

No. _____

In the Supreme Court of the United States

JAMES ROBERTSON,

Applicant,

v.

URIEL GONZALEZ,

Respondent.

**APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

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To the Honorable Anthony M. Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and this Court's Rule 13.5, the Attorney General of California, on behalf of James Robertson, Warden of Pelican Bay State Prison at Crescent City, California, respectfully requests a thirty-day extension of time, to and including April 26, 2018, within which to file a petition for a writ of certiorari in this case.¹ The court of appeals issued its opinion on October 11, 2017, and denied rehearing on December 27, 2017. Unless extended, the time within which to file a petition for writ of certiorari will expire on March 27, 2018. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). A copy of the opinion of the court of appeals and a copy of the court's order denying rehearing are attached.

1. The State of California is considering whether this case would provide the Court an appropriate vehicle to address a question expressly left open in *Magwood v. Patterson*, 561 U.S. 320 (2010), and whether that question warrants the Court's review at this time. In *Magwood*, the Court held that a numerically second or subsequent federal habeas petition need not meet the stringent threshold requirements for "second or successive" petitions imposed by the Antiterrorism and Effective Death Penalty Act of 1996, see 28 U.S.C. § 2244(b), if there has been a "new judgment intervening between the two

¹ Warden Robertson has succeeded Stuart Sherman as respondent Gonzalez's custodian. See S. Ct. R. 35.3; Fed. R. Civ. P. 25(d).

habeas petitions,” 561 U.S. at 341. In that case, the new judgment arose from a capital resentencing proceeding following a previous successful federal writ petition, and the prisoner’s second-in-time habeas petition challenged only the new sentence. *Id.* at 341-342. *Magwood* held that under those circumstances the petition was not subject to AEDPA’s second-or-successive petition bar, but the Court declined to decide whether the same would be true for a habeas petition that challenged aspects of the original proceedings left undisturbed by the intervening developments and new judgment. *Id.* at 342.

The federal courts of appeal have divided over that unanswered question. Some circuits have viewed a criminal judgment as divisible into components, and consider a later-in-time habeas petition challenging the undisturbed portion of a new judgment to be second or successive under AEDPA. See *Suggs v. United States*, 705 F.3d 279, 285 (7th Cir.) (federal prisoner); *In re Lampton*, 667 F.3d 585 (5th Cir. 2012) (federal prisoner). Other circuits, including the Ninth Circuit, have viewed a criminal judgment as indivisible, and do not consider a later-in-time petition challenging the undisturbed portion of a new judgment to be second or successive. See *In re Gray*, 850 F.3d 139, 144 (4th Cir. 2017); *In re Stansell*, 828 F.3d 412, 418 (6th Cir. 2016); *In re Brown*, 594 F. App’x 726, 729-730 (3d Cir. 2014) (per curiam); *Insignares v. Sec’y, Fla. Dep’t of Corr.*, 755 F.3d 1273, 1280-81 (11th Cir. 2014); *Wentzell v. Neven*, 674 F.3d 1124 (9th Cir. 2012); *Johnson v. United States*, 623 F.3d 41, 46 (2d Cir. 2010).

2. This case arises as an application of Ninth Circuit precedent adopting the latter approach, and presents the consequences of that approach in sharp relief. Respondent Uriel Gonzalez was convicted in 2001 of four counts of attempted murder based on his having shot at several people as part of a gang rivalry, and he was sentenced to a total term of sixty-five years to life in prison. See *Gonzalez v. Sherman*, 873 F.3d 763, 765 (9th Cir. 2017). His sufficiency-of-the-evidence and ineffective-assistance claims were rejected on direct appeal, and the judgment was affirmed in 2002. See *id.* at 765-766. Almost nine years later, in 2011, Gonzalez filed a federal habeas petition advancing the same claims he had raised on his state direct appeal. *Id.* at 766. The district court dismissed the petition as untimely. *Id.*; see 28 U.S.C. § 2244(d).

Shortly thereafter, the Ninth Circuit held in *Wentzell v. Neven*, *supra*, that a later-in-time federal habeas petition is not subject to AEDPA's second-or-successive petition bar if it follows an intervening judgment, even if the petition challenges undisturbed aspects of the judgment. Two months after the *Wentzel* decision, Gonzalez returned to state court and asked that his judgment be vacated. When that request was denied, he moved for modification of a presentence custody credit calculation that the trial judge had made at sentencing. See *Gonzalez v. Sherman*, 873 F.3d at 766. The state court granted the request and awarded Gonzalez twenty-one additional days of presentence credit against his 65-years-to-life sentence. *Id.* Gonzalez moved for reconsideration, asking the court to enter a formal new judgment rather

than purporting to recalculate the sentencing credit nunc pro tunc. *Id.* The state court denied the reconsideration motion. *Id.*

Gonzalez then returned to federal court and filed a new habeas petition, raising the same claims that were in his first (time-barred) petition, plus additional ineffective-assistance and sufficiency-of-the-evidence claims, as well as claims challenging the admission of gang evidence at his trial, the court's denial of a bifurcation motion, and the prosecutor's reference in argument to witness intimidation. See *Gonzalez v. Sherman*, 873 F.3d at 766. He asked the district court to take judicial notice of *Wentzell*, arguing that the custody credit recalculation amounted to an intervening judgment and therefore his new habeas petition was neither untimely nor second or successive. *Id.* The district court concluded that the custody credit recalculation did not qualify as a new judgment and therefore granted the State's motion to dismiss the petition as, among other things, untimely and successive. *Id.* at 766-767.

The Ninth Circuit reversed. It held that the custody credit recalculation resulted in a new judgment under California law for purposes of *Magwood* and *Wentzell*, and that Gonzalez's new habeas petition was therefore neither time-barred nor second or successive under AEDPA. *Gonzalez v. Sherman*, 873 F.3d at 769-774. The State sought rehearing en banc, urging the court of appeals to reconsider its panel decision in *Wentzell*. The court denied rehearing.

3. The State accepts for present purposes the court of appeals' conclusion that Gonzalez's custody credit recalculation is a new intervening judgment as

a matter of state and federal law. This case thus squarely presents the issue left open in *Magwood* that has divided the lower courts: whether a later-in-time federal habeas petition following an intervening state-court judgment is barred as untimely or second or successive insofar as it attacks an undisturbed portion of the judgment. Under the rule of *Wentzell* and the similar precedent of five other circuits, Gonzalez is permitted to litigate his numerous habeas claims in federal court without satisfying AEDPA's stringent threshold requirements for timeliness and for second or successive petitions. Under Fifth and Seventh Circuit precedent, those requirements would apply and Gonzalez's petition would be dismissed if he could not meet them.

The State is mindful that the Court has declined to review several other cases presenting the same issue, including *Wentzell* itself. See *Westbrooks v. Allen*, 138 S. Ct. 648 (2018) (No. 17-445); *Turner v. Brown*, 137 S. Ct. 2219 (2017) (No. 16-1196); *Kramer v. United States*, 136 S. Ct. 1493 (2016) (No. 15-787); *Jones v. Thompson*, 136 S. Ct. 1166 (2016) (No. 15-689); *Neven v. Wentzell*, 569 U.S. 989 (2013) (No. 12-352); *Suggs v. United States*, 569 U.S. 972 (2013) (No. 12-978). On the other hand, the result in this case imposes an unjustified burden on the State that seems clearly antithetical to sound principles of finality and comity and to the purposes of AEDPA. The State is accordingly carefully considering whether this case would present the Court with a more appropriate vehicle for addressing the question and whether developments in the lower courts have now progressed to the point where the

issue is ripe for this Court's review in such an appropriate case. Our inquiry into these points would benefit from more time to consult both internally and with colleagues from other jurisdictions. Our final consideration of these issues has also been unavoidably delayed by a heavy press of other business, including a number of other time-sensitive proceedings and preparation for the oral argument before this Court in *Nat'l Inst. of Family and Life Advocates v. Becerra*, No. 16-1140. Additional time will facilitate the State's careful evaluation of whether to file a petition for a writ of certiorari in this case and, if one is filed, the most helpful presentation of the matter for the Court's consideration.

Accordingly, the State respectfully asks for thirty additional days within which to file a certiorari petition in this case, to and including April 26, 2018.

Respectfully submitted

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