No._____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE LUIS BUENROSTRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prisoner whose sentence has been reduced from life to 30 years imprisonment through a presidential commutation may file a new motion to vacate under 28 U.S.C. § 2255 after the sentence reduction under the "new judgment" rule in *Magwood v. Patterson*.

LIST OF PARTIES

The parties to the proceedings below were Petitioner, Jose Luis Buenrostro, and Respondent, United States of America.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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Petitioner Jose Luis Buenrostro respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in case number 17-15453.

OPINIONS BELOW

In an order filed March 1, 2017, the district court adopted the magistrate judge's finding and recommendations (Appendix, at App. 1-3) and denied petitioner Jose Luis Buenrostro's motion to vacate under 28 U.S.C. § 2255. App. 4-5.

In a published opinion filed July 13, 2018, the Ninth Circuit Court of Appeals affirmed the district court's order denying Buenrostro's § 2255 motion. App. 6-15. In that consolidated opinion, the Ninth Circuit also resolved Buenrostro's appeal of the district court's order denying his motion to reduce sentence under 18 U.S.C. § 3582(c)(2), which is not at issue here. *See* No. 16-10499.

JURISDICTION

The Ninth Circuit affirmed the district court's denial of Buenrostro's § 2255 motion on July 13, 2018. App. 6-15. This Court has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(a) and the Court's rules 13.1 and 13.3.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2255(a) states:

> **(a)** A prisoner in custody under sentence of a court established by Act of Congress claiming that right to be released upon 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, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

28 U.S.C. § 2255(h) states:

> **(h)** A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> **(1)** newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would otherwise be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> **(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

Defendant Jose Luis Buenrostro was found guilty after a jury trial of one count of conspiracy to manufacture methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. On January 8, 1997, the district court sentenced Buenrostro to mandatory life imprisonment, after finding that he had previously been convicted of at least two felony drug offenses set forth in an Information filed under 21 U.S.C. § 851. On appeal, the Ninth Circuit affirmed Buenrostro's conviction and sentence. *United States v. Buenrostro,* 163 F.3d 608 (9th Cir. 1998).

On September 13, 1999, Buenrostro filed a motion to vacate his judgment and sentence under 28 U.S.C. § 2255. Docket 219. He later filed first and second amended § 2255 motions. Dockets 233, 254. On October 6, 2003, the district court adopted the magistrate judge's findings and recommendations that Buenrostro's second amended § 2255 motion be denied. Docket 306. The Ninth Circuit affirmed. *United States v. Buenrostro,* 163 Fed. Appx. 524 (9th Cir. 2006).

On December 12, 2007, Buenrostro moved the district court to reopen his § 2255 proceeding under Federal Rule of Civil Procedure 60(b) based on a newly discovered claim that his trial counsel rendered

ineffective assistance by failing to convey a plea offer before trial. ER 10-91. After hearing argument, docket 416, at 20-29, the district court dismissed the Rule 60(b) motion as, in substance, an unauthorized second or successive § 2255 motion. Docket 341; *see* 28 U.S.C. §§ 2255(h), 2244(b)(3)(A). The Ninth Circuit affirmed the denial of Buenrostro's Rule 60(b) motion on the ground that he "had a 'ripe' ineffective assistance claim, he could have brought in his first § 2255" even if "he had no reason to know that he could bring such a claim." *United States v. Buenrostro,* 638 F.3d 720, 726 (9th Cir. 2011).

Four months later, Buenrostro applied for permission in the Ninth Circuit to file a second or successive § 2255 motion in light of three recent Supreme Court decisions concerning ineffective assistance of counsel claims, *Martinez v. Ryan,* 566 U.S. 1 (2012), *Missouri v. Frye,* 566 U.S. 134 (2012), and *Lafler v. Cooper,* 566 U.S. 156 (2012). The Ninth Circuit denied his application on the ground that neither *Martinez, Frye,* nor *Lafler* decided a new rule of constitutional law as required under § 2255(h)(2). *United States v. Buenrostro,* 697 F.3d 1137 (9th Cir. 2012).

On or about August 3, 2016, President Barack Obama commuted Buenrostro's sentence from life to 360 months imprisonment. Docket 400, at 6.

On September 15, 2016, Buenrostro filed a pro se motion for leave to file a motion to vacate under 28 U.S.C. § 2255. Docket 416. The motion raised various claims of ineffective assistance of counsel, centered on his trial counsel's failure to convey an offer for a maximum 14-year prison sentence, and requested an evidentiary hearing. Docket 416, at 5-14. Buenrostro argued that the district court had jurisdiction to entertain his § 2255 motion because it was not a "second or successive" petition under *Magwood v. Patterson,* 561 U.S. 320, 333 (2010), since the president's commutation of his sentence effectively resulted in a new judgment.

The magistrate judge disagreed, issuing findings and recommendations that Buenrostro's motion for leave to file a § 2255 motion be denied on the ground that his petition was a second or successive petition and he had not obtained authorization to file such petition from the court of appeals. *See* 28 U.S.C. §§ 2255(h), 2244(b)(3). App. 1-3. After Buenrostro filed objections to the magistrate judge's

conclusions, docket 431, the district court adopted the magistrate judge's findings and recommendations in full, denied the motion for leave to file the § 2255 motion, and declined to issue a certificate of appealability. App. 4-5. Buenrostro timely filed a notice of appeal. Docket 433.

The Ninth Circuit granted a certificate of appealability on the issue whether the president's commutation of sentence resulted in a "new judgment" under *Magwood*. No. 17-15453, docket 5-1. The order stated that Buenrostro's § 2255 motion contains at least one "constitutional claim debatable among jurists of reason, namely whether trial counsel furnished ineffective assistance by rejecting a plea offer without informing appellant of it." *Id.*

In a published opinion filed July 13, 2018, the Ninth Circuit affirmed, holding that a president's reduction of a sentence through his commutation powers is not a "new judgment" under *Magwood*. App. 13-15. Buenrostro petitions for review of that opinion.

REASONS FOR GRANTING THE PETITION

Because President Barack Obama's reduction of petitioner Jose Luis Buenrostro's sentence from life to 30 years imprisonment through commutation constitutes a "new judgment" under *Magwood v. Patterson*, his motion to vacate under 28 U.S.C. § 2255 is not barred as a "second or successive" motion.

The question here involves an important issue of federal law: whether Buenrostro's post-commutation motion to vacate his sentence under 28 U.S.C. § 2255 is a first petition challenging the "new judgment" that reduced his sentence from life to 30 years imprisonment under *Magwood v. Patterson,* 561 U.S. 320 (2010). If it is, Buenrostro's petition was timely and should have been reviewed on the merits. On the other hand, if a petition is deemed "second or successive," the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) requires the petitioner to first obtain leave from the court of appeals before filing it in the district court. 28 U.S.C. § 2255(h). If a petition is "second or successive" and the petitioner failed to obtain the required authorization from the court of appeals, the district court lacks jurisdiction to entertain the petition. *Burton v. Stewart,* 549 U.S. 147, 153 (2007). Because Buenrostro had filed a prior § 2255 motion, the district court dismissed his current motion as successive because he had

not first obtained authorization to file it from the court of appeals notwithstanding his motion challenged the new sentence and judgment. App. 1-5.

The term "second or successive" in AEDPA is a technical "term of art." *Slack v. McDaniel,* 529 U.S. 473, 486 (2000). The phrase does not refer "to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application." *Panetti v. Quarterman,* 551 U.S. 930, 944 (2007); *see, e.g., Slack,* 529 U.S. at 477 (concluding that a second habeas application was not "second or successive" after the first habeas application had been dismissed for failure to exhaust state remedies).

In *Magwood*, the petitioner was resentenced to death after his first death sentence was reversed through habeas corpus. The state inmate claimed that an aggravating factor that was also relied upon at his initial sentencing did not provide constitutionally-adequate fair notice. Because the appellate court determined that the inmate's challenge to the aggravating factor could have been raised in the inmate's first habeas petition, it concluded that his current petition was

barred as an unauthorized second or successive petition. The Supreme Court reversed, holding that the inmate's habeas petition was not barred as second or successive because it challenged a "new judgment" after resentencing for the first time. *Id.* at 331.

Starting with the text, the Court noted that the limits on second or successive petitions in § 2244(b) "apply only to a 'habeas corpus application under section 2254,' that is, an 'application for a writ of habeas corpus on behalf of a person in custody pursuant to *the judgment* of a State court.'" 561 U.S. at 332 (quoting 28 U.S.C. § 2254(1)). A habeas "petition seeks *invalidation* (in whole or in part) of the *judgment* authorizing the prisoner's confinement." *Id.* (quoting *Wilkinson v. Dotson,* 544 U.S. 74, 83 (2005)). If the writ is granted, "the State may seek a *new* judgment (through a new trial or new sentencing proceeding)." *Id.* Thus, both the text and the relief it provides support interpreting "second or successive" with respect to the particular judgment challenged. *Id.*

The Court also rejected the State's argument that such an interpretation would defeat the statutory purpose behind the rule of giving inmates only "one opportunity" to minimize piecemeal litigation

and gamesmanship. *Id.* at 334. The Court emphasized that "AEDPA uses the phrase 'second or successive' to modify 'application,'" *see* 28 U.S.C. §§ 2244(b)(1), (2); § 2255(h) ("second or successive motion"), and courts should not "replace the actual text with speculation as to Congress' intent." *Id.* Further, the State's "one opportunity" rule "would considerably undermine—if not render superfluous—the exceptions for dismissal set forth in § 2244(b)(2)." *Id.* at 335.

As a result, the Court held that "Magwood's first application challenging his new sentence under the [prior] judgment is not 'second or successive' under § 2244(b)." 561 U.S. at 342. The Court thus reversed the appellate court's reading of § 2244(b) as barring review of Magwood's fair-warning claim even though it could have been raised in a challenge to the initial judgment.

Under the *Magwood* "new judgment" rule, Buenrostro's § 2255 motion is not "second or successive."[1] President Obama's commutation

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[1] While *Magwood* considered whether a habeas petition challenging a state-court judgment under 28 U.S.C. § 2254 was "second or successive" within the meaning of § 2244(b)(2), the courts of appeals have consistently construed the phrase "second or successive" in §§ 2255(h) and 2254(b) as equivalent. *See, e.g., United States v. Buenrostro,* 638 F.3d 720, 724 (9th Cir. 2011) ("We assume, without deciding, that the [Supreme] Court's interpretation of 'second or

of Buenrostro's sentence from life to 30 years imprisonment resulted in a new judgment. As this Court has held, "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Burton v. Stewart,* 549 U.S. 147, 156 (2007) (quoting *Berman v. United States,* 302 U.S. 211, 212 (1937)); *see also In re Stansell,* 828 F.3d 412, 416 (6th Cir. 2016) ("the Court [in *Burton*] has told us that the sentence is the judgment in a criminal case, . . . meaning that any change to the custodial sentence necessarily changes the judgment") (internal citation omitted); *Ferreira v. Secretary, Dept. of Corr.*, 494 F.3d 1286, 1292 (11th Cir. 2007) ("the judgment to which AEDPA refers is the underlying conviction and *most recent sentence* that authorizes the petitioner's current detention") (emphasis added).

Here, Obama's commutation resulted in a new, reduced sentence and thus a new judgment. Because Buenrostro's § 2255 current motion is the first motion to challenge this new judgment, it is not "second or

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successive for purposes of § 2244(b)(2) applies to § 2255(h)."); *In re Lampton,* 667 F.3d 585, 588 (5th Cir. 2012) ("The phrase [second or successive] appears in both § 2244 and § 2255, and it carries the same meaning in both provisions."); *Suggs v. United States,* 705 F.3d 279, 283 n.1 (10th Cir. 2012); *Johnson v. United States,* 623 F.3d 41, 45 (2d Cir. 2010) ("the rule stated in *Magwood* applies to § 2255 motions").

successive" within the meaning of §§ 2255(h) or 2244(b). *See Wentzell v. Neven,* 674 F.3d 1124, 1127 (9th Cir. 2012) ("the basic holding of *Magwood* applies here: the latter of two petitions is not 'second or successive' if there is a 'new judgment intervening between the two habeas petitions'") (quoting *Magwood,* 561 U.S. at 341); *In re Lampton,* 667 F.3d 585, 587 (5th Cir. 2012) ("Whether a new judgment has intervened between two habeas petitions, such that the second petition can be filed without [the appellate court's] permission, depends on whether a new sentence has been imposed."). The district court thus erred in dismissing Buenrostro's § 2255 motion.

In upholding the dismissal, the Ninth Circuit acknowledged the *Magwood* holding and agreed generally that "[i]n criminal cases, '[t]he sentence *is* the judgment.'" App. 14, quoting *Gonzalez v. Sherman,* 873 F.3d 763, 769 (9th Cir. 2017) (quoting *Burton,* 549 U.S. at 156). The appellate court nonetheless affirmed the dismissal of Buenrostro's § 2255 motion on the ground that "[t]o create a new judgment, a change to a sentence must be accompanied by a legal invalidation of the prior judgment." App. 14. The court noted that a grant of a pardon does not overturn the judgment of conviction; "it is '[a]n executive action that

mitigates or sets aside *punishment* for the crime.'" App. 15, quoting *Nixon v. United States,* 506 U.S. 224, 232 (1993). Relying on *Schick v. Reed,* 419 U.S. 256, 266 (1974), the Ninth Circuit concluded that Buenrostro was not challenging a new judgment because "[a] presidential commutation does not invalidate the prior court-imposed judgment." App. 15.

But *Schick* did not involve the issue here. Nor does it justify the district court's conclusion that a commuted sentence is not a new judgment under *Magwood*. In *Schick,* the President commuted the petitioner's death sentence to life subject to the condition that he would not thereafter be eligible for parole. The Court's decision that "the President has constitutional power to attach conditions to his commutation of any sentence," 419 U.S. at 267-68, supports the conclusion that a commutation is a new sentence and new judgment. *Schick* upheld the President's power to not only reduce the length of a sentence, but also to add conditions to the sentence that were not imposed by the district court. *Id.* at 267 (holding the President has the power "to reduce the penalty in terms of a specified number of years, or

to alter it with conditions which are in themselves constitutionally unobjectionable").

Thus, a President's commutation does more than just mitigate punishment or restrict enforcement of the prior judgment; the President may also modify a judgment by imposing new conditions or otherwise altering the judgment,[2] that is, a commutation results in a new judgment. *See Jones v. Scott,* 216 F.3d 1087, 2000 U.S. App. Lexis 15973, at *2 n.1 (10th Cir. 2000) (unpublished) ("When the [state] murder sentence was commuted to life imprisonment [from death], a new judgment was entered."). The new judgment alters or invalidates the prior judgment to the extent that it is inconsistent with the commuted sentence.

For these reasons, President Obama's commutation reducing Buenrostro's sentence to 360 months constitutes a "new judgment."

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[2] For example, President Obama's August 2016 commutations not only reduced the length of prison sentences, but in some cases modified other aspects of the judgment by reducing the terms of supervised release or inmates' restitution or forfeiture obligations. *See, e.g.,* docket 400, at 6 (reducing supervised release term of Donna Marie Harriel and vacating the $2,000,000 forfeiture obligation from Cedric DeWayne Stephens's judgment); docket 400, at 7 (remitting unpaid restitution balance from Patricia Widener's sentence).

Under *Magwood,* Buenrostro's challenge to "his new sentence under the [commutation] judgment is not 'second or successive.'" 561 U.S. at 342. The Court thus should grant certiorari because the Ninth Circuit's holding that the reduction in Buenrostro's sentence from life imprisonment to 30 years did not result in a "new judgment" is error and conflicts with *Magwood* and *Burton*.

CONCLUSION

For these reasons, the Court should grant Buenrostro's petition for writ of certiorari.

Dated: September 18, 2018

Respectfully submitted,

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