

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2020

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PHILLIP MINOR, *Petitioner*,

v.

RENEE BAKER, Warden, et al., *Respondents*.

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Did the Ninth Circuit err by not “second guessing” the decision of the state court as to the timing of Mr. Minor’s petition, when the state court decision did not take into account the filing of a new intervening judgment that re-started Mr. Minor’s post-conviction statute of limitations?
2. Did the Ninth Circuit decide an important question of federal law that has not been, but should be, settled by this Court, specifically what constitutes a “new intervening judgment” for purposes of Title 28 United States Code Section 2244?

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## I.

### PRAYER FOR RELIEF

Mr. Phillip Minor respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) to review its decision dismissing his appeal. The basis of this petition is that the Ninth Circuit erroneously affirmed the decision by the United States District Court (Nevada) that dismissed Mr. Minor’s petition for writ of habeas corpus as untimely. The Ninth Circuit was erroneous in its decision when recent case law contradicts and should have superseded the decision of the Nevada state court, particularly the re-starting of the statute of limitations for a petition for writ of habeas corpus after an amended judgment was entered in Mr. Minor’s case.

In the alternative, the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. This includes the split of authority between the Sixth Circuit and the Ninth Circuit as to what type of change to a judgment constitutes a “new intervening judgment” for habeas purposes. The Sixth Circuit agreed with the Fifth, Sixth, Seventh, and Eleventh Circuits in holding that a new judgment that reduces the amount of time a petitioner serves does not constitute a “new judgment” for purposes of post-conviction timing and relief. The Ninth Circuit does not differentiate between whether the new intervening judgment was better or worse for a petitioner, and instead differentiates between an amended judgment that has a substantive change as opposed to a “scrivener’s error” or a “ministerial act.” *Gonzalez v. Sherman*, 873 F.3d 763, 772 (9th Cir. 2017).

## II.

### OPINION BELOW

A three-judge panel of the Ninth Circuit entered judgment in a memorandum that was final and unpublished, dismissing Mr. Minor's appeal of the dismissal of his petition for habeas corpus under 28 U.S.C. § 2254 as untimely. *Phillip Minor v. Renee Baker, et al.*, No. 19-15822 (9th Cir. January 20, 2021). *Appendix A*. The United States Court of Appeals for the Ninth Circuit decided, under a *de novo* review, that: (1) the district court correctly determined that the statute of limitations began to run from the date the second amended judgment became final, and (2) the district court properly dismissed the petition as untimely because Mr. Minor was not entitled to statutory tolling. *Id.*

## III.

### BASIS FOR JURISDICTION

On January 20, 2021, a Panel of the Court of Appeals for the Ninth Circuit delivered an unpublished memorandum that dismissed Mr. Minor's appeal. *Appendix A*. This is the final judgment for which a writ of certiorari is sought. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

#### IV.

#### CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Section (d) of Title 28 United States Code Section 2244, outlines the specifics of the 1-year filing deadline for a petition for writ of certiorari under 28 U.S.C. § 2254:

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.



V.

STATEMENT OF THE CASE

**A. Jurisdiction of the Courts of First Instance.**

The district court had jurisdiction under 28 U.S.C. § 2254. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253.

**B. Facts Material to the Questions Presented.**

On November 18, 2013, after granting Mr. Minor's motion for the same, a Nevada state court entered a second amended judgment of conviction that included additional sentencing credits to Mr. Minor's sentence. Within three weeks, on December 4, 2013, Mr. Minor filed a notice of appeal of the November 2013 second amended judgment to Nevada state appellate court.

The Nevada appellate court dismissed the appeal on April 4, 2014, with remittitur issued on April 29, 2014. The Nevada appellate court dismissed the appeal because Mr. Minor was not an "aggrieved party" when the second-amended judgment afforded Mr. Minor the sentencing credit relief he had sought.

Mr. Minor filed a state court post-conviction petition on September 2, 2014. On January 7, 2015, the state court conducted a hearing on Mr. Minor's *pro se* post-conviction petition without argument and without Mr. Minor being present. On February 4, 2015, Findings of Fact, Conclusions of Law and an Order were entered that dismissed the state petition. The findings and conclusions were:

- a. the post-conviction petition was untimely because the petition was filed 28 years after the original judgment date of February 15, 1986.
- b. Mr. Minor failed to overcome the procedural time-bar through a showing of good cause for not previously filing his post-conviction petition.
- c. the post-conviction petition was precluded by statutory laches, which creates a presumption of prejudice if the petition was filed over 5 years after the filing of the original judgment of conviction.

On February 10, 2015, Mr. Minor filed a notice of appeal to the Nevada appellate court. On February 13, 2015, Mr. Minor filed a motion for re-hearing with the Nevada trial court, and on March 30, 2015, the Nevada trial court entered an order that denied Mr. Minor's motion due to lacking jurisdiction over the matter.

On June 16, 2015, the Nevada appellate court issued an order of affirmance, finding that Mr. Minor's state habeas petition was untimely because it was filed on September 2, 2014, more than 28 years after the entry of the original judgment of conviction. The Nevada appellate court additionally found that Mr. Minor's 2014 state habeas petition was an abuse of the writ because his claims in the 2014 petition were new and different from claims raised in previous petition. The Nevada appellate court concluded that the petition was procedurally barred absent a demonstration of good cause and actual prejudice. The Nevada appellate court also found that because the prosecution had specifically pleaded laches, then Mr. Minor was required to overcome a rebuttable presumption of prejudice. Additionally, the Nevada appellate court found

that *Martinez v. Ryan*, 566 U.S. 1 (2012) was unavailing because the Nevada Supreme Court had already decided in *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014), that *Martinez* did not apply to Nevada's statutory post-conviction procedures.

Finally, the Nevada appellate court found that the claim as to filing within one year of the amended judgment was unavailing because Mr. Minor did not challenge any of the changed information in the amended judgment of conviction. The Nevada appellate court found that because the claims in the 2014 state habeas petition challenged the original judgment of conviction, then there was not good cause to overcome the procedural bars. A clerk's judgment entered in the Nevada appellate court on June 16, 2015. On July 13, 2015, remittitur issued.

Mr. Minor's federal post-conviction was filed with the United States District Court in Nevada on October 16, 2015. Following the appointment of counsel, an amended petition was thereafter filed on September 13, 2017. Six claims were raised:

1. [Mr.] Minor was deprived of his right to due process of law under the Fifth and Fourteenth Amendments because he was denied (1) a direct appeal by the Nevada Supreme Court; (2) meaningful consideration of his habeas petition by the district court; and (3) a meaningful appeal of his habeas petition.
2. [Mr.] Minor did not enter his guilty plea voluntarily, intelligently or knowingly, in violation of his Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution.
3. [Mr.] Minor was held in violation of his constitutional rights and in violation of a law that establishes his actual innocence.
4. [Mr.] Minor was denied his constitutional right to the effective assistance of counsel, under the Fifth, Sixth, and Fourteenth

Amendments. He received constitutionally ineffective representation from his trial counsel who inadequately investigated and prepared the case. Trial counsel also failed to ensure, in several particulars, that [Mr.] Minor's guilty plea was knowingly, voluntarily and intelligently entered.

5. [Mr.] Minor was deprived of his right to effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments because trial counsel failed to advise him he could file a direct appeal and failed to file an appeal on his behalf.
6. The cumulative effect of the constitutional errors deprived [Mr.] Minor of due process, in violation of his rights under the Fifth and Fourteenth Amendments.

The respondents filed a motion to dismiss on November 6, 2017, and on March 20, 2019, the federal district court entered an order that granted respondent's motion to dismiss the habeas petition as untimely. The federal district court dismissed the federal habeas petition as untimely because it found that the 2014 state habeas petition was not "properly filed" for purposes of 28 U.S.C. § 2244(d)(2) because the state court had already adjudicated the 2014 petition as untimely when it calculated the filing date of the petition from the date of the original 1986 judgment.

The federal district court further found that the claims raised in the federal petition did not relate to the changes made in the second-amended judgment, and instead traced back to the original judgment of conviction. As the final arbiter of the procedural law, the state court found the petition was untimely under Nevada state law, then so too did the federal district court. The federal district court dismissed the matter with prejudice, and denied a certificate of appealability. A written judgment

was entered on March 20, 2019.

On April 19, 2019, Mr. Minor filed a notice of appeal of the dismissal of his federal petition to the United States Court of Appeals for the Ninth Circuit. On May 23, 2019, Mr. Minor filed a counseled request for certificate of appealability. On September 30, 2019, the Ninth Circuit granted Mr. Minor's request for a certificate of appealability as to whether Mr. Minor's federal habeas petition under 28 U.S.C. § 2254 was timely filed. In granting the certificate of appealability, the Ninth Circuit concluded that at least one of the federal constitutional claims was debatable among jurists of reason, specifically whether counsel rendered ineffective assistance.

Following briefing, the Ninth Circuit entered a Memorandum on January 20, 2021 that affirmed the decision of the federal district court. The Ninth Circuit found that the district court properly determined that the one-year limitation period under AEDPA began to run from the date the second-amended judgment became final. This Court also found that Mr. Minor's state petition was untimely filed because the state court had found that Mr. Minor's petition was untimely, and this Court was 'not at liberty to second guess that court's decision when it was acting on direct appeal of the state post-conviction court's judgment.' (quoting *Rudin v. Myles*, 781 F.3d 1043, 1054 (9th Cir. 2014)).

## VI.

### REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the Ninth Circuit Panel's decision erroneously dismissing Mr. Minor's appeal. The Ninth Circuit erred by finding that Mr. Minor's petition was untimely. The Ninth Circuit specifically erred by deciding not to "second guess" the decision of the state court as to the timeliness of Mr. Minor's petition. As these material points of fact were overlooked by the Ninth Circuit, and by default the district court, it is respectfully requested that Mr. Minor's petition for writ of certiorari be granted.

**A. The Decision of the Ninth Circuit Was in Error When the State Court Overlooked the Case Law Precedent as to the Issuance of an Amended Judgment, and the Restarting of a Post-Conviction Statute of Limitations Timeline Thereto.**

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a prisoner that is in custody under a state court judgment has one year to file a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 from latest of "the date on which the judgment became final...." 28 U.S.C. § 2244(d)(1)(A). Pursuant to 28 U.S.C. § 2244(d)(2), the time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment is pending shall not be counted toward any period of limitation.

The federal court in Mr. Minor's case decided that pursuant to 28 U.S.C. § 2244(d)(2), the state petition was not "properly filed" because the state court had

decided it so, and the federal court was not going to change the state court's decision. The Ninth Circuit subsequently found in its Memorandum opinion that pursuant to *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005), that when the state court decides that the post-conviction petition is untimely under state law, then that is the "end of the matter for purposes of 28 U.S.C. § 2244(d)(2)." The Ninth Circuit applied the facts of Mr. Minor's case and found that because the Nevada Supreme Court concluded that Mr. Minor's petition was untimely under state law, then the Ninth Circuit was "not at liberty to guess that court's decision when it was acting on direct appeal of the state post-conviction court's judgment." *Rudin v. Myles*, 781 F.3d 1043, 1054 (9th Cir. 2014).

The case law cited by the Ninth Circuit in its Memorandum opinion, and its findings thereto, do not align with subsequent decisions as to the issuance of new, intervening, judgment. *Pace v. DiGuglielmo* does not address such a circumstance, and, furthermore, this case can be decided in Petitioner's favor despite the holding in *Pace* as well as *Rudin v. Myles*.

Subsequent case law in this Court demonstrates that the Nevada state court's decision was in error, and Mr. Minor's federal habeas case should have been allowed to proceed. In *Magwood v. Patterson*, the petitioner filed a second petition challenging his sentence of death following a resentencing. 561 U.S. 320, 328, 130 S.Ct. 2788 (2010). This Court concluded that because Magwood's petition had challenged the new judgment for the first time, and was not "second or successive" under 28 U.S.C. § 2244(b). *Id.*, at 323-24.

Recent and subsequent decisions in the circuit where this case was originated, the United States Court of Appeals for the Ninth Circuit, buttressed this finding by holding that a new state court judgment constitutes a new, intervening judgment. *Wentzell v. Neven*, 674 F.3d 1124, 1127-28 (9th Cir. 2012). Pertinent to Mr. Minor's case, in *Gonzalez v. Sherman*, 873 F.3d 763 (9th Cir. 2017), even something as potentially minor as the state court's alteration of the number of presentence credits to which a prisoner was entitled constituted a new intervening judgment under *Wentzell*.

At least one other circuit court has potentially created a split of authority as to what type of change to a judgment constitutes a "new intervening judgment" for habeas purposes. The Sixth Circuit differentiated between a judgment that follows a full resentencing from a "limited sentence modification" that benefits a petitioner. *Crangle v. Kelly*, 838 F.3d 673, 677-78 (6th Cir. 2016). The Sixth Circuit agreed with the Fifth, Sixth, Seventh, and Eleventh Circuits in holding that a new judgment that reduces the amount of time an inmate serves does not constitute a "new judgment" for purposes of post-conviction timing and relief. *Id.*

The Sixth Circuit's holding, even if a basis for review under a petition for writ of certiorari, is not relevant to the findings in his case. The other circuit court cases cited in *Crangle* were in a different procedural position than the instant case as they either involved a motion for sentence reduction under 18 U.S.C. § 3582, or a motion for a reduced sentence under Rule 35 of the Federal Rules of Criminal Procedure. Additionally, the holding by the Sixth Circuit in *Crangle*, that a habeas petitioner is



only entitled to a new judgment to proceed from if the new sentence is “worse” than the prior sentence, would potentially create perverse circumstances. For example, an inmate could commit an infraction that resulted in a resentencing on the original judgment, with a sentence that was “worse” than the original sentence, and thereby a new timeline for a potential habeas petition.

The Nevada state court found that Mr. Minor’s state post-conviction petition was precluded by statutory laches, because pursuant to Nevada law there was a rebuttable presumption of prejudice when a defendant files a petition over five years after the filing of the judgment of conviction. In rendering its decision, the state court measured the filing date of the petition from the original judgment of conviction twenty-eight years earlier in 1986, and not the new intervening judgment entered in 2013.

The state rule of laches described in the order on Mr. Minor’s state post-conviction petition should not apply in light of the application of subsequent case law. A state court finding as untimely essentially any state habeas petition after the original judgment would render the findings in *Gonzalez* and *Magwood* useless for precedential and constitutional purposes. This is not the intent of the purpose of 28 U.S.C. § 2244(d)(2), and contradicts the specific findings in *Smith*, *Gonzalez*, and *Magwood*.

Additionally, for a rule of laches to apply in this context would render any amended judgment meaningless in terms of its ability to be litigated in a post-conviction setting. The recent Ninth Circuit holding *Smith v. Williams*, 871 F.3d 684

(9th Cir. 2017) demonstrated the constitutional issues that arise with the argument that the statute of limitations runs from the date of the original judgment. In *Smith v. Williams*, not only would the argument that the statute of limitations run from the date of the original judgment be “foreclosed by common sense and an elementary understanding of the law,” but also would be practically impossible for a habeas petitioner to be able to file and litigate a first federal petition, have the judgment amended in the state court, and file a new federal petition under that new judgment within a one-year time period of the original conviction. *Id.*, at 688; *see also Wentzell, id.* (describing cases involving the AEDPA bar to “second or successive” petitions).

Lastly, the rule of laches ignores the idea of the new intervening judgment, and instead measures the amount of time from the original judgment that was superseded by the filing of the amended judgment. Several years can thus pass between the time of the original judgment and the filing of a petition based upon the underlying case facts that led to the original judgment. For example, in *Wentzell v. Neven*, 674 F.3d 1124 (9th Cir. 2012), the prisoner was allowed to file a new federal petition twelve years after the conviction became final due to a new intervening judgment.

The case decisions in *Smith v. Williams*, *Gonzalez v. Sherman* and *Magwood v. Patterson* all demonstrate that Mr. Minor should have been allowed to proceed with his federal petition from an amended judgment issued in November of 2013. The petition for writ of certiorari should be granted on this basis.

**B. The Ninth Circuit Decisions in *Smith* and *Gonzalez* and the Sixth Circuit Decision in *Crangle* Demonstrates that Whenever there is a New Intervening Judgment, the Claims in the New Petition Can Be Claims that Involve the Original Case Facts.**

The claims in Mr. Minor’s federal petition, even the claims that dated back to his guilty plea and direct appeal, were proper and should have been allowed to proceed. In *Magwood*, 561 U.S. at 341-342, this Court found that when there is a new judgment intervening between two petitions for habeas corpus, then an application challenging the resulting new judgment is not second or successive. This Court left open the issue in *Magwood* of whether a petitioner would be able to challenge his original undisturbed judgment whenever there is a new sentence. *Id.*, at 342.

The Ninth Circuit has resolved the question as to the types of claims in favor of the petitioner, and Mr. Minor’s instant petition should be granted so that his case may be granted similar relief. In the Ninth Circuit, where a new judgment intervened between two habeas petitions, the judgment from which the statute of limitations runs under AEDPA is the one under which the petitioner is currently incarcerated, meaning the most recent judgment entered. *Smith v. Williams, id.* The judgment and the sentence contained within the judgment are one and the same; the “sentence *is* the judgment.” *Gonzalez*, 873 F.3d at 769 (quoting *Burton v. Stewart*, 549 U.S. 147, 156 (2007) (per curiam)) (emphasis in original). In other words, the judgment of conviction is “one unit,” instead of treating the conviction and the sentence as separate entities. *Wentzell v. Neven*, at 1127-28.

A change to a defendant's sentence is thus a change to a defendant's judgment, regardless of the type of challenge that caused the new judgment to be entered. *Gonzalez*, 873 F.3d at 769; *see also Smith*, 871 F.3d 684. A new judgment may be challenged in total even if the new petition challenges only the undisturbed portions of the judgment. *Gonzalez*, at 768. In *Smith v. Williams*, the Ninth Circuit held that the habeas petitioner's federal petition challenging both his conviction and sentence under a second amended judgment was timely filed, and reversed and remanded the matter for further proceedings. *Id.*, at 689.

The Sixth Circuit, so long as the new judgment is "worse" than the former judgment, agrees with the idea that all claims are available with the issuance of a new judgment. *Crangle v. Kelly*, 838 F.3d 673, 677-78 (6th Cir. 2016), extended *Magwood* and decided that a resentencing constitutes a new judgment that resets the one-year limitations period under § 2244(d)(1)(A) for all claims, even untimely claims challenging the underlying judgment.

Mr. Minor's November of 2013 judgment should have been allowed to be challenged on any basis, even the undisturbed portions of said judgment dating back to 1986 so long as Mr. Minor cleared the standard AEDPA procedural hurdles. Even though there are several types of amended judgments that will qualify as a new judgment for purposes of AEDPA, said pathway is not without rules or boundaries. The amended judgment still has to be more than a "scrivener's error" or a "ministerial act" to constitute a new judgment for purposes of 28 U.S.C. § 2254. *Gonzalez v.*

*Sherman, id.* at 772. Additionally, the new judgment will be limited by the one-year rule under AEDPA, and the underlying claims within the new habeas petition will be subject to procedural rules under AEDPA, including relation back of the claims, and exhaustion of the claims in state court. *See, e.g.,* 28 U.S.C. § 2254(b)(1); *see also Mardesich v. Cate*, 668 F.3d 1164 (9th Cir. 2012).

The procedural hurdles are even higher if the petitioner previously filed a federal petition related to the underlying conviction. If the petitioner previously filed a federal petition with any number or none of the same claims, AEDPA places “strict limitations on the ability of a petitioner held pursuant to a state judgment to file a second or successive federal petition for writ of habeas corpus.” *Gonzalez*, 873 F.3d at 767; *see also* 28 U.S.C. § 2244. The larger constitutional concern is the contrary position, if any new judgment would not be considered a “new judgment” for AEDPA purposes. Many petitioners would potentially lose out on claims related or unrelated to the change in the judgment simply because a procedural bar foreclosed any claim in their case, even if the claims are litigated many years later.

An amended judgment restarts the AEDPA statute of limitations on all potential claims, regardless of the entry of the amended judgment, and the amount of time that has passed between the original and amended judgment. *Smith*, 871 F.3d at 688. In *Smith*, the petitioner’s underlying conviction was in 1997, but the state court overturned and vacated the petitioner’s convictions and sentences in 2007. *Id.*, at 685. The state supreme court reversed the state court in 2009, and remanded the matter to

the state court. *Id.* In 2012 the state court entered a second amended judgment, reinstating the convictions and sentence. *Id.* Even though fifteen years had passed as of that point, the focus of the statute of limitations is the “judgment pursuant to which the petitioner is being held,” regardless of the amount of time that had passed between the original and amended judgment. *Id.*, at 687.

The entry of the amended judgment, even many years later, thus does not limit the type of claims that a petitioner can raise based upon the new judgment. The Court in *Gonzalez* noted that for AEDPA purposes, it “does not matter whether the error in the judgment was minor or major...what matters is whether there is an amended judgment.” *Id.*, at page 772, fn. 5. Thus, a new judgment may be challenged even if the new petition challenges only the undisturbed portions of the judgment. *Id.*, at 768.

Here, pursuant to the 2017 decisions from the Ninth Circuit in *Gonzalez*, and *Smith v. Williams*, as well as the 2016 decision from the Sixth Circuit in *Crangle*, Mr. Minor should be able to challenge all portions of his sentence and judgment following the issuance of a new intervening judgment in his case in November of 2013. For the foregoing reasons, Mr. Minor respectfully requests that his petition for writ of certiorari be granted.

**VII.**

**CONCLUSION**

For the foregoing reasons, Mr. Phillip Minor respectfully asks this Court to grant this petition for writ of certiorari.

Dated: April 19, 2021.

Respectfully submitted,

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