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## “New Judgment” and the Federal Habeas Statutes

Thomas Burch\*

### INTRODUCTION

Prisoners love to file habeas petitions. Maybe a little too much. That is why Congress drafted the federal habeas statutes to preclude prisoners from filing “second or successive” petitions attacking their judgments.<sup>1</sup> But in drafting those statutes, Congress left open a loophole: if a prisoner secures some change to his judgment that makes that judgment “new,” the next petition he files challenging it is not second or successive, even if it raises claims that the prisoner had an opportunity to raise before.<sup>2</sup> So, if a prisoner has previously filed one or more petitions, a court trying to determine if the current petition is second or successive must first determine if the prisoner is challenging a “new judgment.” In other words, determining whether a prisoner has obtained a new judgment is central to determining the availability of relief under the federal habeas statutes.

Currently, lower courts are divided on how to make that determination. All agree that being re-sentenced creates a new judgment, because that is what the Supreme Court found in *Magwood v. Patterson*.<sup>3</sup> But they frequently disagree on what other types of changes satisfy the new judgment requirement. This

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1. See 28 U.S.C. §§ 2244, 2254, 2255 (2012).

2. See *Magwood v. Patterson*, 561 U.S. 320, 341–42 (2010), <https://supreme.justia.com/cases/federal/us/561/320>.

3. *Id.* at 331.

matters because the question arises in multiple contexts, and because, in almost every circuit to address the issue, once a prisoner obtains a new judgment he can challenge the entire judgment (not just the parts that changed) through a new petition. This means that for both prisoners and the courts in which they file, the stakes regarding the meaning of new judgment are high.

This essay explains the shortcomings of how some courts have assessed that meaning, and it proposes a straightforward test for determining when a new judgment exists. Part I starts by addressing the parameters of the Supreme Court's *Magwood* decision, including the confusion and disagreement it has engendered. Since *Magwood*, courts have been reaching conflicting outcomes on identical questions because they have little guidance on what new judgment means. Part II begins providing that guidance by explaining where some of those courts have gone wrong. Whether disregarding how the Supreme Court has defined "judgment," incorrectly separating judgments into their component parts, or wrongly emphasizing a "custody" requirement, these courts are unnecessarily complicating the new-judgment analysis. To avoid these complications, Part III provides a straightforward new-judgment test. In particular, it explains that a "judgment" has two parts—the sentence and the conviction—and that a material change to either is enough to show that a prisoner has a new judgment. That basic analysis is consistent with both the text of the federal habeas statutes and the Supreme Court precedent interpreting them, making it the most justifiable means for determining whether a judgment is "new" and, therefore, whether a prisoner's petition is second or successive.

## I.

### THE POST-MAGWOOD HAZE.

Billy Joe Magwood was convicted of killing an Alabama sheriff and sentenced to death.<sup>4</sup> After exhausting his state court remedies, he filed a habeas petition in federal district court, ultimately convincing the district court to vacate his death sentence and remand for resentencing.<sup>5</sup> On remand, though, the state court again gave him a death sentence.<sup>6</sup> So Magwood filed another federal habeas petition challenging his sentence, which the district court again granted.<sup>7</sup> This time, however, the Eleventh Circuit reversed, finding that the petition was second or successive because Magwood's sentence had not changed and because his petition raised a claim against it that he had a chance to raise before.<sup>8</sup> As a result, Magwood petitioned the Supreme Court to grant review, arguing that his petition was not successive under the plain text of the federal habeas statutes.<sup>9</sup>

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4. *Id.* at 323.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Magwood*, 561 U.S. at 323, 329.

9. *Id.* at 331.

Section 2244 of those statutes says that a “claim presented in a *second or successive habeas corpus application* under section 2254 that was presented in a prior application shall be dismissed.”<sup>10</sup> Section 2254 then says that district courts can entertain a petition from someone who is “in custody pursuant to the *judgment* of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”<sup>11</sup> When interpreting this language in *Magwood*, the Supreme Court found that “second or successive” modified “application” and that an “application” challenged a “judgment,” meaning that an application challenging a “new judgment” could not be second or successive.<sup>12</sup> According to the Court, the presence of a new judgment is “dispositive” in the second-or-successive analysis, meaning that any application challenging a new judgment is not second or successive “at all” (even if it raises claims that were, or could have been, raised before).<sup>13</sup>

But the Court did not explain, exactly, what “new judgment” means. It simply said that the re-sentencing in that case was, in fact, a new judgment.<sup>14</sup> Since then, lower court opinions have varied widely on what satisfies this new-judgment requirement. All seem to agree that clerical changes do not.<sup>15</sup> But they seem to disagree on almost everything else. For example, they have been unable to agree on: whether *only* a re-sentencing can create a new judgment;<sup>16</sup> whether a change to one count in a multi-count conviction creates a “partially new” judgment that limits the claims a prisoner can raise;<sup>17</sup> whether eliminating a chemical castration requirement creates a new judgment;<sup>18</sup> whether adding a

10. 28 U.S.C. § 2244(b)(1) (2012) (emphasis added).

11. 28 U.S.C. § 2254(a) (2012) (emphasis added). Section 2255 does not include Section 2254’s “judgment” language. 28 U.S.C. § 2255 (2012). Yet the courts of appeals apply *Magwood*’s judgment-based approach in Section 2255 cases, too. See *In re Lampton*, 667 F.3d 585, 586–88 (5th Cir. 2012), <http://law.justia.com/cases/federal/appellate-courts/ca5/11-30458/11-30458-cv0.wpd-2012-01-11.html>; *Johnson v. United States*, 623 F.3d 41, 42 (2d Cir. 2010), [http://law.justia.com/cases/federal/appellate-courts/ca2/10-3046/10-3046-op\\_opn-2011-03-27.html](http://law.justia.com/cases/federal/appellate-courts/ca2/10-3046/10-3046-op_opn-2011-03-27.html). So how courts define “judgment” will affect the scope of relief under both Sections 2254 and 2255. See *id.*

12. See *Magwood*, 561 U.S. at 341–42.

13. *Id.* at 338, 341–42.

14. *Id.* at 323–24.

15. See, e.g., *United States v. Cano*, 558 Fed. App’x 936, 941 n.6 (11th Cir. 2014), <http://law.justia.com/cases/federal/appellate-courts/ca11/12-16202/12-16202-2014-03-11.html>; *In re Martin*, 398 Fed. App’x 326, 327 (10th Cir. 2010), <https://casetext.com/case/in-re-martin-35>.

16. Compare *Lampton*, 667 F.3d at 588 (finding that whether a new judgment exists “depends on whether a new sentence has been imposed”), with *Johnson*, 623 F.3d at 42–43, 46 (finding a new judgment even though the prisoner’s sentence had not changed).

17. Compare *Turner v. Brown*, 845 F.3d 294, 298–99 (7th Cir. 2017), <https://docs.justia.com/cases/federal/appellate-courts/ca7/15-1592/702911354> (finding, for purposes of the second-or-successive analysis, that judgments can be divided into component parts and that a new application can challenge only the parts that changed), with *In re Gray*, 850 F.3d 139, 142–43 (4th Cir. 2017), <http://law.justia.com/cases/federal/appellate-courts/ca4/16-433/16-433-2017-02-28.html> (finding that a new judgment allows the prisoner to challenge the entire judgment, not just its changed parts).

18. An Eleventh Circuit panel found that eliminating a chemical castration requirement from a sentence created a new judgment. *Patterson v. Sec’y, Florida Dep’t of Corr. (Patterson I)*, 812 F.3d 885,

post-release control requirement creates a new judgment,<sup>19</sup> and whether changing a prisoner's restitution obligation creates a new judgment.<sup>20</sup> In other words, the new judgment question arises in numerous contexts, and right now courts have been unable to agree on a principled way to answer it.

This inability to agree matters because it affects the scope of relief that is available under the federal habeas statutes. Any court attempting to apply *Magwood*'s ruling—i.e., that an application challenging a new judgment is not second or successive at all—must first confront the question of what new judgment means. Put differently, they must first decide how significant the change to a judgment must be to make the judgment “new,” and the conclusion they reach will determine whether a prisoner can have another opportunity to challenge his confinement. This requires courts to consider the degree, if any, to which Congress's desire to limit habeas applications matters, and it raises questions regarding the judicial system's role in stemming those applications. In other words, it is a complicated question. Without guidance, courts will continue to disagree on how to answer it. Plus, prisoners will continue testing boundaries on what the answer to it should be.

## II.

### LOWER COURTS' UNREASONABLE LIMITATIONS ON “NEW JUDGMENT.”

Since *Magwood*, lower courts have limited what counts as a new judgment in three significant ways. First, some have discounted the Supreme Court's decision to define “judgment” to include the sentence and the conviction, limiting prisoners to having a new judgment only when they obtain a new sentence. Second, some have found that multi-count judgments can be broken into component parts, limiting prisoners to challenging only the parts of their judgments that changed. Third, some have conflated the “custody” and “new judgment” requirements, unnecessarily examining whether the change to a prisoner's judgment affected his “custody.” None of these limitations withstand scrutiny.

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887 (11th Cir. 2016), <http://law.justia.com/cases/federal/appellate-courts/ca11/12-12653/12-12653-2016-01-29.html>. But the en banc court reversed, with 6 judges in the majority and 5 in the minority. *Patterson v. Sec'y, Florida Dep't of Corr. (Patterson II)*, 849 F.3d 1321 (11th Cir. 2017), <http://law.justia.com/cases/federal/appellate-courts/ca11/12-12653/12-12653-2017-03-03.html> (en banc).

19. Compare *In re Carnail*, No. 15-3057, at \*6 (6th Cir. June 29, 2016) (unpublished) (no new judgment), with *In re Stansell*, 828 F.3d 412, 416–17 (6th Cir. 2016), <http://law.justia.com/cases/federal/appellate-courts/ca6/15-4244/15-4244-2016-07-01.html> (new judgment), and *Fields v. Lee*, No. 12-4878, 2016 WL 889788, at \*7 (S.D.N.Y. Jan. 28, 2016), <https://casetext.com/case/fields-v-lee-1>, report and recommendation adopted, No. 12-4878, 2016 WL 879319 (S.D.N.Y. Mar. 7, 2016), <https://casetext.com/case/fields-v-lee> (same).

20. Compare *Gonzalez v. United States*, 792 F.3d 232, 233–36 (2d Cir. 2015), <http://law.justia.com/cases/federal/appellate-courts/ca2/14-1994/14-1994-2015-07-02.html> (new judgment, in the context of a statute of limitations case), with *Carrillo v. Zupan*, No. 15-00376, 2015 U.S. Dist. LEXIS 65240, at \*3, \*9 (D. Colo. May 19, 2015), <https://casetext.com/case/carrillo-v-zupan> (no new judgment, in the context of a statute of limitations case).

A. *Ignoring one of a judgment's critical parts.*

A judgment has two parts, the sentence and the conviction. The Supreme Court,<sup>21</sup> the Federal Rules of Criminal Procedure,<sup>22</sup> and the federal habeas forms<sup>23</sup> are clear on this basic principle. But for purposes of the second-or-successive analysis, some courts disregard this principle in an effort to curtail prisoners' ability to file new habeas petitions. Specifically, they find that invalidating a conviction without changing the prisoner's overall sentence does not create a new judgment. Put differently, they require a re-sentencing proceeding before finding that a new judgment exists.

The Fifth Circuit, for example, recently imposed such a requirement in *In re Lampton*.<sup>24</sup> Faced with a prisoner who had convinced a lower court to eliminate one count of a multi-count conviction, the court refused to find that this created a new judgment, even though the eliminated count carried a life sentence.<sup>25</sup> The court pointed out that the prisoner was still serving a life sentence on one of his remaining counts, and it contrasted this with the prisoner in *Magwood*, who had been fully resentenced.<sup>26</sup> It then found that whether a new judgment exists "depends on whether a new sentence has been imposed."<sup>27</sup> In other words, it limited the definition of new judgment to the facts of *Magwood*, finding that only the sentence portion of a judgment matters for purposes of the new-judgment analysis.

That conclusion misses three important points. First, in *Magwood*, the Supreme Court never said that a full resentencing was necessary to create a new

21. *Deal v. United States*, 508 U.S. 129, 132 (1993), <https://supreme.justia.com/cases/federal/us/508/129> ("A judgment of conviction includes both the adjudication of guilt and the sentence."); see also *Burton v. Stewart*, 549 U.S. 147, 151–53, 155–56 (2007), <https://supreme.justia.com/cases/federal/us/549/147> (recognizing that a judgment has two parts).

22. FED. R. CRIM. P. 32(k)(1) ("In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence.")

23. The Section 2254 and Section 2255 forms that prisoners fill out ask those prisoners to identify the "judgment of conviction" (i.e., the same language used in Rule 32 of the Federal Rules of Criminal Procedure) that they are challenging. See *Petition for Relief from a Conviction or Sentence By a Person in State Custody*, U.S. COURTS (Jan. 1 2015), [http://www.uscourts.gov/sites/default/files/ao241\\_0.pdf](http://www.uscourts.gov/sites/default/files/ao241_0.pdf) [<https://perma.cc/F5WA-UWGA>]; *Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody*, U.S. COURTS (Jan. 1 2015), [http://www.uscourts.gov/sites/default/files/ao243\\_0.pdf](http://www.uscourts.gov/sites/default/files/ao243_0.pdf) [<https://perma.cc/EV3V-M9FC>]. "Judgment of conviction" includes both the conviction and the sentence because the forms allow prisoners to raise challenges to either. See *id.*; see also DONALDE E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK §1:1 (Thomson Reuters 2016-17) (defining "judgment of conviction" to include the conviction and the sentence).

24. 667 F.3d 585 (5th Cir. 2012), <http://law.justia.com/cases/federal/appellate-courts/ca5/11-30458/11-30458-cv0.wpd-2012-01-11.html>.

25. *Id.* at 587–89. The Fifth Circuit did something similar in *In re Hensley*, 836 F.3d 504 (5th Cir. 2016), <http://law.justia.com/cases/federal/appellate-courts/ca5/16-30519/16-30519-2016-09-07.html>. There, the prisoner had convinced a lower court to eliminate a habitual-offender designation and the increased sentence that went along with it. *Hensley*, 836 F.3d at 506. The court found that this, too, was insufficient to create a new judgment. *Id.*

26. *Lampton*, 667 F.3d at 589.

27. *Id.* at 587–89.

judgment. It simply said that a full resentencing had been performed in that case, emphasizing that the existence of a new judgment was “especially clear here, where the state court conducted a full resentencing and reviewed the aggravating evidence afresh.”<sup>28</sup> So, relying on *Magwood* for the idea that only a resentencing creates a new judgment is not supported by what the Supreme Court actually said.

Second, the Supreme Court has defined judgment to include both the sentence *and* the conviction.<sup>29</sup> Concluding that only a resentencing creates a new judgment is inconsistent with this basic definition. Specifically, if courts create a new judgment when they change a sentence (even without changing the conviction), it follows that they create a new judgment when they change a conviction, too (even without changing the overall sentence).<sup>30</sup> In both cases, a portion of the judgment is different than it was before. Respecting that point is the only way to respect the Supreme Court’s judgment definition.

Finally, requiring a prisoner to show that he has been resentenced to satisfy the new-judgment analysis is misplaced because a conviction has consequences separate from the sentence attached to it. For example, criminal history points and career criminal status can be dictated by the sheer number of convictions on someone’s record.<sup>31</sup> Consequently, vacating a conviction can have collateral effects, a point the Supreme Court has explicitly recognized.<sup>32</sup> Those effects justify finding that a new judgment exists, even if vacating the conviction had no effect on the prisoner’s sentence.

#### B. *Disaggregating judgments by examining the claims raised.*

When the Supreme Court decided *Magwood*, it left open a question that has subsequently divided the courts of appeals: whether prisoners who convince a lower court to change part of their judgment are limited to challenging the changed part. Most have found that they are not.<sup>33</sup> But two, the Seventh and Tenth Circuits, have decided that under these circumstances the prisoner has

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28. *Magwood*, 561 U.S. at 339, <https://supreme.justia.com/cases/federal/us/561/320>.

29. *Deal v. United States*, 508 U.S. 129, 132 (1993), <https://supreme.justia.com/cases/federal/us/508/129>.

30. *See Johnson*, 623 F.3d at 42–43.

31. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.2(f), 4B1.1 (U.S. SENTENCING COMM’N 2014), <https://www.uscourts.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> [<https://perma.cc/UNM5-DKNC>]; *see also United States v. Clarke*, 780 F.3d 1131, 1133 (11th Cir. 2015), <http://law.justia.com/cases/federal/appellate-courts/ca11/13-15874/13-15874-2015-03-17-0.html> (discussing the history of the Eleventh Circuit counting convictions with sentencing withheld as convictions for federal statutes).

32. *See Ball v. United States*, 470 U.S. 856, 865 (1985), <https://supreme.justia.com/cases/federal/us/470/856/case.html> (vacating an impermissible conviction that did not affect the prisoner’s sentence, and remanding for the district court to enter a new “judgment,” because such a conviction still “has potential adverse collateral consequences that may not be ignored”). One of the “collateral consequences” that the Supreme Court gave as an example was that the conviction could “result in an increased sentence under a recidivist statute for a future offense.” *Id.*

33. *Gray*, 850 F.3d at 142–43 (describing the circuit split).

obtained only a partially new judgment, which limits him to challenging the part that was changed.<sup>34</sup> That approach is mistaken for several reasons.

First, the federal habeas statutes speak of only one “judgment.”<sup>35</sup> In other words, they contemplate a prisoner challenging a unitary judgment, not a prisoner challenging a judgment’s component parts. This is because only one “judgment of conviction” arises from each case, even if a defendant is convicted on multiple counts. The Federal Rules of Criminal Procedure, for example, explain that the “judgment of conviction” is a single document filed by the court at the end of a criminal trial that includes “the plea, the jury verdict or the court’s findings, the adjudication, and the sentence.”<sup>36</sup> This necessarily means that a change to part of the “judgment of conviction” changes the whole thing. Put differently, changing part of a judgment does not create a “partially new judgment.” It creates a single judgment that is totally new. Finding otherwise is inconsistent with the text of the federal habeas statutes and the commonly understood meaning of “judgment of conviction.”

Second, finding that a prisoner has obtained a partially new judgment is the same as adopting the claims-based approach that the Supreme Court rejected in *Magwood*.<sup>37</sup> Consider, for example, a prisoner who obtains a change to part of his judgment, then files a new habeas application that includes claims challenging both the changed and unchanged parts. Courts taking the “partially new judgment” approach would have to examine the application to see which claims were successive and which were not. In *Magwood*, the State asked the Supreme Court to do the same thing, but the Court chose not to. It recognized that the federal habeas statutes require courts to determine whether the “application” is second or successive.<sup>38</sup> If it is, only then do courts review the application on a claim-by-claim basis under Sections 2244(b)(1) and 2244(b)(2) to see if any individual claim may proceed.<sup>39</sup> Put differently, Section 2244 requires courts to determine whether the petition “as a whole” is successive before they can examine the petition’s individual claims.<sup>40</sup> That means that if a petition is the first to challenge a changed judgment, courts should not treat *any*

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34. See *Turner v. Brown*, 845 F.3d at 298–99; *Suggs v. United States*, 705 F.3d 279, 285 (7th Cir. 2013); *Burks v. Raemisch*, No. 16-1247, 2017 WL 727132 (10th Cir. Feb. 24, 2017), <http://law.justia.com/cases/federal/appellate-courts/ca10/16-1247/16-1247-2017-02-24.html> (unpublished) (finding, in the context of Section 2244(d)(1)(A), that the statute of limitations was not reset after a resentencing for claims unrelated to the resentencing).

35. 28 U.S.C. § 2254(a) (2012).

36. FED. R. CRIM. P. 32(k)(1); see also WILKES, STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK § 1:1 (same). Rule 32 also states that the judge “must sign *the* judgment, and the clerk must enter *it*.” FED. R. CRIM. P. 32(k)(1) (emphasis added); see also *United States v. Monsanto*, 491 U.S. 600, 602, 605 n.4 (1989), <https://supreme.justia.com/cases/federal/us/491/600> (referring to “a judgment of conviction” where the defendant was convicted of, and sentenced under, multiple counts) (emphasis added).

37. See *Magwood*, 561 U.S. at 331–33.

38. See *id.* at 334–35; see also 28 U.S.C. § 2244(b)(1) (2012).

39. See 28 U.S.C. §§ 2244(b)(1),(2).

40. *Magwood*, 561 U.S. at 334–35 n.10; 28 U.S.C. §§ 2244(b)(1),(2).



claims within it as successive, even if they challenge the unchanged parts.<sup>41</sup> In other words, it means there is no such thing as a “partially new judgment” when determining whether a petition is successive.<sup>42</sup>

Finally, the “partially new judgment” approach is impractical and inefficient. Consider, again, the prisoner who obtains a change to part of his judgment. Determining whether the claims he raises in a new application challenge the changed or the unchanged parts of that judgment will sometimes be “no easy feat.”<sup>43</sup> Plus, if some of those claims did, in fact, challenge the unchanged parts, the district court would have to transfer those claims to the court of appeals for authorization under Section 2244.<sup>44</sup> Then it would have to wait on the court of appeals’ response.<sup>45</sup> That would be inconsistent with one of the “basic purposes” of the Antiterrorism and Effective Death Penalty Act (AEDPA): “to eliminate delays in the federal habeas review process.”<sup>46</sup>

### C. Conflating the “new judgment” and “custody” requirements.

The federal habeas statutes require courts to consider habeas applications from prisoners who are “in custody” pursuant to a “judgment” if the judgment allegedly violates the Constitution or the laws or treaties of the United States.<sup>47</sup> At least one court, the Eleventh Circuit, has started relying on the “custody” language in these provisions to limit the scope of what “new judgment” means. In *Cox v. Secretary, Florida Department of Corrections*, for example, the prisoner had a three-count conviction, with the third count carrying a suspended sentence.<sup>48</sup> After unsuccessfully filing a first habeas petition in federal court, the prisoner convinced a state court to eliminate count three on double jeopardy

41. See, e.g., *Gray*, 850 F.3d at 143–44; *King v. Morgan*, 807 F.3d 154, 158 (6th Cir. 2015), <http://law.justia.com/cases/federal/appellate-courts/ca6/13-4189/13-4189-2015-12-01.html>.

42. Reading the federal habeas statutes to mean that a prisoner cannot have a “partially new judgment” also is consistent with *Artuz v. Bennett*, 531 U.S. 4 (2000), <https://supreme.justia.com/cases/federal/us/531/4>. There, the State argued that parts of a habeas application might be “properly filed” under Section 2244(d) while other parts might not. *Bennett*, 531 U.S. at 9–10. The Supreme Court rejected that argument, explaining that Section 2244(d) “refers only to ‘properly filed’ applications and does not contain the peculiar suggestion that a single application can be both ‘properly filed’ and not ‘properly filed.’” *Id.* at 10.

43. *King*, 807 F.3d at 158. Because the sentence and conviction are often interrelated, some claims will challenge both. For instance, if the jury finds facts related to the conviction and the sentence, a *Batson* challenge would affect both. *Id.* So would a *Brady* challenge if the government withheld exculpatory evidence until after resentencing. *Id.* Separating these types of claims out when reviewing a petition filed after a new judgment would be difficult, if not impossible. *Id.*

44. *Id.*

45. *Id.*

46. See *Holland v. Florida*, 560 U.S. 631, 648 (2010), <https://supreme.justia.com/cases/federal/us/560/631>.

47. 28 U.S.C. § 2254(a) (2012); 28 U.S.C. § 2255(a) (2012). Again, although Section 2255 uses the word “sentence” instead of “judgment,” courts still apply *Magwood*’s “new judgment” rule to it. See *supra* note 11.

48. 837 F.3d 1114, 1115 (11th Cir. 2016), <http://law.justia.com/cases/federal/appellate-courts/ca11/13-15718/13-15718-2016-09-13.html>.

grounds.<sup>49</sup> He then filed another habeas petition in federal court and argued that it challenged a new judgment.<sup>50</sup> But the Eleventh Circuit disagreed.<sup>51</sup> It found that he was never “in custody” under count three.<sup>52</sup> Put differently, the court decided that the prisoner had to originally be “in custody” under the part of the judgment that was changed for a new judgment to exist.<sup>53</sup>

The court later took a similar step in *Patterson v. Secretary, Florida Department of Corrections*.<sup>54</sup> There, the prisoner convinced a state court to eliminate a chemical castration component of his sentence.<sup>55</sup> He then filed a new habeas petition and argued that this change to his sentence created a new judgment.<sup>56</sup> A three-judge panel agreed,<sup>57</sup> but the en banc court reversed, finding that the order eliminating his chemical castration requirement did not “authorize” his custody.<sup>58</sup> In so concluding, the en banc court appeared to find that such an order would “authorize” custody only if it were memorialized in a new paper judgment or if it added something to the prisoner’s judgment.<sup>59</sup> Put differently, it was not enough to invalidate some part of a prisoner’s sentence or conviction. Further change—in the form of issuing a new paper judgment or worsening the prisoner’s judgment—was necessary.

Intermingling the “custody” and “new judgment” analyses in this way is wrong for two main reasons. First, doing so is inconsistent with the text of federal habeas statutes. In particular, the statutes’ text shows that the “custody” requirement is a jurisdictional requirement that must be satisfied at the time the application is filed.<sup>60</sup> This means that when someone files a petition, the district court looks to see if that individual is *currently* in custody under a judgment that he is challenging on constitutional (or other federal law) grounds. If so, then the district court has jurisdiction to consider his petition.<sup>61</sup> Only then does the court

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1115–16.

53. *See id.*

54. 849 F.3d 1321.

55. *Id.* at 1323.

56. *Id.*

57. *Id.* at 1324 (citing *Patterson I*, 812 F.3d 885).

58. *Id.* at 1325–27. In reaching this conclusion, the court appeared to reject *Cox*’s finding that the eliminated portion of the judgment had to, when it existed, hold the prisoner in custody. *See id.* at 1327 (“But whether a challenge to the removed portion of the sentence was initially cognizable in a habeas proceeding is irrelevant to whether the removal of that condition produces a new judgment.”).

59. The majority’s rationale is a little unclear, as the five dissenting judges point out. *See id.* at 1330–32. Also, a requirement that an order be memorialized in a new paper judgment seems difficult to justify. If we hinged the new judgment analysis on whether the lower court entered a new paper judgment, then the substantive nature of the change would no longer matter and the outcome would vary based on the practices of the lower courts. *Id.*

60. BRIAN R. MEANS, *POSTCONVICTION REMEDIES* § 7.3 (Thompson Reuters 2016) (“The custody requirement is jurisdictional. Thus, it is a preliminary issue to be decided first by the court.”).

61. *See* 28 U.S.C. § 2254(a) (2012); *see also Maleng v. Cook*, 490 U.S. 488, 490–91 (1989), <https://supreme.justia.com/cases/federal/us/490/488> (“We have interpreted the statutory language as

ask whether the prisoner has previously filed a petition challenging his judgment, and if the answer is yes, that is when the court must determine whether the judgment the prisoner is challenging is “new.” In other words, the “custody” inquiry is entirely separate from the question of whether a prisoner is challenging a “new judgment.”

Second, the Supreme Court recognized that point in *Magwood*. There, the State argued that the Court “should focus not on the statute’s reference to a ‘judgment’ but on its reference to ‘custody’” when determining whether a petition is successive.<sup>62</sup> The Court found that argument “unpersuasive,” though, because it was inconsistent with the text of the federal habeas statutes.<sup>63</sup> Put simply, it rejected the State’s attempt to make “custody” the key issue in determining whether a petition is successive; it found that the “judgment” is what matters.<sup>64</sup> Thus, intermingling the “custody” and “new judgment” analyses is not only inconsistent with the text of the federal habeas statutes, it is also inconsistent with the Supreme Court’s interpretation of that text—i.e., neither the text nor the Supreme Court endorses mixing the two.

### III.

#### MATERIAL CHANGES TO SENTENCES OR CONVICTIONS CREATE NEW JUDGMENTS.

So far courts have not applied any consistent test for determining when a new judgment exists. They have addressed each change in the “new judgment” cases piecemeal, without adopting any holistic analysis for figuring out what “new judgment” means. The remainder of this essay lays out such a test in two parts. First, any material change to either a sentence or a conviction should be sufficient to create a new judgment after *Magwood*. “Material” in this context means invalidating or adding to either part of the judgment. Second, the change to a prisoner’s judgment does not have to be detrimental to be material. *Any* material change, even if it helps the prisoner, creates a new judgment under this test. Overall, this test respects the federal habeas statutes’ text and simplifies the analysis for a question that has plagued, and divided, the lower courts ever since the Supreme Court issued its *Magwood* opinion.

#### A. *Material means invalidate or add to.*

Because a judgment has two parts, and because material changes to either have consequences for a prisoner, those changes should be sufficient to create a

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requiring that the habeas petitioner be ‘in custody’ *under the conviction or sentence under attack at the time his petition is filed.*”) (emphasis added).

62. *Magwood*, 561 U.S. at 333.

63. *Id.*

64. *Id.*; see also *Patterson II*, 849 F.3d at 1331–32 (Jordan, J., dissenting) (“In *Magwood*, the Supreme Court rejected the state’s argument that custody is the critical concept in determining whether a habeas corpus petition is second or successive. . . .”).

“new judgment” when analyzing whether a petition is successive after *Magwood*. This means that invalidating or adding to either part of the judgment is enough to make that judgment “new.” Stated differently, any non-clerical change affecting the validity of the underlying judgment would be a “material” change for purposes of determining whether a judgment is new and, therefore, whether a petition is successive.

This test should be relatively easy to apply because what constitutes a clerical change has been well defined by state and federal courts. For example, it is universally accepted that clerical changes are ministerial changes, such as those that conform the written judgment to the oral pronouncement or those that correct dates.<sup>65</sup> And it is universally accepted that clerical changes do not include any “substantive alteration”—that is, changes resulting from “a judicial determination or error” or changes affecting the “validity” of a sentence or conviction.<sup>66</sup> In essence, by hinging the outcome of the “new judgment” test on whether the underlying change to a prisoner’s judgment was clerical, courts would be able to rely on a well-developed body of state and federal case law to determine when a new judgment has been created.

Admittedly, this defines new judgment somewhat broadly. Applying it would mean, for example, that adding a post-release control requirement to a prisoner’s sentence would be a new judgment,<sup>67</sup> as would eliminating one count of a multi-count judgment, even if it in no way affected the prisoner’s sentence.<sup>68</sup> Eliminating a habitual offender designation would qualify, too.<sup>69</sup> So would changing a prisoner’s restitution obligation,<sup>70</sup> invalidating a prisoner’s chemical castration requirement,<sup>71</sup> and amending a prisoner’s judgment to include earned good-time credit.<sup>72</sup> In short, quite a few changes will satisfy this basic test.

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65. See, e.g., CHARLES ALAN WRIGHT, ET AL., 3 FED. PRAC. & PROC. CRIM. § 641 (4th ed. 2017).

66. *Id.*; DONALD E. WILKES, JR., FEDERAL POSTCONVICTION REMEDIES AND RELIEF HANDBOOK § 3:40 (Thomson Reuters 2017); *United States v. Pease*, 331 F.3d 809, 816 (11th Cir. 2003), <http://law.justia.com/cases/federal/appellate-courts/F3/331/809/510947>; FLA. R. CRIM. P. 3.800 court commentary to 1999 amendments.

67. See *In re Stansell*, 828 F.3d 412, 416–17 (6th Cir. 2016), <http://law.justia.com/cases/federal/appellate-courts/ca6/15-4244/15-4244-2016-07-01.html>.

68. See *Johnson*, 623 F.3d at 42–43.

69. This would mean that the Fifth Circuit incorrectly decided *In re Hensley*, 836 F.3d 504, 506 (5th Cir. 2016), <http://law.justia.com/cases/federal/appellate-courts/ca5/16-30519/16-30519-2016-09-07.html>.

70. See *Gonzalez v. United States*, 792 F.3d 232, 233–36 (2d Cir. 2015), <http://law.justia.com/cases/federal/appellate-courts/ca2/14-1994/14-1994-2015-07-02.html> (“Restitution is a serious component of criminal punishment.”).

71. See the original Eleventh Circuit panel opinion in *Patterson I*, 812 F.3d at 887.

72. *Sorey v. Jones*, No. 14-141, 2015 WL 5468671, at \*2–4 (N.D. Fla. May 25, 2015) (finding a new judgment because it added one day of good-time credit), *report and recommendation adopted*, No. 14-141, 2015 WL 5468651 (N.D. Fla. Sept. 16, 2015), <https://casetext.com/case/sorey-v-jones>; *Braunstein v. Cox*, No. 11-00587, 2012 WL 3638772, at \*1–2 (D. Nev. Aug. 22, 2012), <https://casetext.com/case/braunstein-v-cox-1> (finding a new judgment because it added forty days of good-time credit).

But one significant set of changes would not: sentence modifications made under 18 U.S.C. § 3582(c) or any equivalent state procedure.<sup>73</sup> This is so for two reasons. First, these changes do not affect the validity of an underlying judgment. Instead, they modify a judgment based on the result of some collateral proceeding, such as the Sentencing Commission's decision to adjust a guidelines range. Second, with respect to changes under Section 3582, Congress included language in that statute regarding the effect of these modifications,<sup>74</sup> specifying that a prisoner's original judgment of conviction remains his final "judgment" for purposes of the second-or-successive analysis.<sup>75</sup> Consequently, one set of changes that can have the most far-reaching effect for prisoners would not create a wave of new judgments, and therefore a wave of new petitions, under this test.

Even after carving out these sentence modifications, though, some courts may be concerned about the breadth of changes that create a new judgment under this test. Four responses counter those concerns: First, changes that lead to "new judgments" under this test are, and will remain, relatively difficult to obtain. In particular, convincing a naturally skeptical court (usually while acting pro se) to change a conviction or sentence is no easy task. So any concern over creating a flood of new petitions would be "greatly exaggerated," a basic point that the Supreme Court recognized in *Magwood*.<sup>76</sup> Second, the exhaustion doctrine and procedural default rules will still limit prisoners' ability to assert abusive claims.<sup>77</sup> In fact, the Supreme Court recognized in *Magwood* that procedural-default rules are better suited at weeding out abusive claims than the bar on

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73. Some states, for example, allow courts to reduce a sentence if it is too harsh. Doing so says nothing about whether the sentence is illegal or illegally imposed. See DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK § 1:7 (Thomson Reuters 2016-17). That said, at least one court has reached a different conclusion when applying such a law. See *Clayton v. Biter*, 868 F.3d 840, 844 (9th Cir. 2017), <http://law.justia.com/cases/federal/appellate-courts/ca9/15-71566/15-71566-2017-08-21.html> ("[U]nder California law, a resentencing petition does not challenge the underlying conviction or sentence; rather, it seeks to obtain the benefits of Proposition 36 and results in the entry of a new appealable order or judgment. The denial of Clayton's section 1170.126 petition therefore constitutes a new judgment.").

74. Specifically, Section 3582(b) says: "Notwithstanding the fact that a sentence to imprisonment can subsequently be . . . modified pursuant to the provisions of subsection (c) . . . a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes." In other words, Congress stated its intent in Section 3582(b) regarding the effect of these collateral changes on the finality of a prisoner's judgment, something it did not do in the federal habeas statutes regarding the second-or-successive analysis.

75. So far three courts of appeals have agreed that the language included by Congress precludes these modifications from creating "new judgments." See, e.g., *Sherrod v. United States*, 858 F.3d 1240, 1242 (9th Cir. 2017), <http://law.justia.com/cases/federal/appellate-courts/ca9/16-72178/16-72178-2017-06-02.html> ("[W]e join our sister circuits in holding that a § 3582(c)(2) sentence reduction does not qualify as a new, intervening judgment.").

76. See *Magwood*, 561 U.S. at 340.

77. See *King v. Morgan*, 807 F.3d 154, 160 (6th Cir. 2015), <http://law.justia.com/cases/federal/appellate-courts/ca6/13-4189/13-4189-2015-12-01.html>; *Insignares v. Sec'y, Florida Dep't of Corrs.*, 755 F.3d 1273, 1281 n.9 (11th Cir. 2014), <http://law.justia.com/cases/federal/appellate-courts/ca11/12-12378/12-12378-2014-06-23.html>.

second-or-successive petitions.<sup>78</sup> Hence, those rules should be the primary means for discouraging abusive claims, not a new-judgment rule that stretches the second-or-successive bar beyond what the text of the federal habeas statutes supports. Third, if a federal court has already addressed the merits of a claim in the first round of habeas review, that claim will not take long to decide if a prisoner raises it again. The court can summarily dismiss it without having to re-engage the arguments for doing so.<sup>79</sup> Thus, any fear that prisoners would be able to re-litigate the merits of claims that were already decided would be unjustified. Finally, if a valid concern exists over prisoners' ability to raise claims in new petitions, Congress is the appropriate avenue for addressing that concern. It could easily add language to the federal habeas statutes limiting prisoners' ability to file new petitions after obtaining changes to their judgments. It could, for example, limit them to challenging the parts of their judgments that changed. Or it could preclude them from raising claims that they raised, or could have raised, before. Or it could do both. Or it could do something else entirely. The point is that if any action is necessary, clarifying the statutes in this way is the better action to take; disregarding the text of the federal habeas statutes, the Supreme Court's guidance on the "second-or-successive" analysis, and the Supreme Court's basic definition of "judgment," is not.

*B. Material does not mean detrimental.*

One last issue needs to be addressed to explain the scope of the test proposed in this essay. Assume that a prisoner has secured a beneficial change to his judgment. Maybe, for example, the change reduced his sentence. Or maybe it eliminated a conviction from his record but his overall sentence did not change. Either way, this would be a material change that creates a new judgment and allows him to file a new habeas petition. It does not matter that the change was to his advantage.

On its face, allowing a prisoner to file a new petition challenging his *improved* judgment seems counterintuitive. Some courts have hinted as much.<sup>80</sup> But the Supreme Court has found the distinction immaterial. In *Burton v.*

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78. See *Magwood*, 561 U.S. at 340; see also *Wentzell v. Neven*, 674 F.3d 1124, 1127 (9th Cir. 2012), <http://law.justia.com/cases/federal/appellate-courts/ca9/10-16605/10-16605-2012-04-02.html> ("The Supreme Court's discussion in *Magwood* indicates that procedural default rules—rather than the rules governing 'second or successive' petitions—are the more appropriate tools for sorting out new claims from the old.").

79. *Magwood*, 561 U.S. at 340 n.15 ("It will not take a court long to dispose of such claims where the court has already analyzed the legal issues.").

80. See, e.g., *Burks v. Raemisch*, 2017 WL 727132, at \*5 (finding that the prisoner did not have a new judgment for purposes of resetting the statute of limitations clock, in part because his resentencing "resulted in a more favorable sentence"). The en banc Eleventh Circuit expressly asked the parties to brief this question in *Patterson*. See *Patterson II*, 849 F.3d at 1328. It then adopted a new-judgment test focusing on whether a change authorized the prisoner's confinement. *Id.* at 1324–29. From the court's opinion, it appears that the only ways to satisfy that test would be to secure a new paper judgment or to show that the change was detrimental to the prisoner. See *id.* at 1324–26, 1329–33.

*Stewart*, for example, the Court examined whether the prisoner's petition was second or successive and determined that it was because it challenged the same judgment as his prior petition.<sup>81</sup> In reaching that conclusion, it did not matter that the "judgment" was one that had been amended to the prisoner's benefit.<sup>82</sup> In fact, in finding that the prisoner's petition was successive, the Court negatively compared it to the petition in *In re Taylor* out of the Fourth Circuit.<sup>83</sup> There, the prisoner had convinced a court to eliminate three counts and sixty months from his judgment.<sup>84</sup> Then he filed a numerically second petition.<sup>85</sup> This, according to the Supreme Court, was an example of a case with a "new judgment intervening between the two habeas petitions."<sup>86</sup> The fact that the new judgment had helped the prisoner did not matter.

That lack of regard for whether the intervening judgment helped or harmed the prisoner is consistent with the Court's subsequent opinion in *Magwood*, as well. There, the prisoner had convinced a federal district court to vacate his death sentence and order a resentencing.<sup>87</sup> At the resentencing, though, he was again given the death penalty.<sup>88</sup> Thus, his sentence did not change. Yet, when he challenged this new sentence through a new habeas petition, the Supreme Court found that the petition was not second or successive because it challenged a new judgment.<sup>89</sup> In other words, the change's lack of detriment to the prisoner did not prevent the Court from finding that the change created a new judgment for purposes of the second or successive analysis.

While this may seem counterintuitive, it has support in the text of the federal habeas statutes. Specifically, they speak only of the "judgment" and they include no qualifiers as to whether that judgment, if changed, has put the prisoner in a better or worse position.<sup>90</sup> That is, they provide no textual support for examining how the change to a judgment affected the prisoner. So it is unclear why any court in performing the new-judgment analysis would focus on whether a change to a prisoner's judgment helped or harmed him. The only question is whether the judgment has materially changed. If it has, a new judgment exists, period. That is the only result that is consistent with *Burton*, *Magwood*, and the statutes' text.

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81. 549 U.S. 147, 155–56 (2007), <https://supreme.justia.com/cases/federal/us/549/147>.

82. *Id.* at 150–51 (explaining that the March 16, 1998 amended judgment increased the prisoner's good time credits).

83. *Id.* at 156 (citing *In Re Taylor*, 171 F.3d 185 (4th Cir. 1999)), <http://law.justia.com/cases/federal/appellate-courts/F3/171/185/557561>).

84. *Taylor*, 171 F.3d at 186–87.

85. *Id.*

86. *Burton*, 549 U.S. at 156.

87. *Magwood*, 561 U.S. at 323, <https://supreme.justia.com/cases/federal/us/561/320>.

88. *Id.*

89. *Id.* at 341–42.

90. 28 U.S.C. §§ 2244, 2254, 2255 (2012).

## CONCLUSION

The meaning of “new judgment” is controversial because defining it broadly increases a prisoner’s ability to file new habeas petitions, including petitions raising claims that the prisoner has raised, or could have raised, before. Courts are understandably wary of that result. But that is the result that *Magwood* and the language of the federal habeas statutes require. If courts want that to change, Congress is the appropriate venue for changing it. Stretching the statutes’ language, or disregarding how the Supreme Court has interpreted that language, as a means to preclude prisoners’ petitions is not. Until Congress acts, the most justifiable way to address the new judgment question is to ask whether a court has invalidated part of, or added to, a prisoner’s sentence or conviction. If so, then his judgment is new and the first petition filed after it is not second or successive “at all.” That is consistent with *Magwood* and the text of the federal habeas statutes, and that is what courts should require when examining whether a new judgment exists.