No. 20-490

IN THE
Supreme Court of the United States

DAMIEN FREEMAN,
Petitioner,

v.

LYNEAL WAINWRIGHT,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents the recurring and important question of how to apply the statute of limitations under 28 U.S.C. § 2244(d)(1) when a habeas petitioner has been resentenced. The parties agree that the circuits have taken conflicting approaches to deciding this question. They also agree that the petition in this case, which the Sixth Circuit held was barred by the statute of limitations, would have been timely in other circuits. The main disagreement is simply whether the case implicates one deeply entrenched circuit split or two such splits. Petitioner disagrees with respondent's characterization of the widely varying approaches that courts have taken, but perhaps he should not. If the case implicates two circuit splits, as respondent asserts, that is even more reason for the Court to grant review.

I. The Court's Review Is Warranted Under Respondent's Framing of the Issue.

Respondent views this case as presenting two issues under *Magwood v. Patterson*, 561 U.S. 320 (2010). The first is "the question that *Magwood* left open," which respondent characterizes as "whether resentencing orders *also* constitute judgments with respect to convictions they leave undisturbed." Br. in Opp. 1. And the second question is: "What types of alterations to a sentence qualify as resentencings, and thus new 'judgments,' under *Magwood*?" *Id.*

Respondent concedes that the first question "is the subject of an entrenched circuit split." *Id.* According to respondent, the circuits have "split three ways" on this question. *Id.* at 7. Five courts—the Second,

Fourth, Sixth, Ninth, and Eleventh Circuits—hold that resentencing results in a new judgment with respect to both the sentence and the underlying conviction. *Id.* Two courts—the Seventh and Tenth Circuits—hold that resentencing is not a new judgment with respect to an underlying conviction. *Id.* at 8. And two other courts—the Third and Fifth Circuits—"take a middle path" in which resentencing results in a new judgment for the conviction on which resentencing occurred, but not for other counts of conviction. *Id.* at 8-9.

Respondent acknowledges that "Freeman's case comes out differently depending on which rule applies." *Id.* at 9. And she concedes that, if petitioner's resentencing resulted in a new judgment, he could challenge his undisturbed, underlying conviction in seven circuits, and only the Seventh and Tenth Circuits would view that challenge as time-barred. *Id.*

On the second question, respondent again identifies an entrenched circuit split. *Id.* at 10. According to respondent, "[t]he Second and Ninth Circuits have held that all substantive changes to sentences constitute new judgments." *Id.* In contrast, "[t]he Fifth, Sixth, Seventh, and Eleventh Circuits . . . permit courts to make a wide variety of changes to a sentence without creating a new 'judgment.'" *Id.* at 11.

Respondent also again acknowledges that petitioner's case would come out differently in different circuits. *Id.* at 12. His resentencing resulted in a new judgment under the rule applied in the Second and Ninth Circuits, but (in respondent's view) it would not

result in a new judgment in the Sixth and Eleventh Circuits. *Id.* at 11-12.[1]

As discussed below, petitioner disagrees with this framing. For one obvious reason, this case does not involve the "second or successive" bar at issue in *Magwood*. It presents a question of how to apply one of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")'s statute-of-limitations provisions. *See infra* Part II. But the Court need not resolve the disagreement over how many circuit splits are implicated to decide that review is warranted. Whether there is one split or two, the fact that the courts of appeals are deeply divided, and that the disagreement affected the outcome of this case, provides a compelling basis to grant the petition.

II. The Parties' Different Framing of the Issue Does Not Create a Vehicle Problem.

Despite acknowledging the divergent approaches taken by courts of appeals, respondent contends that this case provides a poor vehicle for resolving those issues. That is because, in respondent's view, the petition focuses primarily on the question left open in

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[1] Respondent includes the Fifth and Seventh Circuits in the circuit split, but does not express a view on how those courts would treat the petition in this case. That is likely because the cases respondent cites do not even involve § 2244, much less apply the statute of limitations under that provision. The decisions from those courts that actually apply the relevant limitations provision demonstrate that the petition here would have been timely in those circuits. Pet. 12-13 (citing *Scott v. Hubert*, 635 F.3d 659 (5th Cir. 2011)), 14 (citing *Turner v. Brown*, 845 F.3d 294 (7th Cir. 2017)).

Magwood, while "largely ignor[ing]" the "logically antecedent" question under *Magwood* whether petitioner's resentencing resulted in a new judgment. Br. in Opp. 9-12. This argument fails for numerous reasons. Petitioner, not respondent, properly frames the question presented. But even if the case presented two distinct issues, there would be no vehicle problem because both issues are properly before the Court and warrant further review.

A. Petitioner properly frames the question presented as whether the petition was filed within the limitations period. Respondent attempts to treat this case as presenting the question left open in *Magwood*, and an antecedent question under *Magwood*, but that is incorrect. "*Magwood* left open the question whether a motion following a resentencing is 'second or successive' where it challenges the underlying conviction, not the resentencing." *Suggs v. United States*, 705 F.3d 279, 284 (7th Cir. 2013).[2] While this case similarly involves a petitioner challenging an underlying conviction, not the resentencing, it does not present any question regarding the "second or successive" bar because this is petitioner's first federal habeas petition.

The statute-of-limitations and second-or-successive questions may be closely related, *see, e.g.*, Pet. 3, but that does not mean they are the same issue. They

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[2] *See also Osbourne v. Sec'y, Fla. Dep't of Corr.*, 968 F.3d 1261, 1265 (11th Cir. 2020) (describing "the question left open in *Magwood* as . . . whether a habeas petition is 'second or successive' for purposes of § 2244 where it challenges an undisturbed conviction following the imposition of only a new sentence").

are governed by different statutory provisions containing different statutory language. *Compare* 28 U.S.C. § 2244(b), *with id.* § 2244(d)(1)(A). Nor do courts of appeals uniformly treat the two procedural bars as presenting the same issue.

The Seventh Circuit's decisions show how some courts treat the statute-of-limitations and second-or-successive issues very differently. When that court of appeals addressed § 2244(d)(1)(A)'s statute of limitations, it held that a resentencing created a new judgment for both the convictions and sentences for the counts subject to resentencing. *See Turner v. Brown*, 845 F.3d 294, 298 (7th Cir. 2017). But that court has also held that the second-or-successive bar applies to preclude a second habeas petition challenging the underlying conviction even when the petitioner was resentenced on the same count. *Suggs*, 705 F.3d at 280–81. As a result, if a prisoner's first habeas petition leads to a resentencing and his second petition challenges the underlying conviction, Seventh Circuit precedent would dictate that the second petition (if filed within a year of resentencing) would be timely, yet barred as second or successive.

Given that courts do not treat the statute-of-limitations and second-or-successive questions identically, the petition focused on the split of authority involving circuit court decisions applying § 2244(d)(1)(A)'s statute of limitations. In fact, all of the decisions comprising the circuit split identified in the petition involve the specific question of applying AEDPA's statute of limitations when a habeas petitioner has previously been resentenced. None of those

decisions approach that issue as presenting two separate questions under *Magwood*.[3]

Respondent, in contrast, asserts two circuit splits based on cases deciding a variety of issues. Respondent characterizes the first question presented as the question left open in *Magwood*, but it cites cases applying either that second-or-successive bar or AEDPA's statute of limitations. Respondent's second circuit split, involving decisions from five other circuits on the "logically antecedent" question under *Magwood*, is even further afield. None of the decisions from those five circuits even involves § 2244(d)'s statute-of-limitations provision. They instead involve everything from applying the second-or-successive bar in cases where a federal prisoner obtains a limited resentencing under 18 U.S.C. § 3582 to determining how the mandate rule affects the finality of a judgment. *Compare United States v. Jones*, 796 F.3d 483, 484 (5th Cir. 2015), *with Burrell v. United States*, 467 F.3d 160, 163 (2d Cir. 2006). If respondent were correct that applying AEDPA's statute-of-limitations provision requires consideration of two distinct questions, then surely she could find a case taking this approach.

B. Even if the Court prefers to treat the statute-of-limitations issue as presenting two distinct questions, this case provides an excellent vehicle for deciding

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[3] Determining whether (and to what extent) a resentencing results in a new judgment is relevant and often important to applying the statute of limitations. But respondent overlooks the critical point: courts treat that determination as a part of the statute-of-limitations analysis, not as an independent, antecedent step of that analysis.

both. As respondent seems to acknowledge, the antecedent question is fairly included in the question presented and thus is properly before the Court. She criticizes the amount of attention this issue received in the petition, but that criticism is both misplaced and irrelevant.

The Court may consider any issue that is "fairly included" in the question presented. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992); *see* S. Ct. R. 14.1(a). Far from arguing that the purported subsidiary question does not satisfy this test, respondent concedes that it is "squarely presented" here. Br. in Opp. 12. Indeed, respondent's characterization of the issue as a logically antecedent question that must be resolved before deciding the question presented confirms that it is properly before the Court. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 579 n.4 (2008) ("[If] the question presented cannot genuinely be answered without addressing the subsidiary question, . . . the latter question is 'fairly included' within the former.").[4]

Nor does the petition's treatment of this issue render the case a poor vehicle. The petition addresses at length the question of whether a resentencing resulted in a new judgment. The petition did not treat the issue as a distinct question presented because courts applying AEDPA's statute of limitations do not

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[4] Petitioner disagrees with the suggestion that the Court must decide respondent's two questions in any particular order. Respondent does not contend—nor could she—that the subsidiary question is jurisdictional. The Court may thus decide the questions in whichever order it chooses.

treat it as a separate question. *See supra* pp. 4-6 & n.3. But petitioner's discussion of the circuit split repeatedly mentions the differing views on whether (and to what extent) a resentencing resulted in a new "judgment" under § 2244(d)(1)(A).[5]

Petitioner also cannot be accused of ignoring the cases that respondent identifies as creating the split on the purported antecedent question. Respondent relies on decisions from the Fifth and Seventh Circuits holding that a new judgment does not result from federal sentencing reductions under 18 U.S.C. § 3582 and federal sentencing modifications under Federal Rule of Criminal Procedure 35(b). Br. in Opp. 11. But the petition specifically addressed that line of cases and explained why they do not support the decision below. Pet. 21-22.

Respondent's split includes decisions from the Second and Ninth Circuits applying the second-or-successive bar in a way that respondent concedes is favorable for petitioner. Br. in Opp. 10-11. Petitioner did not cite those specific cases, but he relied on a Ninth Circuit decision applying AEDPA's statute of limitations in a way that was favorable to petitioner. Pet. 10-11 (discussing *Smith v. Williams*, 871 F.3d 684 (9th Cir. 2017)). Respondent hardly identifies a

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[5] *See, e.g.*, Pet. 10 ("Four courts of appeals have held that a resentencing results in a new judgment that entirely replaces the original judgment."), 14 ("Two courts of appeals treat each count of conviction as a separate judgment, and thus resentencing creates new judgments only for the counts subject to resentencing."), 16 ("[T]he Sixth Circuit held that a limited resentencing resulting in a better-than-before sentence does not create a new judgment.").

vehicle problem by pointing out that peititoner cited only some of the many decisions that support him.

That leaves the Eleventh Circuit's recent decision holding that a petition was barred as second or successive where resentencing occurred through the issuance of a *nunc pro tunc* order. *See Osbourne v. Sec'y, Fla. Dep't of Corr.*, 968 F.3d 1261, 1263 (11th Cir. 2020). To the extent that *Osbourne* held that the *nunc pro tunc* label is dispositive of the question of whether a resentencing resulted in a new judgment, it squarely conflicts with the Sixth Circuit case law holding that resentencing by *nunc pro tunc* order can result in a new judgment. Pet. App. 5a-6a (*nunc pro tunc* order results in new judgement if new sentence is worse than the original (citing *Crangle v. Kelly*, 838 F.3d 673, 678 (6th Cir. 2016)), 12a (same). The decision is also in tension with Eleventh Circuit precedent applying AEDPA's statute of limitations, discussed in the petition, which holds that the limitations period begins when the prisoner's corrected sentence becomes final, even where he raises claims "concerning only his original conviction and not his subsequent resentencing." Pet. 11 & n.1 (discussing *Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286 (11th Cir. 2007), and *Thompson v. Fla. Dep't of Corr.*, 606 F. App'x 495, 506 (11th Cir. 2015)).

In any event, the thoroughness of the petition's briefing of the purported "logically antecedent" question should be irrelevant to the Court's decision whether to grant the petition. The issue is properly before the Court and between the petition, brief in opposition, and this reply, the issue has been

adequately vented. Nor is there any reason to doubt that merits briefing would fully address the issue.

In short, respondent has not identified any vehicle problem that should preclude this Court's review. Regardless of whether the case presents one or two circuit splits, the issue (or issues) is properly before the Court. There is thus no impediment to the Court deciding, as petitioner urges, that his habeas petition was timely filed because this suit began within a year of his resentencing becoming final.

III. Respondent Offers No Defense of the Sixth Circuit's Reasoning.

Under the decision below, resentencing restarts the limitations period for filing a habeas petition only if the petitioner had a full resentencing or the petitioner had a limited resentencing and received a worse-than-before sentence. Pet. App. 5a, 9a. If, as here, the petitioner had a limited resentencing and received a better-than-before sentence, the limitations period runs from the original judgment. *Id.* at 7a. No matter how respondent divides up the question presented, she cannot identify any other circuit that considers these same factors.

Nor does repondent even attempt to defend the reasoning of the decision below. The proper interpretation of § 2244(d)(1)(A) must start with the text of that provision. And there is simply nothing in the statutory text that distinguishes between limited and full resentencings or better- and worse-than-before sentences. Pet. 21. As petitioner explained, both statutory text and precedent support the view taken by four circuits that the limitations period for

all claims begins when the new judgment entered following resentencing becomes final. *Id.* at 18-21; *see id.* at 10-13. Respondent does not respond to any of these points.

Respondent contends that many circuits "permit courts to make a wide variety of changes to a sentence without creating a new 'judgment.'" Br. in Opp. 11. But she cannot identify any other circuit that decides whether a resentencing results in a new sentence by considering whether the petitioner received a full or limited resentencing and whether the new sentence was better or worse than the prior sentence. Nor can respondent dismiss the resentencing here as resulting in a minor, non-substantive change to petitioner's sentence. To the contrary, respondent concedes that the resentencing here "altered the substance of Freeman's sentence—the change was not just ministerial." *Id.* at 12. As the magistrate judge observed, the facts here show that "Freeman undoubtedly received a new sentence in 2015," M.J. Op. 4, because the state trial court "vacat[ed]" petitioner's "12/14/2001" judgment; accepted, again, petitioner's "plea of guilty to [felony] murder"; and "impose[d] a prison term . . . of 15 years to life" without imposing a period of post-release control. Pet. App. 30a–31a. Nor did the Sixth Circuit treat the sentencing change as minor. All that mattered to the court below was that the resentencing was "limited" and resulted in a better-than-before sentence. *Id.* at 2a, 5a-7a.

The petition showed that most courts of appeals would have held that petitioner had timely filed his habeas petition. Pet. 10-18. Even by dividing up the

circuit split, respondent cannot dispute that point. Nor does repondent's alternative framing of the case provide any reason to think that the Sixth Circuit's analysis was correct. This Court should grant the petition and hold that it was not.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

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