21-5365 ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARK LEE WILKINSON — PETITIONER (Your Name)

vs.

SIOBHAN BURTLOW, Warden; and, THE ATTORNEY GENERAL FOR THE STATE OF COLORADO, —

RESPONDENT(S) ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Tenth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mark Lee Wilkinson
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P.O. Box 999
Canon City, CO 81215-0999

QUESTION(S) PRESENTED

Whether, consistent with this Court's holdings in *Burton v. Stewart*, 549 U.S. 147 (2007), an intervening new judgment between two habeas petitions restarts the one-year time limitation even when the second petition challenges the underlying conviction rather than the new sentence?

Whether, consistent with this Court's holdings in *Magwood v. Patterson*, 561 U.S. 320 (2010), where there is a new judgment intervening between two habeas petitions, an application challenging the resulting new judgment is not second or successive even when the second petition challenges the underlying conviction rather than the new sentence?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at Wilkinson v. Burtlow, 2021 U.S. App. LEXIS 13624 ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B & C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

[X] reported at People v. Wilkinson, 2018 Colo. App. LEXIS 1042; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Mesa County District Court appears at Appendix E to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was May 7, 2021.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 4, 2021, and a copy of the order denying rehearing appears at Appendix F.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. ___A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. ___A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2244

28 U.S.C. 2254

STATEMENT OF THE CASE

In 2001, after a jury trial, Wilkinson was sentenced to aggregate term of 52 years to life with 5 years mandatory parole. The Colorado Court of Appeals (CCOA) affirmed Wilkinson's conviction and sentences. People v. Wilkinson, (Colo. App. No. 01CA0897) (not published) (Wilkinson I).

In 2003, Wilkinson filed a Crim. P. 35(c) petition; and, in 2004, Wilkinson filed a Crim. P. 35(b) motion. In 2005, Wilkinson, through counsel (Goudy), filed a supplemental Crim. P. 35(a), (b), and (c) motion. Among other issues, Goudy claimed trial counsel (Carpenter) was ineffective for failing to pursue a plea deal or tender a plea offer to Wilkinson.

After a hearing, the court denied the petition. Decision was affirmed: People v. Wilkinson, (Colo. App. No. 07CA0946) (not published) (Wilkinson II).

On October 11, 2011, pursuant to 28 U.S.C. 2254, Wilkinson filed a Second Amended Application for a Writ of Habeas Corpus in the United States District Court for the District of Colorado (case no: 11-cv-0454-REB), raising, as pertinent here, Claim One that Carpenter was ineffective during the plea bargaining process. The Court dismissed the claim as unexhausted as it was raised in an appendix to the opening brief at the CCOA in Wilkinson II. See: Wilkinson v. Timme, 2012 U.S. Dist. LEXIS 17568, at 4-5.

The United Stated Court of Appeals for the Tenth Circuit denied a Certificate of Appealability, see: Wilkinson v. Timme, 503 Fed. Appx. 556 (10th Cir. November 23, 2012), and this Court denied a Petition for a Writ of Certiorari, see: Wilkinson v. Timme, 2013 U.S. LEXIS 3283 (U.S. April 22, 2013).

During the pendency of his appeal to the Tenth Circuit, Wilkinson returned to the

State District Court and filed a Motion to Correct Sentence. Therein he claimed, as relevant here, that his sentence was illegal because it included a period of mandatory parole that the statute did not allow, thus, it was not authorized. (See: Colorado Rules of Criminal Procedure, Rule 35(a), Correction of Illegal Sentence. The court may correct a sentence that was not authorized by law...). The District Court corrected Wilkinson's sentence by removing the period of mandatory parole and issuing a new mittimus.

Following a subsequent appeal of the district court's decision on other issues raised, Wilkinson filed a Motion for Postconviction Relief pursuant to Crim. P. 35(c). There, he raised the issue of the ineffective assistance of Carpenter during the plea bargaining stage. The court denied the claim as previously "raised and resolved". See: Crim. P. 35(c)(3)(VI) The court shall deny any claim that was raised and resolved in a prior appeal or postconviction proceeding.... The CCOA affirmed, see: Appendix D.

Following the denial of Certiorari from the Colorado Supreme Court, Wilkinson filed the Application at issue in this proceeding. Here, Wilkinson claimed that, pursuant to Cone v. Bell, 556 U.S. 449 (2009), the issue was exhausted and ripe for federal review. Further, pursuant to Burton v. Stewart, 549 U.S. 147 (2007), the issue was timely; and, pursuant to Magwood v. Patterson, 561 U.S. 320 (2010), the application was not "second or successive." The Respondents argued the application was untimely and "second or successive." In contravention to Burton, the District Court denied the application as untimely because "the one-year limitation period does not restart following imposition of a new sentence when the habeas application challenges only the original conviction." Tenth Circuit Court of Appeals denied a COA. Further, the Tenth Circuit denied a rehearing en banc. This Petition was timely filed in this Court.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's ruling is in direct contradiction to this Court's holdings in *Burton v. Stewart*, supra. There, Burton argued that he had to raise the claims against his underlying conviction when he did, otherwise, they would have been time-barred. The Court said he was reading the statute wrong. The time-limit, under 28 U.S.C. 2244, did not begin until both the conviction *and* the sentence were final. This applied to claims challenging the new sentence *and* the underlying conviction. If the Supreme Court is right, then Wilkinson's petition cannot be untimely — as the Tenth Circuit found — simply because he challenged the underlying conviction.

Moreover, this Court has previously granted a remand to answer this very question. Following your decision in *Burton v. Stewart*, this Court vacated the Ninth Circuit's opinion in *Ferreira v. Sec'y, Dep't of Corr.*, 183 F. App'x 885 (11th Cir. 2006), wherein the court held, because the inmate's habeas petition challenged only his judgment of conviction, without raising any challenge to his resentencing judgment, the AEDPA's one-year statute of limitations began when his original judgment of conviction became final. This Court, presumably because you questioned the correctness of that finding, remanded it for further consideration in light of *Burton. Ferreira v. McDonough*, 2007 U.S. LEXIS 2021 (2007). Upon remand, the court held that the petition was timely even though it challenged only the original undisturbed conviction. *Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286 (11th Cir. 2007).

Important to the question of granting certiorari review, the Tenth Circuit's position is contrary to the overwhelming majority of other federal Circuit courts of appeal to decide this question creating a circuit split on the interpretation of federal

statute. Without resolving this circuit split, 28 U.S.C. 2244 would be ambiguous as it would be subject to more than one interpretation. Thus, this question, as to when a petition is timely, is "importan[t] to the public as distinguished from that of parties." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

For rulings consistent with *Burton*, see: *Woodfolk v. Maynard*, 857 F.3d 531 (4th Cir. 2017); *Scott v. Hubert*, 635 F.3d 659 (5th Cir. 2011); *Rashad v. Lafler*, 675 F.3d 564 (6th Cir. 2012); *Crangle v. Kelly*, 838 F.3d 673 (6th Cir. 2016); *Turner v. Brown*, 845 F.3d 294, 298 (7th Cir. 2017) (acknowledging that, based on *Burton*, "a challenge to Turner's robbery conviction may be timely" but finding the robbery conviction was not the judgment before them); *Wentzell v. Neven*, 674 F.3d 1124 (9th Cir. 2012); *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944 (Wash. July 19, 2007); *Cochran v. Phelps*, 600 F. Supp. 2d 603 (D. Del. 2009). "Certiorari will be granted where a clash of opinion in Courts of Appeals requires settlement of question by Supreme Court of United States." *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

More confusing is the fact that the Tenth Circuit disagrees with itself. Compare *Reber v. Steele*, 570 F.3d 1206 (10th Cir. 2009) (holding one-year limitation began at finality of new sentence, (quoting approvingly and relying on *Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286 (11th Cir. 2007))); *United States v. Carbajal-Moreno*, 332 Fed. Appx. 472 (10th Cir. 2009) (in light of *Burton*, we hold that in cases in which a defendant's conviction is affirmed on appeal but the case is remanded for re-sentencing, the defendant's conviction becomes final for limitations purposes under the AEDPA when both the conviction and sentence become final by the conclusion of direct review or the expiration of time for seeking such review); and, *Najera v. Murphy*, 462 Fed.

Appx. 827 (10th Cir. 2012) (applying Burton to determine start date for one-year limitation to begin at finality of new sentence), with *Prendergast v. Clements*, 699 F.3d 1182, 1187 (10th Cir. 2012); *Burks v. Raemisch*, 680 Fed. Appx. 686 (10th Cir. 2017); and, *Carrillo v. Zupan*, 626 Fed. Appx. 780 (10th Cir. 2015). In *O'Neal v. Allbaugh*, 2018 U.S. Dist. LEXIS 196398 (N.D. Okla. 2018) the court, acknowledging a split within the Tenth Circuit, examined the different decisions and found "Because the facts in the instant case are more analogous to those in *Burton*, *Carbajal-Moreno*, and *Najera* than to those in *Prendergast*, *Burks*, and *Carillo*, the Court rejects respondent's argument that the habeas petition is untimely."

The Tenth Circuit's argument — in support of their decision in the instant case — is the same argument that *Burton* made to this Court and you told him he was wrong. Therefore, the Tenth Circuit is also wrong. The rulings from this Court are mandatory not just advisory. So, why does the Tenth Circuit not follow your rulings? How is this equal justice when geography determines whether the procedure you followed was right or not? The federal rules must be applied consistently and without any ambiguity. Wilkinson followed the procedure outlined in *Burton* and the Tenth Circuit still found the petition was untimely. This Court must grant this petition for certiorari review and clear-up this confusion.

Additionally, the Tenth Circuit disagrees with the overwhelming majority of other federal Circuits who interpret *Magwood* as applying to challenges concerning the underlying conviction. See: *Johnson v. United States*, 623 F.3d 41 (2d Cir. 2010); *In re Brown*, 594 Fed. Appx. 726 (3d Cir. 2014); *In re Gray*, 850 F.3d 139 (4th Cir. 2017); *King v. Morgan*, 807 F.3d 154 (6th Cir. 2015); *Wentzell v. Neven*, 674 F.3d 1124 (9th Cir.

2012); *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273 (11th Cir. 2014).

The one circuit to take a different approach did so based on on-point, pre-*Magwood* circuit precedent, see *Suggs v. United States*, 705 F.3d 279, 284-85 (7th Cir. 2013), and even that did not satisfy one member of the panel, see id. at 285-89 (Sykes, J., dissenting). However, the State Supreme Court of Illinois, in *People v. Urena-Cardenas*, 2017 IL App (1st) 143770-U (Ill. App. Ct. 2017), stated: "we decline to follow *Suggs*. Instead we follow the directives imposed by *Magwood* requiring that a petition filed after a new sentencing not be treated as a successive petition." In *United States v. Ailsworth*, 513 Fed. Appx. 720 (10th Cir. 2013), the Tenth Circuit cited to *Suggs* approvingly, indicating their intent to follow *Suggs*' exclusion of claims that challenge the undisturbed underlying conviction. In *United States v. Wiseman*, 2018 U.S. Dist. LEXIS 27325, the court summarized the Tenth Circuit's position:

"In *Prendergast v. Clements* the Tenth Circuit held that otherwise time-barred attacks on an original conviction are not resurrected by a resentencing. 699 F.3d 1182, 1186 (10th Cir. 2012)." Further, they found; "In *Burks v. Raemisch*, 680 Fed. Appx. 686, 689-91 (10th Cir. 2017), the Tenth Circuit distinguished *Magwood* and relied on *Prendergast* to conclude that the petitioner's new sentence as a result of the state trial court's *sua sponte* review did not renew the statute of limitations clock... . This Court is bound by the Tenth Circuit's claim-by-claim approach to addressing criminal judgments for AEDPA purposes as set forth in *Prendergast*."

As this question is likely to arise on remand, this Court should take this opportunity to answer the question left open in *Magwood* and resolve the circuit split.

CONCLUSION

Because the Tenth Circuit is contradicting the holdings of this Supreme Court and disagreeing with the overwhelming majority of other federal Circuits; and, because the record firmly supports Wilkinson's claim of the ineffective assistance of his counsel, "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). As a result, the Tenth Circuit should have granted the Certificate of Appealability and ruled consistent with this Court's holding in *Burton v. Stewart* and consistent with the overwhelming majority of other federal Circuits. Thus, this Court should grant this petition for a writ of certiorari and resolve the circuit split.

Respectfully submitted this 4th day of August, 2021.

MARK LEE WILKINSON, Petitioner