No. 20-490

In the Supreme Court of the United States

DAMIEN FREEMAN

Petitioner,

v.

LYNEAL WAINWRIGHT, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. If a state-court order resentencing a criminal defendant leaves the defendant's conviction undisturbed, does that order nonetheless restart the one-year limitations period applicable to a habeas claim challenging the undisturbed conviction?

2. If a state court corrects a sentencing error through a *nunc pro tunc* entry, and if that correction results in the defendant receiving a more favorable sentence, does the entry constitute a new "judgment" that restarts 28 U.S.C. §2244(d)(1)(A)'s one-year limitations period?

LIST OF PARTIES

The petitioner is Damien Freeman, an inmate at the Marion Correctional Institution.

The respondent is Lyneal Wainwright, Warden of the Marion Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

Freeman's list of related proceedings is complete and correct.

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INTRODUCTION

This is a case about 28 U.S.C. §2244(d)(1)(A). That section gives habeas petitioners one year to challenge a state-court "judgment" after the judgment becomes final. In *Magwood v. Patterson*, 561 U.S. 320 (2010), this Court held that the resentencing of a criminal defendant, even if it leaves the defendant's conviction undisturbed, is a new "judgment" with respect to the new sentence. *Id*. at 342. Thus, after *Magwood*, a criminal defendant who is resentenced has another year, under §2244(d)(1)(A), to file a habeas petition challenging his new sentence.

Magwood declined to address, however, whether resentencing orders *also* constitute judgments with respect to convictions they leave undisturbed. 561 U.S. at 342. Thus, *Magwood* does not resolve the question whether a resentencing order that alters a defendant's sentence without disturbing his conviction restarts the one-year limitations period for claims challenging the conviction.

Damien Freeman asks this Court to answer the question that *Magwood* left open—a question that is the subject of an entrenched circuit split. But the Court cannot reach that question until it resolves a logically antecedent question that Freeman fails to brief, that the Sixth Circuit's decision below rested upon, and that is the subject of yet another circuit split. That question is this: What types of alterations to a sentence qualify as resentencings, and thus new "judgments," under *Magwood*? Because the question on which Freeman seeks review depends on the answer to a different question that Freeman ignores, this is a poor vehicle for addressing the question he raises.

STATEMENT

1. Damien Freeman murdered a baby. In 2001, he pleaded guilty. Pet.App.34a. The trial court accepted his plea and, in 2002, imposed a sentence of fifteen years to life. The court also imposed a term of postrelease control, which would have required Freeman to remain under state supervision if he were ever released from prison. *Id.* Freeman did not timely appeal. He tried to file a delayed appeal, but the state appellate court rejected his request. Pet.App.34a–35a.

Fourteen years after his conviction, Freeman filed a motion to withdraw his guilty plea. Freeman claimed that his plea was not knowing, intelligent, and voluntary. Pet.App.36a. He further claimed that, despite his plea, the trial court erred in finding him guilty of murder. Pet.App.37a. The trial court denied his motion.

The state court of appeals affirmed in part and remanded in part. It agreed with the trial court's denial of Freeman's request to withdraw his plea. Pet.App.34a. It thus affirmed on that issue. But the court of appeals noticed an error in Freeman's sentencing entry. The error involved the trial court's imposition, in 2002, of postrelease control. The court of appeals determined that postrelease control is not a permissible sentence for murder. It thus remanded to the trial court with instructions to enter a revised sentencing entry containing no postrelease-control sentence. Pet.App.37a. Ohio case law allows trial courts to make such alterations to sentences with a *nunc pro tunc* entry. *See* Pet.App.37a; *see also State ex rel. Womack v. Marsh*, 128 Ohio St. 3d 303, 306 (2011). On remand, the trial court did just that. In January

2017, it entered a *nunc pro tunc* order removing the imposition of postrelease control from Freeman's sentencing entry. Pet.App.3a. In all other respects, Freeman's conviction and sentence remained unaffected.

2. Five months later, Freeman filed a petition for a writ of habeas corpus in the Northern District of Ohio. Pet.App.4a. In it, Freeman challenged (among other things) the validity of his guilty plea and thus the validity of his conviction.

The District Court dismissed Freeman's petition as untimely under 28 U.S.C. §2244(d)(1)(A). Pet.App.4a. That section gives habeas petitioners one year to file their petitions from "the date on which the [state-court] judgment became final." §2244(d)(1)(A). The District Court determined that Freeman's judgment became final in 2002, when he failed timely to appeal his sentence. Thus, because Freeman filed his federal habeas petition in 2017, his petition was untimely. Pet.App.23a–24a.

The Sixth Circuit affirmed. The majority explained that Freeman's petition was timely filed only if the 2017 *nunc pro tunc* entry modifying Freeman's sentence qualified as a new "judgment" under §2244(d)(1)(A). Under Sixth Circuit precedent, alterations to a previously-imposed sentence generally constitute a new "judgment" that restarts the one-year clock under §2244(d)(1)(A). *King v. Morgan*, 807 F.3d 154, 156 (6th Cir. 2015). But the circuit's precedent creates an exception: when a state court engages in only a "limited resentencing," and when that court alters the sentence in a way that leaves the petitioner better off than he was under the original sentence, the alteration does not constitute a new "judgment." Pet.App.5a (quoting *Crangle v. Kelly*, 838 F.3d 673,

678 (6th Cir. 2016)). That exception, the court held, applied to Freeman's case. The majority reasoned that, if the *nunc pro tunc* entry constituted a "resentencing" at all, it qualified as a "limited" resentencing—the state trial court modified just one part of Freeman's sentence by striking the imposition of postrelease control, and it did so without even holding a hearing. Pet.App.6a–7a. And the change made Freeman better off, not worse off, by freeing him from all postrelease-control obligations. Thus, the state trial court's action in 2017 was the sort of limited resentencing that does not qualify as a new "judgment," and thus does not restart the one-year clock under §2244(d)(1)(A). Freeman's petition was therefore untimely. Pet.App.7a.

Judge Donald dissented. She disputed the majority's conclusion that circuit precedent compelled affirmance. Pet.App.12a–13a. And she argued that *Burton v. Stewart*, 549 U.S. 147 (2007), required reversal. Judge Donald read *Burton* to mean that any alteration to a sentence constitutes a new "judgment" that restarts the one-year clock under §2244(d)(1)(A), without regard to whether the altered sentence makes the defendant better off or worse off. Pet.App.16a–17a.

3. Freeman timely filed a petition for a writ of *certiorari*.

REASONS FOR DENYING THE WRIT

Freeman asks this Court to decide "[w]hether the statute of limitations for filing a habeas petition begins when the new judgment entered following resentencing becomes final." Pet.i. This question conflates two separate questions. The first question, which is the focus of Freeman's petition, asks what type of claims may be brought after a resentencing restarts

the limitations period. That question is indeed the subject of a circuit split. But its resolution assumes the answer to a second question on which the Sixth Circuit's ruling turned—a question that is also the subject of a circuit split. The question is this: What types of sentencing alterations constitute new "judgments" that restart the limitations period? This question matters, because the question whether Freeman can challenge his conviction arises only if his petition was timely, and the petition was timely only if the *nunc pro tunc* entry in state court was a "judgment" for purposes of §2244(d)(1). The Sixth Circuit held that Freeman's petition was *not* a new "judgment," and so the *Magwood* issue never arose. Because the Court likely cannot reach the *Magwood* issue on which Freeman seeks review without addressing the second question, the Court should deny Freeman's petition.

A. The circuits are split regarding whether a resentencing constitutes a new "judgment" with respect to a conviction undisturbed by the resentencing.

Freeman's habeas petition challenges his conviction. For example, Freeman claims he is entitled to habeas relief on the ground that his plea was invalid. It is undisputed that the challenge to his conviction is untimely if the relevant "judgment" became final in 2002. It is also undisputed that no "judgment" since 2002 has ever altered Freeman's conviction. But Freeman's *sentence* was altered by a *nunc pro tunc* order in 2017. Freeman claims that alteration constitutes a new "judgment" that restarts the one-year limitations period under §2244(d)(1)(A). According to Freeman, the restarted limitations period gave him an additional year to file a habeas petition challenging his undisturbed murder conviction.

1. Freeman's argument implicates a circuit split that grows out of a question this Court left unresolved in *Magwood v. Patterson*, 561 U.S. 320 (2010). That case concerned §2244(b), which generally forbids habeas petitioners from filing "second or successive" petitions. §2244(b)(1). *Magwood* held that, if a criminal defendant who already filed one habeas petition is later resentenced, a second petition challenging that sentence is not barred as "second or successive." The Court reasoned that a petition is "second or successive" only if it challenges the same "judgment" as an earlier-filed habeas petition. 561 U.S. at 331–33. Because a newly imposed sentence constitutes a new "judgment," the Court reasoned, a habeas petition challenging that sentence is neither second nor successive. *Id.*

Although *Magwood* did not involve the meaning of §2244(d)(1)(A), its holding regarding the nature of a "judgment" bears directly on the meaning of that statute. Section 2244(d)(1)(A) says that the one-year period in which to file a habeas petition challenging "the *judgment* of a State court" may run from "the date on which the *judgment* became final." (emphasis added). Since *Magwood* makes clear that a resentencing is a "judgment," it suggests that the limitations period can run from the time the resentencing order becomes final. *See Crangle v. Kelly*, 838 F.3d 673, 677–78 (6th Cir. 2016).

Critically, however, *Magwood* declined to address an important issue. The issue is this: Does a resentencing order that has no effect on the underlying conviction qualify as a "judgment" with respect to *both* the "*new* sentence" and the "*undisturbed* conviction"? 531 U.S. at 342. The Court left this question for another day; it had "no occasion to address that

question," it explained, "because Magwood ha[d] not attempted to challenge his underlying conviction." *Id.* Thus, for purposes of resolving *Magwood* itself, it was enough to say that a resentencing order is the "judgment" at issue in a habeas petition challenging the new sentence.

2. In the years since *Magwood*, the circuits have split three ways on the question whether a resentencing order that leaves a conviction undisturbed is a new "judgment" with respect to that undisturbed conviction. And that disagreement produces three different answers to the question whether a resentencing order restarts the one-year limitations period, under §2244(d)(1)(A), for habeas claims challenging undisturbed convictions.

Most courts say that a resentencing is a new judgment with respect to both the "*new* sentence" and the "*undisturbed* conviction." *Magwood*, 561 U.S. at 342. That is the view in the Second, Fourth, Sixth, Ninth, and Eleventh Circuits. *Johnson v. United States*, 623 F.3d 41, 45–46 (2d Cir. 2010); *In re Gray*, 850 F.3d 139, 142–43 (4th Cir. 2017); *King v. Morgan*, 807 F.3d 154, 157 (6th Cir. 2015); *Smith v. Williams*, 871 F.3d 684, 687–88 (9th Cir. 2017); *Thompson v. Fla. Dep't of Corr.*, 606 F. App'x 495, 505–06 (11th Cir. 2015). These courts reason that "a judgment in a criminal case 'includes both the adjudication of guilt and the sentence.'" *King*, 807 F.3d at 157–58 (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)). What is more, these courts say, there can be only one judgment. *Wentzell v. Neven*, 674 F.3d 1124, 1127–28 (9th Cir. 2012); *In re Stansell*, 828 F.3d 412, 418 (6th Cir. 2016). Thus, the thinking goes, if the resentencing constitutes a new judgment, it necessarily constitutes a new judgment as to the entire case—the sentence

and the conviction itself. Applied to §2244(d)(1)(A), this means that a resentencing order restarts the one-year limitations period for both the new sentence and the undisturbed conviction. *See Smith*, 871 F.3d at 687–88.

In contrast, the Seventh and Tenth Circuits have held that the resentencing is *not* a new "judgment" with respect to an undisturbed conviction. *Suggs v. United States*, 705 F.3d 279, 285 (7th Cir. 2013); *Prendergast v. Clements*, 699 F.3d 1182, 1187 (10th Cir. 2012). Under that rule, resentencings that do not affect the underlying conviction do not restart the limitations period for habeas claims challenging the conviction. *Prendergast*, 699 F.3d at 1186–87. And such claims are second or successive if the petitioner already sought habeas relief. *Suggs*, 705 F.3d at 284–85. To hold otherwise—to say that a resentencing qualifies as a new "judgment" with respect to an undisturbed conviction—would "have the odd effect of interpreting AEDPA to relax limits on successive claims beyond the pre-AEDPA standards." *Id.* at 285. It would also create a "perverse incentive" for habeas petitioners: it would encourage them "to commit some infraction, incur resentencing, allege a constitutional violation in the resentencing, and resuscitate the time-barred claims." *Prendergast*, 699 F.3d at 1187; *see also Turner v. Brown*, 845 F.3d 294, 297–99 (7th Cir. 2017) (cited at Pet.14) (holding, based in part on *Suggs*, that when a state court's new "judgment" does not affect a conviction, it does not restart the limitations period under 2244(d)(1)(A) regarding challenges to that conviction).

Two other circuits, the Third and Fifth Circuits, take a middle path. In those courts, a resentencing is a new judgment with respect to the conviction for

which the sentence was imposed, but not for convictions on counts unrelated to the altered sentence. *Romansky v. Sci*, 933 F.3d 293, 300–01 (3d Cir. 2019); *In re Lampton*, 667 F.3d 585, 589 (5th Cir. 2012). (*Scott v. Hubert*, 635 F.3d 659 (5th Cir. 2011) (cited at Pet.12), is not to the contrary. *Scott* held that a resentencing constitutes a judgment with respect to both the sentence and the conviction, *id.* at 664, but it did not consider, as *Lampton* did, whether a resentencing on one criminal count constitutes a judgment as to convictions underlying other criminal counts.) Under that rule, a resentencing restarts the one-year limitations period for habeas claims challenging both the new sentence and the related, underlying conviction.

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Freeman's case comes out differently depending on which rule applies. Under the majority view, the *nunc pro tunc* order, if it constitutes a new "judgment," permits Freeman to challenge both his new sentence and his conviction. The same result obtains under the rule announced by the Third and Fifth Circuits, because the *nunc pro tunc* order altered the sentence for the murder conviction Freeman now seeks to challenge. But in the Seventh and Tenth Circuits, Freeman would be unable to argue that the modification to his sentence restarted the one-year period for filing a habeas petition challenging his underlying conviction.

B. This is a poor vehicle for addressing the question left open in *Magwood*.

The Sixth Circuit did not dismiss Freeman's habeas petition based on its resolution of the *Magwood* issue. Indeed, it did not even reach the question whether Freeman could challenge the conviction his resentencing left undisturbed. Instead, the Sixth

Circuit dismissed Freeman's petition because it determined that the changes the Ohio courts made to his sentence did not qualify as a resentencing, and thus a new "judgment," *at all*. Pet.App.7a. So, before reaching the circuit split on which Freeman's petition focuses, the Court would likely need to resolve another question—a question that is itself the subject of a circuit split—that Freeman's petition largely ignores. That question is this: What types of alterations to a sentence qualify as "judgments" for purposes of §2244?

1. Every circuit to consider the question appears to agree that "not every action that alters a sentence necessarily constitutes a new judgment for purposes of §2244." *Osbourne v. Sec'y, Fla. Dep't of Corr.*, 968 F.3d 1261, 1265 (11th Cir. 2020) (*per curiam*); *see also Dyab v. United States*, 855 F.3d 919, 923 (8th Cir. 2017). They disagree however, about the sorts of changes that qualify as new judgments.

The Second and Ninth Circuits have held that all substantive changes to sentences constitute new judgments; only ministerial changes, like the correction of typos and clerical errors, fail to qualify as new judgments. In the Second Circuit's words, alterations to sentences constitute new "judgments" unless they require only "a routine, nondisrectionary act" that "could not have been appealed on any valid ground." *Burrell v. United States*, 467 F.3d 160, 161 (2d Cir. 2006) (per Sotomayor, J.); *accord Marmolejos v. United States*, 789 F.3d 66, 71 (2d Cir. 2015); *Gonzalez v. United States*, 792 F.3d 232, 236 (2d Cir. 2015). The Ninth Circuit states the rule in similar terms. In that circuit, every alteration that "replaces an invalid sentence with a valid one" constitutes a new judgment. *Gonzalez v. Sherman*, 873 F.3d 763, 769–70 (9th Cir.

2017); *see also Turner v. Baker*, 912 F.3d 1236, 1240 (9th Cir. 2019). In contrast, an alteration does not give rise to a new judgment if state law makes clear that the change *does not* affect the validity of the initially-imposed sentence, or if the changes are purely "ministerial." *Colbert v. Haynes*, 954 F.3d 1232, 1236 (9th Cir. 2020).

The Fifth, Sixth, Seventh, and Eleventh Circuits, by contrast, permit courts to make a wide variety of changes to a sentence without creating a new "judgment." For example, the Eleventh Circuit has held that alterations made by a state court through a *nunc pro tunc* entry relate back to the original judgment and thus do not constitute new "judgments." *Osbourne*, 968 F.3d at 1265. These courts have also held that orders *reducing* an inmate's sentence do not constitute new "judgments." They have said so in cases brought by federal inmates who have their sentences reduced—under Criminal Rule 35(b) or 18 U.S.C. §3582(b), for example—and who then file a postconviction petition under 28 U.S.C. §2255. *Murphy v. United States*, 634 F.3d 1303, 1309 (11th Cir. 2011); *White v. United States*, 745 F.3d 834, 836 (7th Cir. 2014); *United States v. Jones*, 796 F.3d 483, 486–87 (5th Cir. 2015). The same logic applies when *state* prisoners file petitions under 28 U.S.C. §2254 following state-court orders reducing their sentences. And, at least in the Sixth Circuit, the same rule applies. *Crangle*, 838 F.3d at 678; Pet.App.4a–6a; *but see Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273, 1281 (11th Cir. 2014) (treating state-court order reducing sentence as a new "judgment").

2. The question whether the *nunc pro tunc* entry in Freeman's case qualified as a new "judgment" is logically antecedent to the question *Magwood* left

open. The alteration to Freeman's sentence does not qualify as a new "judgment" at all under the rule in many circuits—either because it was done through a *nunc pro tunc* entry, *Osbourne*, 968 F.3d at 1265, or because it left Freeman better off than he was before the resentencing, PetApp.4a–6a. Thus, the one-year limitations period did not restart, and the *Magwood* question never arises. But under the rule in the Second and Ninth Circuits, the *nunc pro tunc* entry was a new "judgment," because the entry altered the substance of Freeman's sentence—the change was not just ministerial.

If the Court were to grant review, it would need to consider whether the *nunc pro tunc* entry in Freeman's case was a "judgment" at all. That issue is squarely presented. Indeed, it is the *only* issue squarely presented, because it formed the basis of the Sixth Circuit's decision below and because there is no reason to reach the *Magwood* issue unless the *nunc pro tunc* entry constitutes a judgment. That is not the basis for Freeman's petition for a writ of *certiorari*, however. The unavoidable presentation of this question makes this a poor vehicle for resolving the *Magwood* issue—the issue on which Freeman *does* seek review.

CONCLUSION

The Court should deny the petition for a writ of *certiorari*.

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NOVEMBER 2020