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## What Is "New"?: Defining "New Judgement" After *Magwood*

Patrick Cothern

*University of Michigan Law School*

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NOTE

WHAT IS “NEW”?:  
DEFINING “NEW JUDGMENT” AFTER *MAGWOOD*

Patrick Cothorn\*

*Habeas corpus* petitioners must navigate the procedural barriers of the Anti-terrorism and Effective Death Penalty Act (“AEDPA”) before courts consider their petitions on the merits. Among the barriers imposed is a general prohibition on “second or successive” habeas petitions, meaning a petitioner who previously filed a habeas petition may not bring another, with limited exceptions. One such exception, recognized by the Supreme Court in *Magwood v. Patterson*, allows for a second habeas petition after the petitioner obtains a “new judgment.” *Magwood* and AEDPA, however, left the term “new judgment” undefined. This Note summarizes the history of habeas corpus in the United States, the passage of AEDPA, and the *Magwood* decision. It contends that the interpretation of “new judgment” adopted by some circuits is impermissibly restrictive of the implied right to petition for habeas relief. Thus, it proposes a simplified interpretation: any judicial change to the original judgment renders a “new judgment,” achieving a better balance between the interests of the petitioner and the state.

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## INTRODUCTION

Habeas corpus is a writ for which a prisoner may petition to challenge the legality of their confinement.<sup>1</sup> Recently, courts and Congress have weakened this protection by limiting a prisoner’s access to habeas review. A significant restriction of access to habeas corpus came from a 2017 en banc decision by the Eleventh Circuit. In *Patterson v. Secretary, Florida Department of Corrections (Patterson II)*, the Eleventh Circuit held in a 6–5 ruling that an order preventing the chemical castration portion of the petitioner’s sentence was not an amended sentence.<sup>2</sup> Thus, the window for filing a habeas challenge was not “reset.”<sup>3</sup> Beyond its disregard of the Supreme Court’s holding in *Magwood v. Patterson*<sup>4</sup> and divergence from other circuit decisions,<sup>5</sup> *Patterson II* illustrates fundamental problems with the Antiterrorism and Effective Death Penalty Act (“AEDPA”)<sup>6</sup>—especially its “second or successive” provision.<sup>7</sup> AEDPA is the oft-maligned<sup>8</sup> act that imposes a host of procedural requirements on prisoners seeking post-conviction habeas re-

1. See *Habeas Corpus*, BLACK’S LAW DICTIONARY (10th ed. 2014).

2. 849 F.3d 1321, 1327–28 (11th Cir. 2017) (en banc).

3. *Patterson II*, 849 F.3d at 1327–28.

4. 561 U.S. 320 (2010).

5. *Compare In re Gray*, 850 F.3d 139, 143 (4th Cir. 2017) (holding that a new judgment “resets the habeas counter to zero”), and *King v. Morgan*, 807 F.3d 154, 156 (6th Cir. 2015) (holding that a habeas petitioner avoids the second or successive requirements of AEDPA if they have received a new judgment), and *Wentzell v. Neven*, 674 F.3d 1124, 1127 (9th Cir. 2012) (holding that the Supreme Court rejected the “one opportunity rule” in *Magwood*), with *Patterson II*, 849 F.3d at 1328 (holding that an order to prevent the execution of a portion of the sentence does not constitute a new judgment).

6. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

7. 28 U.S.C. § 2244(a)–(b) (2012).

8. See, e.g., Justin F. Marceau, *Don’t Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 4 (2010) (“The quantity and creativity of academic attacks on the application of the [AEDPA] has prompted . . . a sense that defense lawyers, and a large part of academia, simply do not like the habeas limiting statutes.” (footnotes omitted)).

view.<sup>9</sup> The lack of clarity in AEDPA makes it difficult to determine when the statute’s limitation on second or successive petitions applies in the case of a “new judgment.”<sup>10</sup> Prisoners are left to navigate a system that places obstacles at every step in the name of judicial efficiency, finality, and state comity.<sup>11</sup> These goals are worthy of consideration but have led to excessive limitation of second or successive habeas petitions. This Note identifies the point at which the application of the second or successive provision of AEDPA crosses from efficiency and comity to inconsistency and unconstitutionality. It concludes with a solution to this AEDPA conundrum by proposing an interpretation that simply compares the judgment a petitioner claims is “new” with the judgment as originally entered, such that any judicially created change constitutes a new judgment.

Part I explores the history and legal background of habeas petitions and successive claims under AEDPA. Part II analyzes recent cases and concludes that there are serious inconsistencies in recent interpretations of the second or successive provision of AEDPA. These inconsistencies threaten the federal check on state courts’ power to review issues of federal law and potentially violate petitioners’ due process rights. Part III proposes a rule for when an amended sentence constitutes a “new judgment” that would correct inconsistencies and bring greater predictability to second-in-time habeas petitions.

#### I. A SHORT HISTORY OF HABEAS, AEDPA, AND THE DEBATE

*Habeas corpus ad subjiciendum* is a tool that a petitioner may use to test the legality of their detention.<sup>12</sup> Dating back to at least 1679,<sup>13</sup> the evolution of “the Great Writ”<sup>14</sup> has been called the “history of the ever-greater manifestation of ideals of fairness, due process, and humanitarianism.”<sup>15</sup> The United States ingrained access to habeas corpus in Article I, Section IX of the Constitution, which states: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safe-

9. Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 447 (2007) (“AEDPA imposed or fortified several obstacles to habeas relief, although its provisions were hastily ratified and poorly cohered.” (footnotes omitted)).

10. See *infra* Section I.0.

11. See Kovarsky, *supra* note 9, at 444.

12. See *Habeas Corpus*, *supra* note 1.

13. See Amanda L. Tyler, *A “Second Magna Carta”: The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949 (2016); Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CALIF. L. REV. 635 (2015); see also William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978); Charles Alan Wright, *Habeas Corpus: Its History and Its Future*, 81 MICH. L. REV. 802 (1983) (reviewing WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* (1980)).

14. *Carbo v. United States*, 364 U.S. 611, 615 (1961); *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 96 (1807).

15. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 581 (2008).

ty may require it.”<sup>16</sup> But despite the broad sentiments of the Constitution, state prisoners were not permitted to seek habeas relief in federal courts until the Habeas Corpus Act of 1867.<sup>17</sup> In the years since, the reach of the writ has expanded. For example, it now extends to extraterritorial jurisdiction and applies to noncitizens, like detainees in Guantanamo Bay.<sup>18</sup> As the scope of the writ expanded, however, procedural barriers to obtaining habeas review increased.

A. *AEDPA, Amended Sentences, and the “Second or Successive” Provision*<sup>19</sup>

A major development in recent habeas corpus jurisprudence was the 1996 passage of the Antiterrorism and Effective Death Penalty Act.<sup>20</sup> The relevant parts of this Act apply to state prisoners who submit habeas petitions in federal court<sup>21</sup> and were intended to expedite federal review of habeas petitions.<sup>22</sup> AEDPA has been widely criticized as ambiguous<sup>23</sup> and confusing.<sup>24</sup> The ambiguities in AEDPA could be explained by its inclusion of antiterrorism legislation; the Act was proposed and expediently passed<sup>25</sup> in the wake of

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16. U.S. CONST. art. I, § 9, cl. 2.

17. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (current version at 28 U.S.C. § 2241 (2012)); McCleskey v. Zant, 499 U.S. 467, 477–79 (1991); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1081 (1995).

18. Boumediene v. Bush, 553 U.S. 723 (2008) (finding that detainees in Guantanamo Bay may petition for writs of habeas corpus).

19. There are many intricacies in this area of law. For the sake of brevity, this Note will refer to motions and petitions under 28 U.S.C. §§ 2244, 2254 (2012) as habeas petitions generally; and will take other similar liberties, unless it is necessary to engage otherwise.

20. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code).

21. 28 U.S.C. § 2254; Harrington v. Richter, 562 U.S. 86, 103 (2011).

22. John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 259–60 (2006).

23. *E.g.*, Lindh v. Murphy, 521 U.S. 320, 336 (1997) (“All we can say is that in a world of silk purses and pigs’ ears, [AEDPA] is not a silk purse of the art of statutory drafting.”); Blume, *supra* note 22, at 261 (“AEDPA’s framers chose arcane statutory language . . . that had no prior habeas history or pedigree . . . [which] left the Supreme Court, and lower federal courts, with little guidance regarding Congress’s intent.”).

24. *E.g.*, LARRY W. YACKLE, *FEDERAL COURTS: HABEAS CORPUS* 57 (2003) (“AEDPA is notorious for its poor drafting. The Act is replete with vague and ambiguous language, apparent inconsistency, and plain bad grammar.”); Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. 887, 887 (2012) (reviewing NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY* (2011)) (“Everyone recognizes that federal habeas doctrine is a mess.”); *see also* Transcript of Oral Argument at 14, *Dodd v. United States*, No. 04-5286 (U.S. Mar. 22, 2005) (“[W]ho’s responsible for writing this . . . ?”).

25. *See* Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 545–46 (2006) (detailing the history of AEDPA’s passage, and how Republicans in Congress “seized the opportunity” and held no “committee hearings, mark-up sessions, or similar opportunities for testing ideas” to get the bill “shot through committee in both bodies and . . . to the floor without an explanatory report”).

the Oklahoma City bombings.<sup>26</sup> Another possible explanation is Congress’s interest in preserving state courts’ authority,<sup>27</sup> as “AEDPA was intended more broadly ‘to further the principles of comity, finality, and federalism.’”<sup>28</sup> Regardless of the explanation, AEDPA now governs federal habeas review. It has become an integral part of habeas doctrine, and prisoners must reckon with its procedural twists and turns.

One of the significant changes that AEDPA brought to habeas analysis was a greater restriction on second or successive motions. Specifically, a court of appeals must certify that any “second or successive” petitions contain either: (1) “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]” or (2) newly discovered evidence which, if proven, would “establish by clear and convincing evidence that . . . no reasonable factfinder would have found the movant guilty.”<sup>29</sup> If the court of appeals finds that these requirements are not satisfied, the petition is deemed “second or successive” and must be dismissed.<sup>30</sup>

This change presents a linguistic ambiguity. “Second or successive” is a term of art<sup>31</sup> left undefined by AEDPA<sup>32</sup> that refers to any habeas petition challenging the same judgment for which the petitioner had previously filed a petition.<sup>33</sup> In other words, it refers to habeas petition *Y* that challenges judgment *A* when the petitioner had previously filed habeas petition *X* also challenging judgment *A*. It does not necessarily refer to the second-in-time habeas petition.<sup>34</sup> “Second in time” is another term of art referring to *any* numerically second habeas petition. For example, it refers to any habeas petition *Y* when the same petitioner previously filed habeas petition *X*, regardless of the claims present in either petition. All “second or successive”

26. Kovarsky, *supra* note 9, at 447.

27. See Blume, *supra* note 22, at 260 (“[G]one were the days of a lone federal judge or panel of judges routinely finding constitutional defects in state court convictions.”).

28. *Suggs v. United States*, 705 F.3d 279, 285 (7th Cir. 2013) (quoting *Duncan v. Walker*, 533 U.S. 167, 178 (2001)).

29. 28 U.S.C. § 2244(b)(2)(A)–(B) (2012).

30. *Id.* § 2244(b)(3)(C).

31. *Magwood v. Patterson*, 561 U.S. 320, 332 (2010).

32. *In re Weathersby*, 717 F.3d 1108, 1110 (10th Cir. 2013) (per curiam) (“The term ‘second or successive’ is not defined in § 2255 or elsewhere in AEDPA.”); *Propes v. Quaterman*, 573 F.3d 225, 229 (5th Cir. 2009) (“There is not, however, a definition in the AEDPA of the term ‘second or successive’ application.”).

33. While AEDPA does not define “second or successive,” courts have. The Supreme Court wrote, “The phrase ‘second or successive’ is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of [AEDPA].” *Panetti v. Quarterman*, 551 U.S. 930, 943–44 (2007) (citation omitted). The circuits have interpreted this pre-AEDPA caselaw to conclude that “second or successive” refers to the “abuse of the writ doctrine.” *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005). That is to ask, is the petitioner abusing the system by including claims that could have been raised earlier? If the answer to that question is yes, the petition is abusing the writ, and is therefore successive. See *id.*

34. *In re Weathersby*, 717 F.3d at 1110; *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998).

petitions are also “second in time,” but not all second-in-time petitions are second or successive. Without a certification that a habeas petition is not second or successive, the district court does not have jurisdiction to hear the case.<sup>35</sup> Prisoners seeking habeas review are thus severely limited in their ability to bring multiple habeas petitions,<sup>36</sup> as their successive petition must raise a claim that could not have been raised in their initial petition.<sup>37</sup>

Crucially for this discussion, if a petitioner has received a “new judgment” after filing an initial habeas petition, a second-in-time habeas petition raising claims based on the new judgment will not be deemed second or successive.<sup>38</sup> The term “new judgment” is also undefined and is a point of contention among the circuit courts.<sup>39</sup>

### B. Magwood, Patterson II, and the Shape of the Debate

*Magwood v. Patterson* is the Supreme Court case that interprets the second or successive provision in the context of new judgments.<sup>40</sup> Billy Joe Magwood was sentenced to death for murdering an Alabama sheriff in 1979.<sup>41</sup> Just days before his execution, Magwood’s application for a writ of habeas corpus was granted.<sup>42</sup> The district court upheld Magwood’s conviction but vacated his sentence because the trial court failed to find mitigating circumstances relating to Magwood’s mental state.<sup>43</sup> The trial court held a new sentencing hearing in 1986, and Magwood was again sentenced to death.<sup>44</sup> One year after AEDPA was passed, Magwood sought leave to file a

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35. 28 U.S.C. § 2244(b)(3)–(4) (“Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application . . . . A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.”); *see also* *Burton v. Stewart*, 549 U.S. 147, 152–53 (2007).

36. *King v. Morgan*, 807 F.3d 154, 155 (6th Cir. 2015) (“[AEDPA] does not take kindly to repeat requests for habeas relief.”); *United States v. Jones*, 796 F.3d 483, 485 (5th Cir. 2015) (“This requirement ‘creates a gatekeeping mechanism for the district court’s consideration of successive applications for habeas relief.’”) (quoting *Propes*, 573 F.3d at 229); Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 77 (2005) (“Unfortunately, due to the AEDPA’s changes to the rules governing successive motions . . . prisoners found the courthouse doors closed to them, or at least, quite difficult to pry open.” (footnote omitted)).

37. *In re Cain*, 137 F.3d at 235 (“[A] later petition is successive when it: 1) raises a claim challenging the petitioner’s conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes an abuse of the writ.” (citation omitted)).

38. *Panetti*, 551 U.S. at 944.

39. *See infra* Section II.0.

40. 561 U.S. 320 (2010).

41. *Magwood*, 561 U.S. at 324.

42. *Id.* at 326.

43. *Id.*

44. *Id.*

habeas petition challenging his new death sentence, which the district court conditionally granted.<sup>45</sup> The district court first asked whether the application was barred as successive for the purposes of AEDPA and concluded that it was not.<sup>46</sup> The Eleventh Circuit reversed, finding that the new claims raised in his second-in-time habeas petition could have been brought at the time of the first habeas petition.<sup>47</sup> Because Magwood did not argue for one of the statutory exceptions available for “second or successive” provisions, the circuit court dismissed his claim.<sup>48</sup> The Supreme Court agreed with the district court and reversed.<sup>49</sup> The Court held that “the phrase ‘second or successive’ must be interpreted with respect to the judgment challenged”<sup>50</sup> and that a habeas petition is not “second or successive” if it challenges a “new judgment” for the first time.<sup>51</sup> Although the relevant AEDPA provision does not define the term “second or successive,” the Supreme Court used a separate provision of AEDPA to determine that the judgment was the baseline against which the “second or successive” analysis must be conducted.<sup>52</sup> Thus, a prisoner who obtains a new judgment will not be blocked by the second or successive clause of AEDPA, as “the existence of a new judgment is dispositive.”<sup>53</sup>

*Magwood* leaves several questions unanswered. For instance, how should courts interpret the second or successive provision in cases where the defendant challenges their underlying conviction but not the new sentence?<sup>54</sup> Similarly, what should courts do with habeas challenges to the execution of a sentence rather than the judgment?<sup>55</sup> Most importantly, what is the definition of “new judgment”? The circuit courts have been left to define this pivotal term.<sup>56</sup>

45. *Id.* at 327–28.

46. *Id.* at 328.

47. *Id.* at 329.

48. *Id.*

49. *Id.* at 331.

50. *Id.* at 333.

51. *Id.* at 323–24.

52. *Id.* at 332–33 (looking to 28 U.S.C. § 2254(b)(1) (2012)).

53. *Id.* at 338.

54. *Id.* at 342.

55. *Id.* at 338 n.12 (stating that “[w]e address only an application challenging a new state-court judgment for the first time,” not “habeas petitions challenging the denial of good-time credits or parole”).

56. See *In re Gray*, 850 F.3d 139, 142 (4th Cir. 2017) (“That unanswered question is precisely the one before us . . .”); *United States v. Jones*, 796 F.3d 483, 485 (5th Cir. 2015); *Suggs v. United States*, 705 F.3d 279, 284 (7th Cir. 2013) (“Because the question before us is settled in our circuit and the Supreme Court considered the question but expressly declined to answer it, we follow our circuit’s precedents . . .”); *Wentzell v. Neven*, 674 F.3d 1124, 1127 (9th Cir. 2012) (“Although the court had ‘no occasion to address’ the precise scenario this case presents, we conclude, as a matter of first impression . . .” (citation omitted)).



*Patterson II*<sup>57</sup> demonstrates the need to answer these questions. Following his conviction for capital sexual battery, Ace Patterson was sentenced to 311 months imprisonment with a consecutive life sentence and chemical castration.<sup>58</sup> Eight years later, Patterson filed a habeas corpus petition challenging his conviction, but the petition was dismissed as untimely.<sup>59</sup> After the dismissal, Patterson filed a motion to correct his sentence, challenging the chemical castration portion of his sentence as illegal under Florida law.<sup>60</sup> The trial court granted his motion and amended his sentence to exclude chemical castration.<sup>61</sup>

Patterson then filed another habeas petition, which was dismissed by the district court as successive under AEDPA.<sup>62</sup> A three-judge panel of the Eleventh Circuit reversed, with the concurring opinion finding that the “case is not hard.”<sup>63</sup> The panel permitted Patterson’s claim to go forward on what it deemed a second-in-time habeas petition that was not a “second or successive” petition.<sup>64</sup> But an en banc Eleventh Circuit reversed the panel’s finding in a 6–5 decision, despite the panel’s reaction that the case was “not hard.” The court found that the removal of chemical castration from Patterson’s sentence was not a “new judgment.”<sup>65</sup> In addition to the determination that he did not have a new judgment, the court also found that Patterson did not qualify for any other statutory exceptions to second or successive petitions.<sup>66</sup> Thus, Patterson was unable to bring his claim.<sup>67</sup> *Patterson II* brings the crux of the problem into focus: there are significant inconsistencies among the circuits’ interpretations of the second or successive provision of AEDPA that illogically limit access to habeas relief.

## II. CIRCUIT INCONSISTENCIES AND THE ORIGIN OF THE PROBLEM

Given the current landscape of interpretations of “second or successive,” it is difficult to determine when the habeas “count” is reset for purposes of finding a habeas petition second or successive under AEDPA. There have been several confusing and inconsistent decisions since *Magwood*. These inconsistencies erode review of federal law and raise due process concerns,

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57. *Patterson v. Sec’y, Fla. Dep’t of Corr. (Patterson II)*, 849 F.3d 1321 (11th Cir. 2017) (en banc).

58. *Id.* at 1323.

59. *Id.* at 1324.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Patterson v. Sec’y, Fla. Dep’t of Corr. (Patterson I)*, 812 F.3d 885, 894 (11th Cir. 2016) (Haikala, J., concurring specially).

64. *Patterson II*, 849 F.3d at 1324.

65. *Id.* at 1325–26.

66. *Id.* at 1327.

67. *See id.* at 1328.

highlighting the need for a clear resolution that protects the rights of prisoners and detainees.

### A. Circuit Inconsistencies

Although circuit courts agree with *Magwood’s* holding that a “new judgment” resets the habeas count,<sup>68</sup> they disagree on how to define the term.<sup>69</sup> This disagreement has left room for circuit courts to split on two issues: what constitutes a “judgment,” and what makes a judgment “new.”

#### 1. What is a “Judgment”?

Nearly every circuit court has recognized that the new judgment analysis considers changes to both the conviction<sup>70</sup> and the sentence.<sup>71</sup> The Seventh Circuit is an outlier, finding in *Suggs v. United States*<sup>72</sup> that the conviction and sentence are analyzed separately, depending on which component is being challenged in the second-in-time petition.<sup>73</sup> Imagine the following scenario: a court enters an order that changes the offense for which a petitioner is convicted but carries the same sentence as the original conviction. In this scenario, under the Seventh Circuit interpretation, the petitioner obtained a new judgment *only* for purposes of a second-in-time petition challenging the altered conviction, not the unaltered sentence. In every other circuit, the

68. *In re Gray*, 850 F.3d 139, 142–143 (4th Cir. 2017) (citing *King v. Morgan*, 807 F.3d 154 (6th Cir. 2015)) (looking to the other circuits to conclude that when a habeas petition challenges a new judgment, it is not successive); *In re Brown*, 594 F. App’x 726 (3d Cir. 2014) (per curiam); *Insignares v. Sec’y, Fla. Dep’t of Corr.*, 755 F.3d 1273 (11th Cir. 2014); *Wentzell v. Neven*, 674 F.3d 1124 (9th Cir. 2012); *Johnson v. United States*, 623 F.3d 41 (2d Cir. 2010).

69. See *United States v. Jones*, 796 F.3d 483, 485 (5th Cir. 2015) (“While *Magwood* establishes that a habeas application challenging a ‘new judgment’ is not second or successive, it does not define the term ‘new judgment.’”).

70. *Patterson II*, 849 F.3d at 1328–29 (Carnes, C.J., concurring) (noting that the court did not get to answer that question); *In re Gray*, 850 F.3d at 142 (finding a “judgment” is a conviction and a sentence); *King v. Morgan*, 807 F.3d 154, 156 (6th Cir. 2015) (finding similarly); *In re Brown*, 594 F. App’x at 729 (adopting the Second Circuit’s approach in *Johnson*); *Insignares*, 755 F.3d at 1281 (“[W]hen a habeas petition is the first to challenge a new judgment, it is not ‘second or successive,’ regardless of whether its claims challenge the sentence or the underlying conviction.”); *Wentzell*, 674 F.3d at 1127 (adopting the Second Circuit’s approach in *Johnson* and stating that “[t]he Supreme Court rejected such a ‘one opportunity rule’ in *Magwood*”); *Johnson*, 623 F.3d at 46 (“[W]here a first habeas petition results in an amended judgment, a subsequent petition is not successive regardless of whether it challenges the conviction, the sentence, or both.”).

71. *Burton v. Stewart*, 549 U.S. 147, 156–57 (2007); *In re Gray*, 850 F.3d at 141–42 (citing *Deal v. United States*, 508 U.S. 129, 132 (1993)); *Ferreira v. Sec’y, Dep’t of Corr.*, 494 F.3d 1286, 1292–93 (11th Cir. 2007); *United States v. Dodson*, 291 F.3d 268, 272 (4th Cir. 2002).

72. *Suggs v. United States*, 705 F.3d 279 (7th Cir. 2013).

73. *Id.* at 282–83 (“We have held that [habeas] motions after resentencing . . . are second or successive when they challenge the underlying conviction . . . . We conclude that because *Magwood* expressly declined to extend its holding to the facts before us here, it did not disturb our circuit’s precedent . . . .” (citations omitted)).

change to the conviction would likely be considered a new judgment, regardless of the claims in the second-in-time petition.<sup>74</sup>

The Seventh Circuit panel deciding *Suggs* noted that other circuit courts have interpreted *Magwood* more broadly.<sup>75</sup> However, the *Suggs* court reasoned that *Magwood's* failure to specifically address this question provided all the room it needed to follow its own pre-*Magwood* precedent.<sup>76</sup> Other courts overturned their own precedents to find that the “judgment” analysis always includes both the conviction and the sentence,<sup>77</sup> but the *Suggs* court refused to do the same. A crucial portion of the *Magwood* interpretation became inconsistent because of the Seventh Circuit’s reliance on pre-*Magwood* precedent—an inconsistency the Supreme Court could easily have avoided by defining the term it created. Beyond this incongruity, the *Suggs* approach overemphasizes the pre-AEDPA “abuse of the writ” standard for successive habeas petitions. The court separated analysis of the sentence and the conviction to vindicate the restrictions on successive claims that AEDPA intended.<sup>78</sup> But as a result, the *Suggs* approach bars some second-in-time habeas petitions even when there has been a significant change to a component of the judgment.<sup>79</sup> Thus, by refusing to embrace the more inclusive interpretation adopted by other circuits, the Seventh Circuit placed procedural concerns over the constitutional interests of the habeas petitioner.

The *Suggs* approach requires the procedural oddity of separating a petitioner’s challenges to the conviction from those to the sentence.<sup>80</sup> This is a difficult task for courts to accomplish, as it is not always clear which is being challenged.<sup>81</sup> In some cases, it could be impossible to challenge one without also challenging the other.<sup>82</sup> The trouble petitioners would face in the same exercise is of even greater concern. And even if petitioners can sufficiently separate their claims, this system does not account for how that separation

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74. *Id.* at 284–85 (“We recognize that our reading of *Magwood* differs from the approach taken by other circuits. [The Ninth and Second C]ircuits found *Magwood's* teaching sufficiently clear to extend it to the circumstances before them. Here, however, where we have clear circuit precedent directing us otherwise, we do not find *Magwood's* guidance to be clear enough to depart from our precedent.” (citations omitted)).

75. *Id.*

76. *Id.*

77. *King v. Morgan*, 807 F.3d 154, 156 (6th Cir. 2015); *Johnson v. United States*, 623 F.3d 41, 42 (2d Cir. 2010).

78. *See Suggs*, 705 F.3d at 285 (“[O]ther circuits’ broader readings of *Magwood* have the odd effect of interpreting AEDPA to relax limits on successive claims beyond the pre-AEDPA standards.”).

79. For example, the deletion of the chemical castration punishment in *Patterson II* would still bar a second-in-time petition with claims that challenge the underlying conviction. *See Patterson v. Sec’y, Fla. Dep’t of Corr. (Patterson II)*, 849 F.3d 1321 (11th Cir. 2017) (en banc).

80. *See King*, 807 F.3d at 157–59.

81. *Id.* at 158.

82. *Id.*

might shift a petitioner’s incentives.<sup>83</sup> It is simply not feasible to consider each component of the judgment in a vacuum.

## 2. What is a “New” Judgment?

The interpretation of the word “new” has been subject to much more debate and inconsistency than the term “judgment.” These inconsistencies can be grouped in relation to three categories: new sentencing proceedings, correction of clerical errors, and the raising of claims that were available for a prior petition.

First, circuit courts agree that when a prisoner is resentenced but receives the same punishment as in their original sentence, the prisoner nonetheless has a “new” judgment.<sup>84</sup> A longer sentence,<sup>85</sup> a change to a sentence enhancement,<sup>86</sup> or a different minimum term of imprisonment also constitutes a “new” judgment.<sup>87</sup> For example, the Eleventh Circuit held in *Insignares v. Secretary, Florida Department of Corrections* that a reduced minimum sentence from twenty to ten years constituted a new judgment.<sup>88</sup> The Tenth Circuit reached a similar conclusion in *In re Weathersby*.<sup>89</sup> There, the court vacated the state judgment that was the basis for a sentencing enhancement.<sup>90</sup> It determined that this constituted a new judgment and reset the habeas count.<sup>91</sup>

Yet receiving a lesser sentence may not constitute a new judgment.<sup>92</sup> In *United States v. Jones*, the Fifth Circuit adopted a slightly different definition

83. *Id.* (“Suppose a defendant is convicted on two counts, and just one of them involves a constitutional error. If the defendant receives five-year *concurrent* sentences on both convictions, his incentives to challenge the defective conviction in his first habeas application is low; success on that challenge alone will not change his time in jail. If resentencing makes those five-year sentences *consecutive*, however, his incentives change considerably, because success now decreases his sentence by half.”).

84. *In re Brown*, 594 F. App’x 726, 726–27, 729 (3d Cir. 2014) (holding that a petitioner who was originally sentenced to life in prison and received the same sentence after his resentencing proceedings had a new judgment); *Blanco v. Sec’y, Fla. Dep’t of Corr.*, 688 F.3d 1211, 1240 (11th Cir. 2012) (holding that a judgment can be an “intervening judgment” even if it imposes the same sentence as the first judgment); *Wentzell v. Neven*, 674 F.3d 1124, 1125–27 (9th Cir. 2012) (holding that resentencing that deletes part of the sentence and reissues the otherwise exact same sentence resets the habeas counter).

85. *King*, 807 F.3d at 156. King was resentenced and received a longer minimum sentence than he had originally, and the court found this to be a “new” judgment. *Id.*

86. For example, a change to habitual offender status.

87. *Insignares v. Sec’y, Fla. Dep’t of Corr.*, 755 F.3d 1273, 1281 (11th Cir. 2014); *In re Weathersby*, 717 F.3d 1108, 1111 (10th Cir. 2013) (per curiam); *Stewart v. United States*, 646 F.3d 856, 865 (11th Cir. 2011).

88. 775 F.3d at 1277–78.

89. 717 F.3d 1108.

90. *In re Weathersby*, 717 F.3d at 1109.

91. *Id.* at 1111.

92. *United States v. Jones*, 796 F.3d 483, 484–85 (5th Cir. 2015) (holding that a sentence reduction is not a “new judgment” after Jones had his life sentence reduced to 405 months);

for “new judgment” compared to most other circuits.<sup>93</sup> The Fifth Circuit reviewed Jones’s second-in-time habeas petition after he received a new, modified sentence pursuant to a federal statute.<sup>94</sup> The court wrote that a review of the precedent “ma[de] clear that Jones . . . received a reduced sentence, *not a new one*.”<sup>95</sup> The Fifth Circuit reasoned that reissuing a sentence did not “resemble a full resentencing,” as this was a modification “of a term of imprisonment.”<sup>96</sup> It held that the federal statute through which Jones’s sentence was modified was not a resentencing mechanism,<sup>97</sup> concluding that “Jones provides [the court] with no reason to depart from these interpretations of § 3582’s plain text.”<sup>98</sup> Effectively, because Jones had his sentence altered in the incorrect format (incorrect in the Fifth Circuit’s view of AEDPA), his judgment was not “new.”<sup>99</sup> The inconsistency between the *Jones* standard and other circuit court standards demonstrates the need for a simpler, more uniform “new judgment” test.

Second, the correction of clerical or typographical errors in a sentence does not constitute a new judgment.<sup>100</sup> A correction does not disturb the underlying conviction, so the judgment is not “new.”<sup>101</sup> But there is significant disagreement on what constitutes a “clerical” or “typographical” error. In *Patterson II*, the Eleventh Circuit likened vacating an illegal chemical castration sentence to the correction of a clerical error.<sup>102</sup> To the court, that the same sentence was issued again, with only the castration portion of the sentence removed, prevented Patterson’s judgment from being considered “new.”<sup>103</sup> In the process, the Eleventh Circuit seemingly ignored its own precedent from *Insignares*, in which it recognized that a minimum sentence

White v. United States, 745 F.3d 834, 836–37 (7th Cir. 2014) (holding that “*Magwood* does not reset the clock or the count, for purposes of [AEDPA] when a prisoner’s sentence is reduced,” and noting a “substantial difference between resentencing, and sentence reduction”); Suggs v. United States, 705 F.3d 279, 286 (7th Cir. 2013) (Sykes, J., dissenting) (arguing that Suggs had received a new judgment, despite the majority’s finding that his petition was not second or successive on other grounds).

93. 796 F.3d 483.

94. See *Jones*, 796 F.3d at 485 (determining whether a sentence that has been reduced pursuant to 18 U.S.C. § 3582(c)(2) (2012) qualifies as a “new judgment”).

95. *Id.* (emphasis added).

96. *Id.* at 485–86 (citing 18 U.S.C. § 3582(c)(2) (2012)).

97. *Id.* at 486 (citing *Dillon v. United States*, 560 U.S. 817, 825 (2010)).

98. *Id.*

99. And, accordingly, the habeas petition was “second or successive.” See *id.* at 485–87.

100. *In re Lampton*, 667 F.3d 585, 588–89 (5th Cir. 2012); *In re Martin*, 398 F. App’x 326, 327 (10th Cir. 2010).

101. *In re Martin*, 398 F. App’x at 327.

102. *Patterson v. Sec’y, Fla. Dep’t of Corr. (Patterson II)*, 849 F.3d 1321, 1326–27 (11th Cir. 2017) (en banc).

103. *Id.*

reduction was a new judgment.<sup>104</sup> Although removing chemical castration from a sentence could fairly be considered a sentence reduction, the Eleventh Circuit treated the issue differently in *Patterson II*. Typically, a clerical correction involves circumstances more like remedying a sentence mistakenly entered as one hundred years instead of ten,<sup>105</sup> rather than the correction of an illegal form of punishment.<sup>106</sup>

The Third Circuit held in *In re Brown* that when a sentence was overturned because of a procedural flaw, the reentry of an identical sentence was more than a simple “mechanical correction of the docket” and constituted a new judgment.<sup>107</sup> This stands in stark contrast to the *Patterson II* decision, in which even the entry of a different level of punishment was not viewed as a new judgment.<sup>108</sup> This inconsistency accentuates the need for a more consistent model of interpretation of the “second or successive” clause of AEDPA.

Third, the Court in *Magwood* made clear that the “judgment is dispositive” for the “second or successive” provision analysis.<sup>109</sup> This means that all considerations revolve around the judgment, not the specific habeas claim. Yet some courts still apply a claims-based approach, holding that a judgment is not new because the claims could have been brought in an earlier habeas petition.<sup>110</sup> For example, the petitioner in *Suggs* challenged only his conviction, not his new sentence.<sup>111</sup> The Seventh Circuit reasoned that because the Supreme Court had left open the question of how to consider challenges to the underlying conviction after an intervening judgment, it was free to apply its own precedent and bypass *Magwood*’s holding that the “judgment is dispositive.”<sup>112</sup> Thus, the court concluded that because the claims could have been raised previously, the judgment was not “new.”<sup>113</sup> The Supreme Court’s instruction that the “judgment is dispositive” is distinct from the open question of a second-in-time petition challenging an underlying conviction. But

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104. *Id.* at 1329 (Jordan, J., dissenting); *Insignares v. Sec’y, Fla. Dep’t of Corr.*, 755 F.3d 1273, 1281 (11th Cir. 2014) (holding that the 2009 reduction of “Insignares’s mandatory-minimum imprisonment sentence . . . resulted in a new judgment” even though it “retained his 27-year imprisonment sentence”).

105. *Patterson II*, 849 F.3d at 1332 (Jordan, J., dissenting).

106. *Id.* at 1326 (majority opinion).

107. 594 F. App’x 726, 729 (3d Cir. 2014) (per curiam).

108. Compare *In re Brown*, 594 F. App’x at 729, with *Patterson II*, 849 F.3d at 1326.

109. *Magwood v. Patterson*, 561 U.S. 320, 338 (2010); see also *White v. United States*, 745 F.3d 834, 836 (7th Cir. 2014) (“[*Magwood*] holds that the issuance of a writ of habeas corpus setting aside a sentence as invalid, followed by the imposition of a new sentence, resets the clock and the count, so that an attack may be waged against the new sentence even if the same legal grounds could have been urged against the original sentence.” (emphases added)).

110. *E.g.*, *In re Wright*, 826 F.3d 774, 784–85 (4th Cir. 2016); *Suggs v. United States*, 705 F.3d 279, 284–85 (7th Cir. 2013).

111. *Suggs*, 705 F.3d at 280.

112. *Id.* at 282–84.

113. *Id.* at 285.

in order to adequately protect habeas petitioners' access to relief, the *Suggs* court should have recognized that the components of the judgment are inextricable for purposes of the analysis.

The Fourth Circuit engaged in an almost identical analysis in *In re Wright*.<sup>114</sup> Despite the Supreme Court's firm position, the Fourth Circuit also reasoned that the petitioner challenged the "execution" of his sentence, as opposed to the actual conviction or sentence.<sup>115</sup> Like the Seventh Circuit, the Fourth Circuit also cited pre-*Magwood* opinions as a basis for its decision.<sup>116</sup> Both circuits diverged from the widely cited *Johnson* decision from the Second Circuit, which had previously rejected the claims-based approach and instead overturned its precedents that were incompatible with *Magwood*.<sup>117</sup> The Seventh and Fourth Circuits were of course free to differ from their sister circuit's conclusions in *Johnson*. But their refusal to follow *Johnson* is especially questionable considering that the majority of circuits that have considered the question do.<sup>118</sup> For example, in *King v. Morgan*, the Sixth Circuit considered both *Suggs* and *Johnson* before following the *Johnson* approach and overturning its own pre-*Magwood* precedents.<sup>119</sup> The *King* court concluded that the petitioner had obtained a new judgment, allowing him to bring a new habeas petition even though his second-in-time petition raised the same claims as his first-in-time petition.<sup>120</sup> This was an informed and careful rejection of the *Suggs* and *Wright* claims-based approach in favor of the judgment-based approach from *Magwood* and *Johnson*.

The judgment approach is superior because it allows for a new habeas petition after any judicial modification, whether to the sentence or to the conviction. The claims-based approach, on the other hand, could prevent a petitioner from filing a second-in-time petition even after their conviction was significantly altered, changing their incentives for filing for habeas relief. As the *King* court put it, the claims-based approach prohibits the "now-more-critical challenge" to confinement, an outcome that "would make little sense."<sup>121</sup> For example, the claims-based approach favored by the Fourth and Seventh Circuits would have left the petition in *King* procedurally barred.<sup>122</sup>

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114. 826 F.3d at 784.

115. *In re Wright*, 826 F.3d at 777.

116. *Id.* at 784 (citing *McCleskey v. Zant*, 499 U.S. 467, 489 (1991), and *Noble v. Barnett*, 24 F.3d 582, 585 (4th Cir. 1994)).

117. *Johnson v. United States*, 623 F.3d 41, 42 (2d Cir. 2010).

118. See *King v. Morgan*, 807 F.3d 154, 159 (6th Cir. 2015) (noting that the Second, Third, Ninth, and Eleventh Circuits have followed the judgment-based approach).

119. *Id.* at 156, 159.

120. *Id.* at 156. The court in *Insignares* noted earlier that "[t]he Supreme Court also clarified that the phrase 'second or successive' applies to habeas *petitions*, not the *claims* they raise." *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273, 1279 (11th Cir. 2014).

121. *King*, 807 F.3d at 159.

122. See *King v. Morgan*, No. 1:12 CV 2000, 2013 WL 5531365, at \*1-2 (N.D. Ohio Sept. 26, 2013) (listing the claims that King brought in his first petition and those that he brought in his second petition, where there was some overlap).

The judgment-based approach also makes more practical sense, as the claims-based approach would become difficult to implement in cases where petitioners bring multiple claims.<sup>123</sup>

Thus, there is a rift developing among the circuits on whether to apply a claims-based or judgment-based approach. If unaddressed, this inconsistency has the potential to further complicate habeas doctrine despite the clarity *Magwood* seemed to provide. Aside from consistency, there are even deeper problems with an approach that subjugates the rights of habeas petitioners due to an overvaluation of the state’s interests.

### B. *The Scope of the Problem*

The failure to define “second or successive” has serious implications for habeas petitioners.<sup>124</sup> Because a petitioner cannot appeal a denial of authorization on the “second or successive” issue,<sup>125</sup> it is crucial that courts get the determination correct on the first try. Approaches that overvalue the concerns of the state run the risk of eliminating a petitioner’s legitimate claims. The petitioner’s first opportunity to seek permission to bring a second habeas petition is their only opportunity. Given that access to habeas relief is an implied constitutional right,<sup>126</sup> the ambiguity and excessive restraint of a petitioner’s final opportunity to vindicate that right is especially untenable.<sup>127</sup>

The dire need for consistency on a petitioner’s final opportunity for access to habeas relief illustrates the ultimate stakes of the circuit split—the sufficient availability of habeas review. Those opposed to expanding such

123. *King*, 807 F.3d at 158.

124. See Mark T. Pavkov, Comment, *Does “Second” Mean Second?: Examining the Split Among the Circuit Courts of Appeals in Interpreting AEDPA’s “Second or Successive” Limitations on Habeas Corpus Petitions*, 57 CASE W. RES. L. REV. 1007, 1023 (2007) (“[T]he Supreme Court needs to provide the courts of appeals with a clear, definitive interpretation of ‘second or successive.’ The Court should definitively define what constitutes a ‘second or successive’ petition under § 2244(b) in order to resolve the split among the circuits, to curb the inconsistent decisions within individual circuits, and to ensure that the circuits uniformly interpret ‘second or successive’ in the future.”).

125. 28 U.S.C. § 2244(b)(3)(A) (2012).

126. *Boumediene v. Bush*, 553 U.S. 723, 744–45 (2008) (“The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”); Resolution of the New York Ratifying Convention (July 26, 1788), in 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327, 328 (Jonathan Elliot ed., 2d ed. 1866) (“[E]very person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful.”); Brian Farrell, *From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law*, 17 MICH. ST. U.C.L. J. INT’L L. 551, 563 (2008–2009) (“No right is affirmatively granted. However, this prohibition and the inclusion of the term habeas corpus clearly imply the existence of the right to habeas corpus.”).

127. See Nathan Nasrallah, Comment, *The Wall that AEDPA Built: Revisiting the Suspension Clause Challenge to the Antiterrorism and Effective Death Penalty Act*, 66 CASE W. RES. L. REV. 1147, 1167 (2016) (“States have the power to administer and enforce their own criminal laws, but they do not have the power to violate federal rights in doing so.”).



availability point to well-established concerns, such as the conservation of judicial resources, the need for finality, and the protection of federalism.<sup>128</sup> Justice Brennan wrote of these concerns about federalism, finality, and judicial resources and concluded that they should not be considered equally among constitutional claims.<sup>129</sup> Justice Blackmun was even more critical, calling invocations of comity, finality, and federalism a “crusade to erect petty procedural barriers” and “a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights.”<sup>130</sup> The Justices were correct that the state’s interests are insufficient to justify the status quo. Prioritizing those concerns presumes that they are more important than ensuring that a prisoner may assert their habeas right and attack impermissible irregularities in their confinement. They are not.<sup>131</sup>

### 1. Promoting Federal Review of Federal Law

The need for federal review of detainment and the vindication of constitutional rights should be prioritized over these less vital policy concerns. The majority of habeas petitions are filed by prisoners held in state, rather than federal, custody.<sup>132</sup> So federal courts evaluating habeas petitions are in the precarious position of reviewing decisions made by state courts, the instruments of a coequal sovereign.<sup>133</sup> Thus, a desire to respect the judgment of state courts has underpinned federal habeas law for decades.<sup>134</sup> Proponents

128. For an analysis of these concerns, see Kovarsky, *supra* note 9, at 453–57.

129. *Stone v. Powell*, 428 U.S. 465, 522–23 (1976) (Brennan, J., dissenting); see also Philip C. Chronakis, *Cold Comfort for Change: Trends of Preclusion in Habeas Corpus Litigation*, 76 U. DET. MERCY L. REV. 17, 24–25 (1998) (noting that finality should not be considered in habeas cases the same way it is in other civil claims because “[t]he liberty interest at stake for a criminal defendant, incarceration or death[,] . . . heavily outweighs the interests of a civil defendant”).

130. *Coleman v. Thompson*, 501 U.S. 722, 758–59 (1991) (Blackmun, J., dissenting).

131. Patrick J. Fuster, Comment, *Taming Cerberus: The Beast at AEDPA’s Gates*, 84 U. CHI. L. REV. 1325, 1354–55 (2017) (“Federal courts have abstracted AEDPA’s purposes to such a high level of generality that they serve as a presumption in favor of the state respondent on all contested issues of interpretation. When doing so, they ignore Justice Antonin Scalia’s admonition that “[n]o legislation pursues its purposes at all costs.” (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013))).

132. Jordan Gross, *Through a Federal Habeas Corpus Glass, Darkly—Who Is Entitled to Effective Assistance of Counsel in Tribal Court Under ICRA and How Will We Know if They Got It?*, 42 AM. INDIAN L. REV. 1, 28 (2017) (citing a U.S. federal courts report from 2014–2015 that found 16,030 petitions from state prisoners and 2,417 from federal prisoners). A significant majority of prisoners in the United States are held in state custody as opposed to federal custody. E. ANN CARSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2016, 3 tbl.1 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/2T3C-AH9C>].

133. See *Coleman*, 501 U.S. at 730–31.

134. These concerns were perhaps most neatly laid out in *Coleman v. Thompson*, in which Justice O’Connor famously wrote:

This is a case about federalism. It concerns the respect that federal courts owe the States . . . .

of the federalist critique of habeas review argue that even in the case of a new judgment that refreshes habeas availability under the second or successive provision of AEDPA, the state still has sovereign power to adjudicate prisoners’ claims in its own courts.<sup>135</sup> Permitting expanded federal habeas review assumes that state remedies are inadequate,<sup>136</sup> though this presumption may be unfounded.<sup>137</sup> Further, they contend that preserving federalism’s balance is essential to facilitate an open-ended dialogue that ultimately promotes resolution of legal conflicts.<sup>138</sup>

These federalism interests, however important, do not outweigh the need for federal review. As Justice Blackmun saw it, the commonly cited federalism concerns were unjustified, as he doubted not only that the states and the federal government were coequal but also that the interests of federalism were served by creating procedural schemes that limited review of state judgments.<sup>139</sup> To Justice Blackmun, properly employed federalism would protect *federal* interests.<sup>140</sup> Protecting the right to file appropriate second or successive habeas petitions is one such opportunity to vindicate this vision of federalism by ensuring state court decisions are subject to federal review.<sup>141</sup>

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... Without the [respect], a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners . . . an end run around the limits of this Court’s jurisdiction and a means to undermine the State’s interest in enforcing its laws.

*Id.* at 726, 730–31.

135. Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. U. L.Q. 1679, 1703 (2005) (“To its staunchest critics, federal habeas review of state court decisions is (and has always been) a blatant affront to state autonomy.”); *see, e.g.*, Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 467–68 (2018) (explaining that “[o]ne federalism interest purportedly protected by procedural default doctrine is ‘the State’s sovereign power to punish offenders’” (footnote omitted)).

136. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1108–09 (1977) (describing the historical underlying “assumption of lack of parity” between state and federal remedies that favored the federal courts); *see also* Bloom, *supra* note 135, at 1704 (“[F]ederal habeas review of state-court decisions *does* imply a federal distrust of state power, often quite plainly.”).

137. *See* Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) (“AEDPA’s requirements reflect a ‘presumption that state courts know and follow the law.’” (citing Woodford v. Visciotti, 537 U.S. 19, 24 (2002))).

138. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048 (1977). This is an especially “academic” argument, reasoning that more voices in the room leads to more ideas which leads to better solutions. *See id.* at 1049. For more on the “academic” arguments of opposing habeas viewpoints, *see also* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2334–35 (1993).

139. *Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting).

140. *Id.* at 759.

141. *See* Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 87–88 (2012).

Indeed, over time, expanding habeas corpus review provided federal judges with a check on states.<sup>142</sup> It served as an assurance that state judges would rule correctly on matters of federal law regarding prisoners or otherwise face reversal from a reviewing federal judge.<sup>143</sup> Current interpretations of the “second or successive” provision threaten this principle. If a state judge knows that they are unlikely to face habeas review after a prisoner’s first habeas petition fails, the judge may not work as diligently to ensure that a resentencing or sentence modification is in accordance with federal law.<sup>144</sup> Worse, a state judge may even actively disregard federal law if they know habeas review of their determination at the federal level is unlikely.<sup>145</sup> To promote compliance with federal law, a federal forum is needed. This concern is compounded by the overwhelming number of state prisoners in comparison to federal prisoners, as almost all convictions are given in state court.<sup>146</sup> A check is needed to ensure the application of federal law, and that check diminishes in power when a habeas petition is dismissed on questionable procedural grounds. The federal courts need a better mode of analysis to safeguard their power of review and protect the conception of federalism as a check on state compliance.

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142. *Coleman*, 501 U.S. at 759–60 (Blackmun, J., dissenting).

143. *Stone v. Powell*, 428 U.S. 465, 520–21 (1976) (Brennan, J., dissenting) (“‘[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.’ The availability of collateral review assures ‘that the lower federal and state courts toe the constitutional line.’” (emphasis omitted) (citation omitted) (quoting *Desist v. United States*, 394 U.S. 244, 262–64 (1969) (Harlan, J., dissenting))).

144. *See id.*

145. *See id.* at 521 (“In effect, habeas jurisdiction is a deterrent to unconstitutional actions by trial and appellate judges, and a safeguard to ensure that rights secured under the Constitution and federal laws are not merely honored in the breach.”).

146. CARSON, *supra* note 132, at 3 tbl.1 (showing that in 2016, the total state prison population was about 690% higher than the federal prison population (1,317,565 state prisoners versus 189,192 federal prisoners, including juveniles)); *see also id.* at 3 tbl.2 (indicating that in 2016, Texas had a prison population of 163,703, or one nearly equal to the total federal prison population).

## 2. Potential Constitutional Implications<sup>147</sup>

Prisoners have a right to effective federal habeas review.<sup>148</sup> But the inconsistencies from the Supreme Court’s failure to fully address the questions raised in *Magwood* highlight the ineffectiveness of the review process for these habeas petitions. It is true that the Supreme Court has repeatedly upheld the constitutionality of AEDPA’s provisions,<sup>149</sup> and the prerogative to limit habeas relief belongs to the legislative branch.<sup>150</sup> Yet the application of AEDPA could nevertheless violate due process if it denies petitioners’ rights to habeas corpus protection.<sup>151</sup>

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147. There are several constitutional concerns that could be raised regarding the recent interpretations of the second or successive provision of AEDPA. The discussion here is not exhaustive. For discussion of Suspension Clause concerns in second or successive AEDPA interpretations, see Scott R. Grubman, *What a Relief? The Availability of Habeas Relief Under the Savings Clause of Section 2255 of the AEDPA*, 64 S.C. L. REV. 369 (2012); Randal S. Jeffrey, *Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues*, 84 MARQ. L. REV. 43 (2000); Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275 (2008); Pavkov, *supra* note 124, at 1027–29; Kyle P. Reynolds, Comment, “*Second or Successive*” *Habeas Petitions and Late-Ripening Claims After Panetti v. Quarterman*, 74 U. CHI. L. REV. 1475, 1505–08 (2007); and Deborah L. Stahlkopf, Note, *A Dark Day for Habeas Corpus: Successive Petitions Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1127–35 (1998). For discussion of Sixth Amendment issues, see Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219 (2012). For a separation of powers discussion, see Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61 (2011), and Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699 (2002) (wondering if the creators of AEDPA intended to create a statutory system with severe preclusive effects on successive petitions).

148. *Boumediene v. Bush*, 553 U.S. 723, 744–45 (2008) (“The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”); Resolution of the New York Ratifying Convention, *supra* note 126, at 328 (“[E]very person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful.”); see also Farrell, *supra* note 126, at 563 (“No right is affirmatively granted. However, this prohibition and the inclusion of the term habeas corpus clearly imply the existence of the right to habeas corpus.”); Marceau, *supra* note 8, at 10 (“Even those who advocate for a very narrow scope of federal habeas review recognize *Frank* as setting a constitutional floor. As a matter of due process, *Frank* acknowledges that federal habeas review must, at an absolute minimum, provide the sort of scrutiny of state court decisions that *res judicata* dictates in the realm of civil litigation.”).

149. Marceau, *supra* note 141, at 87–88.

150. Marceau, *supra* note 8, at 4 n.8 (quoting Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 960 (1998)); see also *Frank v. Magnum*, 237 U.S. 309, 331 (1915) (“There being no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* in order to safeguard the liberty of all persons . . .”).

151. Marceau, *supra* note 8, at 49 (“As currently applied, the AEDPA violates due process when federal courts engage in limited or deferential review of a state process that is not fundamentally fair.”).

Consider two fundamentals of due process. First, “[t]he touchstone of due process is protection of the individual against arbitrary action of government.”<sup>152</sup> Second, “[d]ue process is not a mechanical instrument. It is not a yardstick . . . . It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.”<sup>153</sup> Federal courts using the claims-based approach work against this “delicate process” with their recent formalistic interpretations of the “second or successive” provision of AEDPA. It is unfair to expect petitioners to navigate the habeas barriers created by the claims-based approach to second or successive petitions.<sup>154</sup> Habeas petitioners are often unrepresented or underrepresented,<sup>155</sup> which heightens the unfairness of navigating a fractured and ambiguous body of law.<sup>156</sup> The distinction between the different routes to obtaining a new judgment “might be thought a semantic quibble,”<sup>157</sup> but courts do not treat it that way.

The conservation of judicial resources must be considered in any discussion of reforming habeas law. But this factor alone does not justify the pro-government approach utilized by the *Patterson II* and *Suggs* courts in their interpretations of the second or successive provision. Currently, the balance of interests seems to vindicate a point Justice Blackmun foreshadowed when he wrote that the only way to reconcile conflicting procedural requirements favoring the state “is the principle that habeas relief should be denied whenever possible.”<sup>158</sup> The myriad of recent circuit court decisions makes this problem worthy of redress. It highlights the need to provide a check on the states and an incentive for judges to actively engage with difficult cases, as well as the risk to meaningful due process rights for incarcerated petitioners. The Supreme Court has recognized that even if meritorious claims are in the

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152. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)).

153. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

154. See Kimberly A. Thomas, *Substantive Habeas*, 63 AM. U. L. REV. 1749, 1764–65 (2014) (“These procedural cases gave rise to habeas doctrines that are, at best, convoluted and difficult to understand. The complexity of habeas procedure is exacerbated because . . . state inmates who are not subject to capital sentences rarely have a lawyer representing them in federal habeas. This means that state prisoners may initially mis-present the issues for the federal courts’ consideration and may omit important aspects of the argument or ramifications of their positions . . . . This frustration of inmates is intentional. Yet, it is not without important systemic implications because inmates come to perceive the criminal system as a cruel and unjust game in which the courts avoid hearing their claims, no matter how meritorious.”).

155. *King v. Morgan*, 807 F.3d 154, 158 (6th Cir. 2015).

156. See *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.”).

157. *White v. United States*, 745 F.3d 834, 836 (7th Cir. 2014).

158. *Herrera v. Collins*, 506 U.S. 390, 439 (1993) (Blackmun, J., dissenting).

minority, “our procedures must ensure that those few claims are not stifled by indiscriminating generalities,” and “[t]he complexities of our federalism . . . are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others.”<sup>159</sup>

### III. A SIMPLER INTERPRETATION OF NEW JUDGMENT: COMPARE WHAT IS CLAIMED AS NEW WITH WHAT CAME BEFORE

A simpler method for determining when a judgment is new is needed to better protect the interests of petitioners and ensure that courts make correct determinations in such a final matter. This Part proposes a properly crafted interpretation that protects both the interests of the petitioner and the interests of the state.

When considering whether a “new judgment” was issued, courts should evaluate whether there has been any *judicial* change to the original judgment. To accomplish this, the reviewing judge should compare the original judgment entered by the trial court at sentencing with what is being labeled as “new” by the habeas petitioner. If the former judgment is different in any way from the latter, it should be considered “new” and the habeas count should be reset to zero. A judgment is “different” whenever any alteration is officially made, aside from simple corrections of clerical errors. This would include *any* change to the sentence or conviction, even if it is merely “modified.”<sup>160</sup> This covers an increase or decrease in the amount of time to be served, or a different form of punishment imposed, such as relief from the death penalty or altered terms of supervised release. This would focus the attention on only judicially entered changes, allowing sentence modifications to be considered equally alongside official new judgments.<sup>161</sup> This solution would adequately resolve the inconsistent interpretation of *Magwood’s* “new judgment” rule while remaining compatible with the *Magwood* decision more generally. This approach would also better serve habeas petitioners, who would have a clearer rule—and thus a fairer rule—to follow as they attempt to navigate habeas pro se.<sup>162</sup>

This solution would allow an exception for the correction of genuine clerical errors. To prevent another *Patterson II*, “clerical error” should be defined as only typographical errors, thus restoring “clerical error” to its traditional definition.<sup>163</sup> Even with this exception, the analysis would be a simple two-step test: first, is the judgment different; second, was the change entered

159. *Brown v. Allen*, 344 U.S. 443, 498 (1953) (Frankfurter, J., concurring).

160. “Modified” is a generic term to refer to any process by which the court alters the judgment without formally entering a new judgment.

161. Something that was not done in *United States v. Jones*, 796 F.3d 483 (5th Cir. 2015). If it had been considered the same, the court would have been able to find that the judgment was “new.” See *id.* at 485–86.

162. See *Thomas*, *supra* note 154, at 1764–65.

163. See *Patterson v. Sec’y, Fla. Dep’t of Corr. (Patterson II)*, 849 F.3d 1321, 1331–32 (11th Cir. 2017) (en banc) (Jordan, J., dissenting).

by a judicial body. Both factors are easily determined and would minimally expend judicial resources.

This proposed interpretation also provides that only a *judicial* modification to a sentence or conviction should be considered a “new judgment,” not changes imposed by another body. This contrasts with a similar but overly broad solution that has already been proposed.<sup>164</sup> That proposal would allow a new challenge any time there was *any* change to the conviction or sentence, regardless of the governmental body imposing the modification.<sup>165</sup> This solution creates a scheme in which petitioners are permitted to file new habeas claims whenever minor factors unrelated to their court-issued judgment change, such as their custody level, parole status, or even their amount of “good time.” This is overly inclusive. For example, changes in custody level or the assignment of good time are decisions made by the prison system, which is typically administered by an executive branch agency.<sup>166</sup> Allowing a petitioner to claim a “new judgment” when there was no court action goes beyond the traditional understanding that a judgment comes from a court.<sup>167</sup> If this model were adopted, the system could easily be abused; petitioners could argue they have standing when only minor changes to the details of their incarceration were made. The purpose of AEDPA was to eliminate frivolous claims.<sup>168</sup> Although some courts may have taken that imperative too far, the overly broad interpretation would similarly go too far in weakening the “second or successive” bar on truly frivolous petitions.

The en banc *Patterson II* majority wrote that if a solution similar to the one advocated for by this Note were implemented, state prisoners might be worse off in accessing federal habeas review of their sentences.<sup>169</sup> If access to

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164. Thomas Burch, “New Judgment” and the Federal Habeas Statutes, 8 CALIF. L. REV. ONLINE 88 (2017).

165. *Id.* at 98 (“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, as would eliminating one count of a multi-count judgment, even if it in no way affected the prisoner’s sentence. Eliminating a habitual offender designation would qualify, too. So would changing a prisoner’s restitution obligation, invalidating a prisoner’s chemical castration requirement, and amending a prisoner’s judgment to include earned good-time credit. In short, quite a few changes will satisfy this basic test.” (footnotes omitted)).

166. See Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754, 1755 (2010). For a centralized database of each state’s corrections department, see *Correction Departments by State*, USA GOV, <https://www.usa.gov/corrections> [<https://perma.cc/DNG8-JQUX>].

167. *Judgment*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A court’s final determination of the rights and obligations of the parties in a case.” (emphasis added)).

168. James Robertson, *Quo Vadis, Habeas Corpus?*, 55 BUFF. L. REV. 1063, 1082 (2008) (“In 1995, in order to ‘curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases,’ Congress enacted [AEDPA].” (footnote omitted)).

169. *Patterson v. Sec’y, Fla. Dep’t of Corr. (Patterson II)*, 849 F.3d 1321, 1327 (11th Cir. 2017) (en banc) (“As a practical matter, Patterson’s proposed resolution of this appeal might hurt prisoners more than it helps.”).

habeas corpus were expanded for new judgments, then state courts would be unwilling to amend sentences in an attempt to limit prisoners’ chances of habeas review.<sup>170</sup> The dissenting judge in *Patterson* lambasted this argument, writing: “The majority’s underlying assumption . . . is as odd as it is disconcerting. If the majority is right, however, then the trust we place in state courts to adjudicate issues of federal law . . . is completely misplaced, and the deference we give them under AEDPA is a colossal and unjustified mistake.”<sup>171</sup> The original *Patterson I* panel also noted, “[t]he notion that a trial judge would refrain from correcting a sentencing error that all of the parties have acknowledged . . . to avoid a potential habeas petition is repugnant to the judicial office.”<sup>172</sup> It seems difficult, if not impossible, to predict how states would react to this change. Even assuming that state judges would act the way the en banc majority feared, the federal courts are still a safeguard. The majority’s fears were overstated.

A review of post-*Magwood* decisions shows that this Note’s proposed reading of AEDPA would increase consistency and align circuits courts. The Eleventh Circuit’s *Patterson II* rule requires an entirely new judgment to be entered for *Magwood* to be applicable, which ignores the significant alterations to judgments that the elimination or addition of a term of incarceration can create.<sup>173</sup> The proposed solution eliminates that possibility, as a change in the chemical castration portion of a sentence would constitute a “new judgment” under the proposed reading. This would restore the Eleventh Circuit to its *Insignares* precedent.<sup>174</sup> Meanwhile, the proposed solution would preserve the Fourth Circuit’s decision in *Gray*; because *Gray*’s sentence was altered from capital punishment to life imprisonment, this would be a “new judgment” under the proposed model just as it was for the Fourth Circuit.<sup>175</sup> The Sixth Circuit’s *King* decision would be unchanged, as receiving a longer minimum sentence would still amount to a “new judgment.” This solution would also affirm that the interpretation is not claims-based but judgment-based, suggesting that *Suggs* and *Lampton* be decided as *In-*

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170. *Id.*

171. *Id.* at 1333 (Jordan, J., dissenting) (citation omitted).

172. *Patterson v. Sec’y, Fla. Dep’t of Corr. (Patterson I)*, 812 F.3d 885, 895 (11th Cir. 2016) (Haikala, J., concurring), *vacated*, 849 F.3d 1321 (2017).

173. *Patterson II*, 849 F.3d at 1326.

174. *Cf. id.* at 1332 (Jordan, J., dissenting) (“Imagine a case in which a Florida court sentences a defendant to a term of 10 years, but then issues a judgment which mistakenly states that the sentence is 100 years. No one notices the error until the defendant has been in custody for 6 years. If the state court issues a new judgment which corrects the clerical error and commits the defendant to the custody of the Department of Corrections for (the correct) 10 years, that will, according to the majority’s apparent rationale, constitute a new judgment under *Magwood*.”).

175. *In re Gray*, 850 F.3d 139, 143 (4th Cir. 2017).



*signares* and *Johnson* were.<sup>176</sup> In sum, courts that encounter this question would issue more consistent decisions under this proposed model.

Crucially, the proposed solution would promote efficient use of resources by federal courts deciding the second or successive question. Conserving judicial resources is one of the three classic considerations of any habeas procedural rule, along with principles of federalism and concerns of finality.<sup>177</sup> The conservation of resources, then, should make this solution as appealing to the habeas traditionalist as to the habeas reformer. Habeas litigation, and prisoner litigation in general, has developed to the point of becoming “an entire subsection of the judiciary,”<sup>178</sup> exacerbating the resources drain. The specter of frivolous lawsuits wasting time is a concern that continues today but was particularly prevalent in the time leading up to the passage of AEDPA.<sup>179</sup>

The expansion of habeas claims has forced the expansion of the courts as well, in both the number of judges and the size of their research staffs.<sup>180</sup> There are concerns that the growing size of the judiciary’s bureaucracy could create a “monster in the judicial closet,” as judges are forced to rely on their staff rather than make independent decisions.<sup>181</sup> Research indicates a high correlation between the recommendations of the research staff and the corresponding judicial outcomes, supporting the notion that judges are losing their independent decisionmaking power as resources are stretched too thin.<sup>182</sup>

Those who view extended post-conviction litigation as a “waste” of resources disapprove not just of the “waste” itself but also of the detriment to the rehabilitation process.<sup>183</sup> Under this view, a prisoner who challenges their conviction acts in defiance or to stifle prison management, both of which ultimately prohibit rehabilitation.<sup>184</sup> The “waste” can also be harmful to genu-

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176. Compare *Suggs v. United States*, 705 F.3d 279, 284 (7th Cir. 2013), and *In re Lamp-ton*, 667 F.3d 585, 588–89 (5th Cir. 2012), with *Insignares v. Sec’y, Fla. Dep’t of Corr.*, 755 F.3d 1273, 1281 (11th Cir. 2014), and *Johnson v. United States*, 623 F.3d 41, 45–46 (2d Cir. 2010).

177. See *Suggs*, 705 F.3d at 285 (quoting *Duncan v. Walker*, 533 U.S. 167, 178 (2001)).

178. Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21, 21 (1994) (calling all of prisoner-brought civil litigation, which includes habeas petitions, “an entire subsection of the judiciary”).

179. *Id.* at 30–31 (“Meritorious prisoner civil rights cases will continue to be buried unless the deluge of prisoner cases can be stopped.”); Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 OHIO ST. L.J. 307 (1983) (criticizing the failure of the then-existing statutory scheme to prevent frivolous habeas petitions).

180. Doumar, *supra* note 178, at 21.

181. *Id.* at 28 (quoting Mary Lou Stow & Harold J. Spaeth, *Centralized Research Staff: Is There a Monster in the Judicial Closet?*, 75 JUDICATURE 216 (1992)).

182. *Id.* at 30.

183. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963).

184. *Engle v. Isaac*, 456 U.S. 107, 126–27 (1982) (“[T]he individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a

ine petitions. Justice Jackson noted that “[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones.”<sup>185</sup>

Overemphasizing the concerns about judicial economy is ultimately harmful to the review of habeas petitions and to the development of habeas law. The potential for frivolous claims calls for clear and functional procedures that enable meaningful review, not ever-increasing measures aimed at policing for illegitimate petitions.<sup>186</sup> Consider the classic needle in the haystack analogy: “He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.”<sup>187</sup> This is the risk some courts, such as the *Patterson II* majority, run in their interpretation of the “second or successive” petitions.<sup>188</sup> Creating a system that allows for broad rejection of second or successive petitions greatly decreases the closeness of the examination. A court that incorrectly identifies a second-in-time habeas petition as a statutorily barred second or successive petition creates a thorny issue for the reviewing circuit court, to say nothing about the abhorrent position imposed upon the petitioner.

It is possible that this would oversimplify the habeas consideration process and obliterate the distinctions between the different habeas motions and the procedural paths of petitioners’ respective cases. But this simplicity is exactly why this solution is ideal. The process is too complex for habeas petitioners to navigate pro se—and, because most petitioners proceed pro se, the process is too complex for most petitioners.<sup>189</sup> The process must be simple enough that unrepresented petitioners can reasonably understand the proceedings in which they are participating. Simplifying the process is also necessary to guarantee that the petitioners can exercise their constitutional

conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.”); Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the “Interests of Finality,”* 2013 UTAH L. REV. 561, 571 (“[D]efendants who are allowed to appeal may remain recalcitrant, which may prevent rehabilitation.”).

185. *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

186. *Id.* at 536. (“The fact that the substantive law . . . invite[s] farfetched or border-line petitions makes it important to adhere to procedures which enable courts readily to distinguish a probable constitutional grievance from a convict’s mere gamble on persuading some indulgent judge to let him out of jail. Instead, this Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own.”).

187. *Id.* at 537.

188. Doumar, *supra* note 178, at 30–31 (“It appears the handling of prisoner petitions is becoming a judgeless system. Many prisoner complaints never receive more than a cursory review from a federal judge at either the district or appellate level. Meritorious prisoner civil rights cases [a term the author uses to broadly refer to all prisoner civil cases, which includes habeas petitions] will continue to be buried unless the deluge of prisoner cases can be stopped.”).

189. See Jon O. Newman, Foreword, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519 (1996) (“Prisoner lawsuits challenging prison conditions share two characteristics. Nearly all these lawsuits are filed pro se, and the vast majority are dismissed as frivolous.”).

rights. The proposed interpretation would easily allow petitioners to determine if they have a “new” judgment. They would only need to discover if there was a judicial action leading to different terms of their sentence. If no court was involved, they do not have a new sentence.

The solution would also not require changes to AEDPA. This is a solution of judicial interpretation, not a legislative proposition. The precedent for these changes is already present in the Supreme Court’s *Magwood* decision. This may seem a sweeping liberalization of AEDPA, which could lead to abuse of the system, but these situations of a meritorious “second or successive” habeas petition are “a rare circumstance.”<sup>190</sup> The proposal would only clarify a tumultuous area of law for the great benefit of a few at a small cost; indeed, the simplicity provided by this solution may benefit the courts as much as it does the petitioners. This would not defeat AEDPA’s intended purpose of limiting truly frivolous habeas petitions, but it would ensure the presentation of legitimate habeas petitions to the courts.

Finally, each of the factors addressed here must reckon with the simple truth that there are few individuals who would find themselves in the situation described by this Note. Habeas petitioners tend to be prisoners serving long sentences, leaving the prisoners serving shorter sentences out of the equation altogether.<sup>191</sup> Successive habeas petitions exacerbate this consideration—petitioners must serve a long enough sentence to still be in custody after completing the entire state review process and one round of federal review.<sup>192</sup> So why should a widely used statutory system be altered for the sake of a very few if only to simply correct circuit inconsistency? After all, such a solution threatens the states’ interests in the finality of judgments, the courts’ interest in the preservation and efficient allocation of judicial resources, and principles of federalism.<sup>193</sup> The answer must be that it does not matter how few individuals find themselves in such a position. Writs of habeas corpus are the vehicles through which prisoners assert problems of federal law—including constitutional claims—in their convictions. A flaw in the process of bringing a habeas petition is a structural flaw in the presentation of constitutional issues, and one that simply cannot be allowed to continue regardless of how few it benefits.<sup>194</sup>

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190. *In re Gray*, 850 F.3d 139, 144 (4th Cir. 2017).

191. Garcia Uhrig, *supra* note 147, at 1280 (“[B]ecause inmates must still be ‘in custody’ as well as have completed the direct appellate process in order to file a federal habeas petition, federal habeas petitioners are typically those serving long sentences.”).

192. NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 4 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf> [<https://perma.cc/5LLN-ADPE>].

193. See *Harrington v. Richter*, 562 U.S. 86, 103 (2011); see also *Withrow v. Williams*, 507 U.S. 680, 693 (1993) (“Finally, and most importantly, eliminating review of [certain habeas claims] would not significantly benefit the federal courts in their exercise of habeas jurisdiction, or advance the cause of federalism in any substantial way.”).

194. Habeas law is a method through which petitioners can challenge the structural (or procedural) adequacy of the state procedures leading to their convictions. See Eve Brensike

Reforming recent interpretations of the “second or successive” provision is necessary to ensure that every meritorious second-in-time habeas petition is reviewed in the most efficient way possible. The proposed solution accomplishes such a reform. With the relatively simple solution proposed, courts determining if a habeas petition is “second or successive” will rapidly and more accurately determine the correct result that *Magwood* intended.

#### CONCLUSION

AEDPA was intended to limit the number of frivolous habeas petitions that prisoners file, but the balance between weeding out the frivolous petitions and protecting the valid ones is in danger. To ensure the continued viability of habeas petitions, reform is needed to solve the inconsistencies in interpretations of the “second or successive” provision.

Interpreting “new judgment” to mean any different sentence, whether a change in the amount of time served or a court ordered condition of confinement, is the optimal solution. Like Justice Blackmun stated, there is currently “a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights.”<sup>195</sup> This reading would alleviate the noted discrepancies and concerns while preserving AEDPA’s ability to screen out genuinely frivolous habeas petitions.

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Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75, 79–80 (2017). Would it not be intolerably ironic for the tool of asserting procedural flaws to itself suffer from procedural flaws? This might seem tantamount to asserting that there is a constitutional right to file a habeas corpus claim, which is not necessarily the case, though it is clearly implied by the Suspension Clause. See *supra* note 126.

195. *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

