No. 12-978

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, when a federal prisoner's first motion to vacate his sentence under 28 U.S.C. 2255 is granted and an amended judgment is entered following a resentencing, a subsequent Section 2255 motion challenging the prisoner's underlying undisturbed adjudication of guilt is "second or successive" within the meaning of 28 U.S.C. 2244(b) and 28 U.S.C. 2255(h) (Supp. V 2011).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 705 F.3d 279. The memorandum and order of the district court (Pet. App. 27a-31a) is not published in the Federal Supplement but is available at 2010 WL 4318588. A prior opinion of the court of appeals (Pet. App. 41a-49a) is reported at 513 F.3d 675. A prior memorandum and order of the district court (Pet. App. 50a-65a) is not published in the Federal Supplement but is available at 2006 WL 449031. Another prior opinion of the court of appeals (Pet. App. 66a-71a) is not published in the Federal Reporter but is reprinted in 59 Fed. Appx. 818.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2013. The petition for a writ of certiorari

was filed on February 7, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2001, following a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted of conspiracy to possess at least five kilograms of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, and possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Petitioner was sentenced to concurrent terms of 300 months of imprisonment on the drug conviction and 120 months of imprisonment (the statutory maximum) on the firearm conviction. Pet. App. 51a, 72a-86a. The court of appeals affirmed. *Id.* at 66a-71a.

In 2004, petitioner timely filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied the motion. Pet. App. 50a-65a. The court of appeals affirmed the judgment of the district court in part, vacated petitioner's sentence on the ground that petitioner had received ineffective assistance of appellate counsel in connection with a sentencing issue, and remanded for resentencing. *Id.* at 41a-49a. On remand, the district court entered an amended judgment resentencing petitioner to concurrent terms of 240 months of imprisonment on the drug conviction and 120 months of imprisonment on the firearm conviction. *Id.* at 37a-40a. Petitioner filed a notice of appeal but later voluntarily dismissed his appeal.

In 2009, petitioner filed an application with the court of appeals for leave to file a successive Section 2255 motion. See 28 U.S.C. 2244(b)(3)(A). The court of appeals denied the application. Pet. App. 34a-36a. Petitioner nevertheless filed a second Section 2255 motion, which the district court dismissed as an impermissible

"second or successive" motion for which authorization had not been granted. *Id.* at 27a-31a. The court of appeals granted a certificate of appealability (COA) and affirmed. *Id.* at 1a-21a.

1. On July 27, 2000, a police officer at the Phoenix, Arizona, airport noticed a suspicious suitcase bound for St. Louis, Missouri, and notified Drug Enforcement Administration agents. When the flight arrived in St. Louis, agents located the suitcase, and a drug-detection dog alerted to the presence of narcotics. The agents sent the suitcase on through baggage, where it was claimed by John Ellebracht. The agents approached Ellebracht and asked if he would speak with them, and he agreed. They then asked Ellebracht for permission to search the suitcase, and he consented. The suitcase contained more than ten kilograms of cocaine and more than seven kilograms of marijuana wrapped in cellophane. The agents arrested Ellebracht. During post-arrest questioning, Ellebracht stated that he had been recruited by Joyce Ogle to transport the suitcase for petitioner. Pet. App. 67a.

In October 2000, a grand jury in the Southern District of Illinois charged Ellebracht, Ogle, and petitioner with conspiracy to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. The grand jury also charged petitioner with being a felon in possession of a firearm stemming from a 1996 incident. Ellebracht pleaded guilty and testified at Ogle and petitioner's joint trial. The jury found Ogle and petitioner guilty of the drug charge and also found petitioner guilty of the firearm charge. The district court sentenced petitioner to concurrent terms of 300 and 120 months of imprisonment on

the drug and firearm convictions, respectively. Pet. App. 68a, 72a-86a.

Petitioner appealed, arguing that "the district court erred in allowing the government to present evidence of a conspiracy not charged in the indictment and in not providing a jury instruction on multiple conspiracies." Pet. App. 68a-69a. The court of appeals rejected that contention and affirmed. *Id.* at 69a-71a. This Court denied petitioner's petition for a writ of certiorari. 540 U.S. 909 (2003) (No. 03-5443).

2. On October 12, 2004, petitioner timely filed a motion to vacate his sentence under 28 U.S.C. 2255. Petitioner's motion attacked his conviction and his sentence on an array of grounds, including (1) that trial counsel rendered ineffective assistance in failing to raise a Confrontation Clause challenge under *Bruton* v. *United States*, 391 U.S. 123 (1968), to the admission of Ellebracht's statements at trial and (2) that appellate counsel rendered ineffective assistance in failing to challenge the sentencing court's application under Sentencing Guidelines § 2D1.1(b)(1) of a two-level enhancement for possession of a dangerous weapon. Pet. App. 47a. The district court denied petitioner's motion in all respects. *Id.* at 50a-65a.

On appeal, the court of appeals rejected petitioner's *Bruton*-based ineffective-assistance claim, but concluded that appellate counsel rendered ineffective assistance in failing to challenge the sentencing enhancement. Pet. App. 41a-49a. Accordingly, the court of appeals "VACATE[D] [petitioner's] sentence and REMAND[ED] for resentencing," but "AFFIRMED," in "all other respects, the judgment of the district court." *Id.* at 49a.

On April 14, 2008, the district court resentenced petitioner on remand to 240 months of imprisonment on the

drug conviction and ordered that sentence to run concurrently with the 120-month sentence on the firearm conviction. Pet. App. 37a-40a. The court entered an amended judgment memorializing the new sentence. *United States* v. *Ellebracht*, 00-cr-30176 Docket entry No. 183 (S.D. Ill. Apr. 14, 2008). Petitioner appealed from the amended judgment, but he later filed a motion to dismiss the appeal, which the court of appeals granted. *United States* v. *Suggs*, 08-3460 Docket entry Nos. 8, 9 (7th Cir. Jan. 12, 2009; Jan. 13, 2009).

3. On August 20, 2009, petitioner applied to the court of appeals for authorization to file another Section 2255 motion. *Suggs* v. *United States*, 09-3070 Docket entry No. 1 (7th Cir.); see 28 U.S.C. 2244(b)(3)(A). Petitioner sought to file a second-in-time Section 2255 motion based on what he characterized as newly discovered evidence—*viz.*, an affidavit from Ellebracht recanting his trial testimony (Pet. App. 92a-96a)—purportedly demonstrating that he was innocent of the drug conspiracy and that the government had violated its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose material, exculpatory evidence at the time of trial. See 28 U.S.C. 2255(h)(1) (Supp. V 2011) (court of appeals may authorize a successive Section 2255 motion if the prisoner makes a prima facie showing based on "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"). The court of appeals denied the application, concluding that "Ellebracht's recantation—which comes eight years after trial and long after Ellebracht received whatever benefit he got in exchange for his cooperation—simply does not come close to showing that

no reasonable factfinder would have found him guilty as [is] required for authorization." Pet. App. 35a-36a.

4. On September 21, 2009, notwithstanding the court of appeals' denial of his application to file a second Section 2255 motion, petitioner filed a second Section 2255 motion in the district court, reasserting his claims that Ellebracht's recantation demonstrated that he was innocent and that the government had violated its *Brady* obligations. See Pet. App. 28a-29a.

a. The district court dismissed the motion for lack of jurisdiction. Pet. App. 27a-31a. Relying on *Dahler* v. *United States*, 259 F.3d 763 (7th Cir. 2001), the district court concluded that the motion was an unauthorized "second or successive" motion. Pet. App. 31a. In *Dahler*, as in petitioner's case, the prisoner had successfully challenged his sentence through a Section 2255 motion, had been resentenced, and then challenged an error made during proceedings to adjudicate his guilt; the Seventh Circuit held that the later-in-time motion was barred as a "second or successive" motion, reasoning that Section 2255 distinguishes between "challenges to events that are novel to the resentencing" and "events that predated the resentencing." 259 F.3d at 765.

The district court explained that *Magwood* v. *Patterson*, 130 S. Ct. 2788 (2010), did not compel the conclusion that petitioner's motion was not a "second or successive" motion requiring pre-filing authorization by the court of appeals. The court explained that, unlike the prisoner in *Magwood*, petitioner was attempting to attack his underlying conviction, which had not been disturbed by the previous grant of Section 2255 relief concerning petitioner's sentence. The district court therefore dismissed the motion for lack of jurisdiction and denied a COA. Pet. App. 30a-31a.

b. The court of appeals granted petitioner a COA, concluding that he had made a "substantial showing of the denial of a constitutional right" on his *Brady* claim. Pet. App. 22a. The order granting the COA appointed counsel for petitioner and directed the parties to address, in addition to petitioner's *Brady* claim, the threshold question whether petitioner's current, second-in-time Section 2255 motion was a "second or successive" motion requiring pre-filing authorization. *Id.* at 22a-23a.

c. The court of appeals affirmed. Pet. App. 1a-12a. The government acknowledged that "the evidence [petitioner had] presented would be enough to require at least an evidentiary hearing on the *Brady* claim." *Id.* at 3a; Gov't C.A. Br. 12 n.3. But the government argued that the district court had correctly held that petitioner's motion was "second or successive" because the motion raised a challenge to petitioner's underlying adjudication of guilt, which was unaffected by the grant of Section 2255 relief on petitioner's sentence. The court of appeals agreed.

The court noted that, in *Magwood*, this Court had held that a state prisoner's second-in-time habeas corpus application, filed after an earlier successful application resulted in a new sentencing judgment, was not "second or successive" because the second-in-time application was the first application challenging the new judgment. Pet. App. 9a (citing 130 S. Ct. at 2797-2801). The court of appeals "recognize[d] that the reasoning in *Magwood* casts some doubt" on its decision in *Dahler*, *id.* at 2a, but it noted that *Magwood* had expressly reserved the question of whether a subsequent application for collateral relief "'challenging not only [a prisoner's] resulting, *new* sentence, but also his original *undis-*

turbed conviction'" would be "second or successive," *id.* at 10a (quoting 130 S. Ct. at 2802-2803). The court of appeals majority then concluded that, because *Magwood* reserved the issue resolved in *Dahler* and presented by petitioner's case, *Dahler* continued to apply and compelled affirmance. *Id.* at 11a.

Judge Sykes dissented. Pet. App. 13a-21a. In her view, the Second and Ninth Circuits had correctly concluded that the distinction drawn in *Dahler* 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*. *Id.* at 15a-16a (brackets in original) (quoting *Dahler*, 259 F.3d at 765); see also *id.* at 18a-19a (citing *Wentzell* v. *Neven*, 674 F.3d 1124 (9th Cir. 2012), petition for cert. pending, No. 12-352 (filed Sept. 18, 2012); *Johnson* v. *United States*, 623 F.3d 41 (2d Cir. 2010)). Judge Sykes acknowledged that *Magwood* expressly reserved the question of whether post-resentencing challenges to the underlying conviction are "second or successive," but concluded that this reservation was "not a limitation on the Court's reasoning or its interpretation of [Section] 2244(b)." *Id.* at 17a-18a. Judge Sykes would have held that *Magwood* was "clear enough to require a departure" from *Dahler*, *id.* at 20a, and that petitioner should be permitted to file his current motion and obtain a hearing on his *Brady* claim. *Id.* at 20a-21a.

ARGUMENT

Petitioner contends (Pet. 7-14) that his current, second-in-time Section 2255 motion was not a "second or successive" motion requiring pre-filing authorization within the meaning of 28 U.S.C. 2244(b) and 28 U.S.C. 2255(h) (Supp. V 2011). The court of appeals' conclusion

that petitioner's motion was "second or successive" is correct. Although the few circuits to have considered the issue since *Magwood* v. *Patterson*, 130 S. Ct. 2788 (2010), have reached different conclusions as to whether an application for postconviction relief in a posture similar to petitioner's motion is "second or successive," the contours and implications of that disagreement are not sufficiently clear to warrant review of the issue by this Court at this time. Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 7-14) that the courts below erred in concluding that his Section 2255 motion was a "second or successive" motion within the meaning of 28 U.S.C. 2244(b) and 28 U.S.C. 2255(h) (Supp. V 2011). The decision below is correct. Petitioner's motion was "second or successive," and the district court therefore lacked jurisdiction to entertain it because the court of appeals had not authorized it to be filed (and had in fact expressly declined to authorize its filing).

a. Before 1996, state and federal prisoners were permitted to file repetitive applications for postconviction relief in the district court without securing pre-filing authorization. Such repetitive filings, however, were often summarily dismissed based on judge-made doctrines such as "abuse of the writ." See, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467 (1991). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, altered this practice by imposing "new restrictions on successive petitions," *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996), by state and federal prisoners.[1] Today, a state or federal prisoner

[1] The procedural provisions regulating the availability of successive postconviction applications appear in 28 U.S.C. 2244. Those provisions by their terms apply to applications for habeas corpus by state

may not file a "second or successive" application for postconviction relief in federal district court unless the prisoner first obtains certification from the court of appeals that his motion satisfies one of two enumerated grounds. For federal prisoners, those grounds are set forth in 28 U.S.C. 2255(h) (Supp. V 2011), and include (as relevant here) the existence of a claim based on "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, 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) (Supp. V 2011). If the prisoner has not obtained the required appellate certification, then the district court lacks jurisdiction to entertain the motion. See *Burton* v. *Stewart*, 549 U.S. 147, 153 (2007) (per curiam).

The statutory phrase "second or successive" as used in the AEDPA is a "term of art." *Magwood*, 130 S. Ct. at 2797 (quoting *Slack* v. *McDaniel*, 529 U.S. 473, 486 (2000)). "Congress did not define the phrase," *id.* at 2796, and this Court "has declined to interpret [it] as referring to all [applications for postconviction relief] filed second or successively in time," *Panetti* v. *Quarterman*, 551 U.S. 930, 944 (2007). For example, in *Magwood*, a state prisoner obtained relief from his death sentence—but not the adjudication of his guilt of the underlying offense—on his first federal habeas petition. 130 S. Ct. at 2793. After the State held a new sentencing proceeding at which the death sentence was reimposed, the prisoner filed a second federal habeas

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prisoners, but the statute governing federal prisoners' motions for postconviction relief incorporates the procedural provisions of Section 2244. See 28 U.S.C. 2255(h) (Supp. V 2011) ("A second or successive motion must be certified as provided in section 2244.").

petition challenging the new death sentence. *Id.* at 2793-2794. This Court held that the prisoner's second-in-time habeas petition was not a "second or successive" petition within the meaning of the AEDPA, thus permitting the prisoner to file his petition without appellate certification. *Id.* at 2792. The Court reasoned that a new criminal judgment had intervened between the prisoner's petitions; that the later petition was the prisoner's "*first* application challenging that intervening judgment"; and that "[t]he errors [the prisoner] allege[d] [were] *new*." *Id.* at 2801.[2]

The prisoner in *Magwood* sought to challenge a component of his criminal judgment (his new death sentence) that was entered after his sentence had been set aside in his first federal habeas proceeding. In ruling that this challenge could be brought in a second-in-time application, this Court expressly reserved the question whether an application for postconviction relief challenging an undisturbed adjudication of guilt is "second or successive" if it follows a grant of habeas relief as to the applicant's sentence. *Magwood*, 130 S. Ct. at 2802 & n.16.

b. The court of appeals correctly concluded that its prior decision in *Dahler* v. *United States*, 259 F.3d 763 (7th Cir. 2001), dictated that petitioner's second-in-time Section 2255 motion was "second or successive." As the majority explained (Pet. App. 8a), the prisoner in *Dahler* filed a second-in-time Section 2255 motion following an earlier, successful Section 2255 motion that resulted in a

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[2] Although *Magwood* addressed a habeas petition brought by a state prisoner under 28 U.S.C. 2254(a), the government agrees with petitioner (Pet. 11 n.2) that the holding in *Magwood* applies to federal prisoners' motions for postconviction relief under 28 U.S.C. 2255. See, *e.g.*, *Johnson* v. *United States*, 623 F.3d 41, 45-46 (2d Cir. 2010).

resentencing. The prisoner's second Section 2255 motion challenged his underlying adjudication of guilt. The court of appeals concluded that the prisoner alleged not a new error made at the resentencing, but an old error that could have been challenged earlier, including in the first Section 2255 motion. 259 F.3d at 765. In concluding that the prisoner's motion was "second or successive," *Dahler* drew a distinction between challenges to events that are novel to the resentencing, on the one hand, and challenges to events that predated the resentencing, on the other. *Dahler* concluded that, for new errors, a second-in-time motion will not be "second or successive," but that, for old errors in undisturbed components of the judgment, the motion is "second or successive." *Ibid.*; see Pet. App. 8a. The court of appeals below correctly concluded that *Magwood* did not abrogate *Dahler* because *Magwood* expressly reserved the question presented on the facts of *Dahler* and the facts of this case of whether a second-in-time Section 2255 motion raising a challenge to the underlying conviction is "second or successive." *Id.* at 8a-10a; *Magwood*, 130 S. Ct. at 2802 & n.16.

2. Since *Magwood*, some lower courts have, as the court of appeals recognized (Pet. App. 11a), reached differing conclusions about the implications of that decision for some of the many fact patterns not addressed by *Magwood*. Compare *ibid.* (second motion challenging undisturbed adjudication of guilt was "second or successive"), *In re Lampton*, 667 F.3d 585, 589 (5th Cir. 2012) (first motion under Section 2255 resulted in vacatur of one count of conviction; later motion challenging undisturbed adjudication of guilt on other counts was "second or successive"), and *In re Martin*, 398 Fed. Appx. 326, 327 (10th Cir. 2010) (first habeas petition was followed

by clerical correction of judgment; later petition was "second or successive") with *Wentzell* v. *Neven*, 674 F.3d 1124, 1125, 1126-1128 (9th Cir. 2012) (following denial of first federal habeas petition, one count of conviction was dismissed in state habeas proceedings and an amended judgment was entered; subsequent federal habeas petition challenging undisturbed counts of conviction was not "second or successive"), petition for cert. pending, No. 12-352 (filed Sept. 18, 2012), *Campbell* v. *Secretary for the Dep't of Corr.*, 447 Fed. Appx. 25, 26 (11th Cir. 2011) (per curiam) (denial of first habeas petition was followed by state court's reduction of petitioner's death sentence to life imprisonment; second habeas petition challenging undisturbed adjudication of guilt was not "second or successive"), and *Johnson* v. *United States*, 623 F.3d 41, 43, 46 (2d Cir. 2010) (first Section 2255 motion resulted in amended judgment dismissing one count of conviction on double-jeopardy grounds; subsequent motion challenging undisturbed adjudication of guilt on other counts of conviction was not "second or successive").

3. Review of the issue left open by *Magwood* at this time would be premature. The precise question reserved in *Magwood* is only one of several closely related questions that can arise when a modification or correction is made or relief is granted—on collateral review or otherwise—as to some components of a criminal judgment and the prisoner later seeks postconviction relief as to an undisturbed portion of the judgment. Many of these fact patterns have not been addressed in the courts of appeals (or by more than one court of appeals), and, therefore, the implications of the competing approaches are unclear. This Court's analysis would be aided by fuller consideration in lower courts of the range

of issues that arise in this context. For example, in addition to the question posed in this case, related questions that some lower courts have considered include:

- What if some, but fewer than all, of the counts of conviction are vacated in a Section 2255 proceeding; is a later motion "second or successive"? See *Johnson*, 623 F.3d at 45-46 (concluding that such relief resets the "second or successive" counter as to all counts of conviction).

- How should a habeas court treat the correction of a clerical error in the judgment under Federal Rule of Criminal Procedure 36 or equivalent state practice? See *Hawkins* v. *Miller-Stout*, No. 12-cv-5477, 2012 WL 6114976, at *6-*8 (W.D. Wash. Nov. 15, 2012) (rejecting argument that a "ministerial change to [the prisoner's] existing judgment" reset the "second or successive" counter); *Rice* v. *United States*, No. 11-cv-22172, 2012 WL 3095397, at *2 (S.D. Fla. July 30, 2012) (similar, with respect to clerical correction entered upon first Section 2255 motion); *Greene* v. *McDaniel*, No. 3:09-cv-601, 2012 WL 297928, at *3, *4-*5 (D. Nev. Jan. 31, 2012) (reluctantly concluding that a clerical correction does reset the "second or successive" counter as to all counts of conviction); cf. *Martin*, 398 Fed. Appx. at 326 (concluding that such a correction is not newly discovered evidence for purposes of 28 U.S.C. 2244(b)(2)(B)); *id.* at 327-328 (Hartz, J., dissenting) (concluding that such a correction resets the "second or successive" counter).

- How should a habeas court treat an amendment to a term of supervised release on a Section 2255 mo-

tion? See *United States* v. *Ramirez-Fernandez*, No. 2:89-cr-24, 2010 WL 4024600, at *3-*4 (D. Me. Oct. 12, 2010) (recommended decision concluding that, under a prior court of appeals decision in Ramirez-Fernandez's case, but perhaps not under *Magwood*, such an order did not reset the "second or successive" counter as to undisturbed portions of the judgment), aff'd, 2010 WL 4856506 (D. Me. Nov. 23, 2010).

- Do other amendments to or modifications of the details of a criminal judgment restart the "second or successive" counter? See 18 U.S.C. 3582(c) (sentence modification based on, *inter alia*, retroactive amendment of sentencing guidelines); Fed. R. Crim. P. 35(b) (sentence reduction for substantial assistance); Fed. R. Crim. P. 32.2(e) (amendment of forfeiture order); 18 U.S.C. 3583(e) (modification of terms of supervised release); Fed. R. Crim. P. 32.1(c) (same); *Mackey* v. *Sheets*, No. 3:12-cv-73, 2012 WL 3878145, at *9 (S.D. Ohio Sept. 6, 2012) (state court's modification of terms of post-release supervision does not reset the "second or successive" counter); cf. *Murphy* v. *United States*, 634 F.3d 1303, 1309 (11th Cir. 2011) (holding that postjudgment reduction of sentence for substantial assistance does not restart the AEDPA's statute of limitations by establishing a new "date on which the judgment of conviction becomes final," 28 U.S.C. 2255(f)(1) (Supp. V 2011)).
- Does the revocation of supervised release or probation under 18 U.S.C. 3565 or 3583(e)(3) and Federal Rule of Criminal Procedure 32.1(b) affect the "second or successive" counter? Cf. *Morgan* v. *Ryan*, No. 10-cv-2215, 2011 WL 6296763, at *4-

> *6 (D. Ariz. Nov. 28, 2011) (report and recommendation concluding that state revocation of probation resulted in a separate judgment, rather than a new judgment, and thus did not reset the "second or successive" counter as to the prisoner's underlying conviction), adopted, Docket entry Nos. 40, 49 (Dec. 16, 2011 & Feb. 14, 2012).

The district court decisions cited above are a testament to the variety of scenarios in which second-in-time applications for postconviction relief can arise, yet the courts of appeals have had only limited opportunity in the three years since *Magwood* was decided to articulate and apply consistent principles of law that respect *Magwood* and apply across the range of scenarios. As a result, this Court would benefit from further analysis in the circuits of such applications for postconviction relief. That would assure that the Court has in view the variety of fact patterns left unaddressed in *Magwood* and has the full benefit of lower courts' efforts to address them.

Allowing the matter to percolate in lower courts is particularly likely to assist this Court because the circuit courts that have accepted petitioner's position with respect to one of the scenarios above (*e.g.*, the Second Circuit in *Johnson* and the Ninth Circuit in *Wentzell*) have had almost no opportunity to confront the logical implications of, or limits to, that position as it applies to other scenarios. Lower courts' experience with the workability (or not) of petitioner's position could prove particularly informative to this Court if and when it returns to issues it left open in *Magwood*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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