 1124 (9th Cir. 2012), *petition for cert. pending*, 81 U.S.L.W. 3275 (No. 12-352) (filed Sept. 18, 2012); *Johnson v. United States*, 623 F.3d 41 (2d Cir. 2010). The Eleventh Circuit has issued decisions going in opposite directions. *See Campbell v. Secretary for the Dep't of Corr.*, 447 F. App'x 25, 27-28 (11th Cir. 2011) (not second or successive); *Cassidy v. Secretary, Fla. Dep't of Corr.*, No. 11-14817, slip op. at 2 (11th Cir. Mar. 22, 2012) (Order) (applying second or successive bar), *reconsideration denied* (11th Cir. May 14, 2012), *petition for cert. pending* (No. 12-5747) (filed Aug. 7, 2012). The Solicitor General has acknowledged the existence of this circuit conflict. Br. for the U.S. in Opp'n at 9, 13-14, *Harris v. United States*, No. 12-6111 (U.S. Jan. 15, 2013).

The development of this full-blown circuit split within three years of this Court's *Magwood* decision underscores the frequent recurrence of the question

and its importance both to federal and state habeas petitioners and to the States. Six circuits, controlling the standards for habeas relief in more than half of the States, have now given contradictory answers to the same question of federal statutory law. Because the conflict has become so widespread and because the conflict is grounded in the proper interpretation and application of this Court's *Magwood* decision, only this Court can bring consistency to the law.

Moreover, this case, in contrast to other pending petitions, cleanly presents the question without procedural complication. And it does so in a case where the ruling materially changed the habeas outcome, depriving Petitioner of his otherwise undisputed right to a hearing on his "substantial" *Brady* claim, App, *infra*, 22a, *see* U.S. C.A. Br. 12 n.3; App., *infra*, 3a, 20-21a. Had Petitioner's Section 2255 motion arisen in the Second or Ninth Circuits, he would have been afforded under *Magwood* the hearing that the Seventh Circuit says *Magwood* does not require. Accordingly, to delay review would simply multiply the disuniformity in federal law and compound the unfairness to habeas applicants and States alike, who find—as Mr. Suggs now has—that the availability of federal habeas review of their criminal convictions turns on nothing more than geographic accident.

I. THE COURTS OF APPEALS ARE IN ACKNOWLEDGED, WIDESPREAD, AND IRRECONCILABLE CONFLICT OVER THE QUESTION THIS COURT RESERVED IN *MAGWOOD*.

A. The Circuit Conflict Is Entrenched.

Since this Court's decision in *Magwood v. Patterson*, 130 S. Ct. 1288 (2010), six courts of appeals have split into opposing camps over a question this Court reserved there: the applicability of AEDPA's rules for "second or successive" petitions to habeas applications that are filed after the entry of a new sentencing judgment, but that only challenge aspects of the original judgment of conviction that the new judgment reinstated. With multiple circuit courts now locked in on each side of the question, the time for this Court's intervention has come.

In *Magwood*, a capital defendant obtained vacatur of his death sentence on federal habeas review, 28 U.S.C. § 2254. After Magwood was again sentenced to death, he challenged his death sentence on a ground that he could have, but had not, pressed in his initial Section 2254 petition. 130 S. Ct. at 2792. This Court held that the new habeas petition was not a "second or successive" petition subject to the strict limitations on such petitions in 28 U.S.C. § 2244, because the habeas petition was actually the first petition challenging Magwood's new capital sentence and judgment. *See Magwood*, 130 S. Ct. at 2797. "This is Magwood's *first* application challenging that intervening judgment[]" and the "errors he alleges are *new*" because "[a]n error made a second time is still a new error." *Id.* at 2801.

In opposing that rule, the State in *Magwood* warned that treating Magwood's application as an initial habeas petition 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." *Id.* at 2802. This Court held that it had "no occasion to address that question" because the petitioner had "not attempted to challenge his underlying conviction." *Id.* In any event, the Court noted, its holding was "base[d] *** on the text, and that text is not altered by consequences the State speculates will follow in another case." *Id.* at 2802-2803.[2]

Since *Magwood* reserved that question, the Second and Ninth Circuits, as well as the Eleventh Circuit in *Campbell*, have held that federal habeas petitions filed after the imposition of a new sentence should not be deemed "second or successive," even if they only challenge aspects of the new judgment that were reinstated from the previous judgment. In *Johnson,* after successfully obtaining a new sentencing under 28 U.S.C. § 2255(a), the prisoner filed a new federal habeas petition challenging his underlying conviction. 623 F.3d at 43. The Second

---

[2] While *Magwood* arose in the context of a state prisoner's habeas proceeding under 28 U.S.C. § 2254, rather than a federal prisoner's proceeding under 28 U.S.C. § 2255, that is a distinction without a difference for these purposes, as the Solicitor General agrees, Br. for the U.S. in Opp'n at 13 n.3, *Harris, supra*. *See also Johnson*, 623 F.3d at 45 (citing *Burton v. Stewart*, 549 U.S. 147, 156 (2007), and *Berman v. United States*, 302 U.S. 211, 212 (1937)).

Circuit ruled that AEDPA's second-or-successive rules do not apply. "[W]here a first habeas petition results in an amended judgment, a subsequent petition is not successive regardless of whether it challenges the conviction, the sentence, or both." *Id.* at 46. In sharp contrast to the majority here, the Second Circuit concluded that, "in 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.*; *see also* App., *infra*, at 18a (Sykes, J., dissenting) ("[A]s the [*Magwood*] Court reads [§ 2244], a habeas petition is deemed initial or successive by reference to the *judgment* it attacks—not which *component* of the judgment it attacks or the nature or genesis of the *claims* it raises."). The United States, moreover, expressly agreed with that disposition, advising the Second Circuit that, "'[i]n light of *Magwood*, Johnson's Third Petition should be treated as a first Section 2255 petition.'" *Id.* at 46 n.6 (quoting U.S. Br. at 4).

The Ninth Circuit followed suit in *Wentzell v. Neven*, 674 F.3d 1124 (9th Cir. 2012), *petition for cert. pending*, 81 U.S.L.W. 3275 (No. 12-352) (filed Sept. 18, 2012). The court "adopt[ed] the Second Circuit's rule," *id.* at 1128, that "'we must interpret successive applications with respect to the judgment challenged and not with respect to particular components of that judgment,'" *id.* at 1127 (quoting *Johnson*, 623 F.3d at 46). *See also* App., *infra*, at 18a (Sykes, J., dissenting) ("Nothing in the Court's opinion suggests that the second-or-successive inquiry turns on which part of the judgment is challenged."). For petitions first filed after a new sentencing, the court explained,

"procedural default rules—rather than the rules governing 'second or successive' petitions—are the more appropriate tools for sorting out new claims from the old." 674 F.3d at 1127.

Likewise, a panel of the Eleventh Circuit concluded in *Campbell* that "*Magwood* permits a petitioner who received an intervening judgment to attack the unaltered prior conviction" without satisfying Section 2255(h)'s preconditions. 447 F. App'x at 27-28 (citing *Johnson*, 623 F.3d at 45-46).

The Fifth, Tenth and now Seventh Circuits, however, have ruled exactly the opposite. The Fifth Circuit, in *In re Lampton*, 667 F.3d 585 (5th Cir. 2012), expressly parted company with the Second Circuit's *Johnson* ruling even though the cases presented "virtually identical facts," *id.* at 589. The Fifth Circuit reasoned that Lampton's federal habeas petition "seeks to challenge the same judgment of conviction that was the subject of his first § 2255 petition," and thus was successive. *Id.* The court further noted that, in its case, the United States had changed course, "mak[ing] no such concession" about *Magwood*'s applicability as it had in *Johnson*. *Id.*

Likewise, in *Martin*, a panel of the Tenth Circuit held that a habeas petition was "second or successive" despite being the first petition following an "amended judgment," because the judgment "merely corrected a clerical error" that "did not rise to the level of constitutional error." 398 F. App'x at 327; *but see id.* at 327-328 (Hartz, J., dissenting) (because the "new judgment changed the offense of conviction," prisoner's first petition following that amended judgment was not second or successive). And in

Cassidy, *supra*, the Eleventh Circuit denied as "second or successive" the first habeas petition filed by a Florida prisoner after he succeeded in vacating one of his two counts of conviction. No. 11-14817-E, slip op. at 2.[3]

The circuits are thus in entrenched and irreconcilable conflict over a frequently recurring question that, at bottom, is answerable only by this Court's determination of the reach of *Magwood*'s construction and analysis of AEDPA.

B. The Conflict Is Ripe For Review.

The Seventh Circuit's divided decision here cemented the circuit conflict, expressly disagreeing in a precedential decision with the Second and Ninth Circuits, App., *infra*, 11a, while acknowledging that *Magwood*'s "reasoning could be understood to extend to a situation like this case," *id*. at 9a. The circuit conflict has thus become too wide and entrenched for the courts of appeals to resolve themselves. Further percolation would simply compound, not resolve, the circuit conflict while the availability of habeas review for substantial constitutional claims' like petitioner's would turn on and off based on nothing more than circuit borders. By the same token, the existing split treats convictions—whether state or federal—differently depending upon geography: the

[3] Thus far, this Court appears to have deferred action on the *Cassidy* petition, which presents this same question but in which a certificate of appealability was denied. No. 11-14817-E, slip op. at 2-4, *reconsideration denied* (11th Cir. May 14, 2012), *petition for cert. pending* (No. 12-5747) (filed Aug. 7, 2012).

judgments of the courts of Alaska, Arizona, California, Connecticut, Hawaii, Idaho, Montana, Nevada, New York, Oregon, Vermont, and Washington are subject to ongoing review in a way that criminal judgments issued in Colorado, Illinois, Indiana, Kansas, Louisiana, Mississippi, New Mexico, Oklahoma, Texas, Utah, Wisconsin and Wyoming are not. And judgments within the Eleventh Circuit are subject to even greater unpredictability. *Compare Cassidy*, No. 11-14817-E, slip op. at 2**,** *with Campbell*, 447 F. App'x at 27-28**.**

The legal question, moreover, has been fully aired in the published decisions of the Second, Fifth, Ninth, and now Seventh Circuits. The division has come to rest fundamentally on competing visions of the meaning of this Court's language and analysis in *Magwood*, and the extent to which this Court's ruling permits lower courts to depart from prior circuit precedent. *Compare* App., *infra*, 11a ("*Magwood*'s application to these facts is not sufficiently clear for us to abandon principles of *stare decisis*[.]"), *with id.* at 20a (Sykes, J., dissenting) ("I cannot reconcile our circuit precedent with *Magwood*."), *and Johnson*, 623 F.3d at 44 ("We conclude, however, that our decision in *Galtieri* [*v. United States*, 128 F.3d 33 (2d Cir. 1997)] cannot be reconciled with the Supreme Court's recent decision in *Magwood v. Patterson*."). Future court decisions likely will simply pick sides in that debate, rather than alter the analytical framework for this Court's review.

II. THIS CASE SQUARELY AND CLEANLY PRESENTS THE QUESTION, AS THE GOVERNMENT'S CONCESSION IN THE COURT OF APPEALS DEMONSTRATES.

The time for this Court's review has come, and this case presents the proper vehicle to resolve the question presented.

First, the procedural posture of this case straightforwardly frames the question for this Court's review. This Section 2255 motion is the first and only habeas motion filed by Petitioner since the entry of his new sentencing judgment. If it is not a second or successive petition under AEDPA, then it is a clean, initial Section 2255 application for relief from the April 2008 sentence. In addition, the court of appeals granted petitioner a proper certificate of appealability so there is no procedural barrier to this Court's review.

Second, and relatedly, the answer to the question presented will have an immediate and material effect on the outcome of this litigation. That is because, as both the Seventh Circuit and the United States agreed, "if appellant's motion were not 'second or successive,' he would be entitled to an evidentiary hearing under 28 U.S.C. 2255(b)" on his substantial *Brady* claim. U.S. C.A. Br. 12 n.3; *see* App., *infra*, 3a, 21a; *see also* App., *infra*, 46a-47a, 62a-63a, 70a-71a (decisions affirming Petitioner's conviction on direct review and denying his initial habeas challenges to his conviction relying heavily on the now-recanted testimony).

Third, the other pending petitions do not allow this Court to properly consider and address the circuit conflict.

The petition in *Harris*, No. 12-6111, is in a far more procedurally unfavorable posture and, indeed, does not appear even to squarely present the question for review. Specifically, the Section 2255 motion for which review is sought in this Court is actually Harris's *second* attempt to obtain review of his *amended* judgment. And it is substantially untimely. Harris's initial Section 2255 motion succeeded in obtaining the entry of a new "'final judgment'" in the case in June 1997. *See* Br. for the U.S. in Opp'n at 6, *Harris*, *supra*. In September 2008—eleven years later and a decade beyond AEDPA's one-year time limit on such motions, 28 U.S.C. § 2244(d)—Harris filed a motion challenging his amended July 1997 sentencing judgment, which he styled as one for relief from judgment under Federal Rule of Civil Procedure 60(b). *Id.* at 7. The district court ruled that the motion was, in substance, a Section 2255 motion and then denied relief. *Id.*; *cf. Gonzalez v. Crosby*, 545 U.S. 524, 530-532 (2005) (Rule 60(b) motion that presents claims for relief from a criminal judgment is the equivalent of a federal habeas corpus application under Section 2254).

A full sixteen months later, Petitioner filed another Section 2255 motion challenging, for the second time, his amended (July 1997) sentence and underlying conviction. And that second petition is the one for which he currently seeks this Court's review. Harris's motion thus is a "second or successive" motion no matter how this Court disposes

of the question reserved in *Magwood*, because it is the second Section 2255 motion he filed *after* his new June 1997 sentence was imposed.

The motions made 11 and 13 years after his resentencing respectively also may be so untimely as to render the question of their status as second or successive largely academic. Finally, as the United States explains, the only question before this Court is whether a certificate of appealability should have issued, and there is no basis to overturn the court of appeals' denial of a certificate because, however debatable the procedural question might be, he has not made a substantial showing of the denial of a constitutional right. Br. for the U.S. in Opp'n 8, 16. It thus appears unlikely that this Court could ever reach, let alone resolve, the question on which the courts of appeals are in conflict in the *Harris* case.

Neven v. Wentzell, No. 12-352, is also a poor vehicle for this Court's review. To begin with, the question presented by the *Neven* certiorari petition is, by its terms, narrowly confined only to situations where "one of multiple counts of [a] judgment of conviction" is "vacat[ed]" in its entirety. No. 12-352, Petition for Writ of Certiorari, at i, *Neven v. Wentzell* (filed Sept. 18, 2012). The question thus would leave the question on which the circuits are in conflict still half-unanswered, without consideration of the other ways in which sentencing judgments are altered by a successful habeas petition, and then post-resentencing challenges are brought, such as occurred with the vacatur of a sentencing enhancement in this case, App., *infra*, 49a, or the new sentencing judgments imposed in *Campbell* and

Martin, *supra*, or even the type of capital resentencing scenario presented in *Magwood*.

In addition, there are substantial grounds for concluding in *Neven*, as in *Harris*, that the habeas petition is untimely. The district court in *Neven* originally dismissed the habeas petition not only as a "second or successive" petition, but also because the court concluded, *sua sponte*, that the petition was barred by AEDPA's one-year time limitation. 28 U.S.C. § 2244(d). The Ninth Circuit did not reverse that holding, but merely vacated for the district court to provide the petitioner with notice and an opportunity to be heard.

Indeed, precisely because of that timing issue, the *Neven* case comes to this Court in an interlocutory posture precisely because the court of appeals remanded for further proceedings. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *see also, e.g.*, *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (statement of Alito, J., respecting denial of petitions for certiorari) (same).

Furthermore, it appears that all of Wentzell's claims may be procedurally defaulted. *See Wentzell v. Nevada*, No. 54171, slip op. at 3 n.3 (D. Nev. Feb. 4, 2010) (reproduced at *Wentzell v. Neven,* No. 10-cv-01024 (D. Nev. Jul. 9, 2010), ECF No. 3-5, at 13 n.3) (so holding). Wentzell pled guilty pursuant to a plea agreement in which he waived his right to appeal. *See* Guilty Plea Agreement at 6, *Nevada v. Wentzell*,

No. 95-cr-3691 (D. Nev. Jan. 17, 1996) (reproduced at *Neven*, No. 10-cv-01024 (D. Nev. Jul. 9, 2010), ECF No. 3-5, at 34). Given that plea and his waiver of his right to appeal, his claim that he was prejudiced by his counsel's failure to take a direct appeal from his conviction would appear to be barred.

Fourth, and finally, review is warranted because the Seventh Circuit's decision is wrong. When "there is a new judgment intervening between the two habeas petitions, *** an application challenging the resulting new judgment is not second or successive at all." *Magwood*, 130 S. Ct. at 2802 (internal quotations and citation omitted). Because "[a] judgment of conviction includes both the adjudication of guilt and the sentence," *Deal v. United States*, 508 U.S. 129, 132 (1993), the entry of a new sentencing judgment in Petitioner's case necessarily encompassed reimposition of the judgment of conviction as well. *See* Pet. App. 40a (readopting "previously imposed" and "heretofore imposed" portions of sentence).

Lastly, the majority employed a wooden distinction between "challenges to events that are novel to the resentencing and events that predated the sentencing." App., *infra*, 8a. But this Court in *Magwood* rejected that very same "claim-focused" approach, *see* 130 S. Ct. at 2796, hewing instead to a "conclusion [based] on the text" of AEDPA, *id*. at 2803, even though it meant that a habeas petitioner could obtain review of challenges to aspects of the judgment that "he could have raised in his first petition *** but did not," *id.* at 2796.

In any event, whether the Second or Ninth Circuits and Judge Sykes got it right, or whether the Seventh Circuit majority, Fifth and Tenth Circuits are correct, the lower courts, federal habeas petitioners, and the state and federal governments all need a uniform answer to what should be the uniform interpretation and operation of a federal law on this important and recurring question. The issue has been comprehensively considered by the courts of appeals, and this case presents the appropriate opportunity for this Court to finally settle the question.

CONCLUSION

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

Respectfully submitted,

Robert J. Palmer
MAY OBERFELL LORBER

Patricia A. Millett
Counsel of Record
Ruthanne M. Deutsch
Amit Kurlekar
Christopher M. Egleson
James E. Tysse
John B. Capehart
AKIN GUMP STRAUSS
HAUER & FELD LLP

Counsel for Petitioner

February 7, 2013