No. 17-445

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE WESTBROOKS, Warden,

Petitioner

vs.

WILLIAM G. ALLEN,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a case that presents itself in an interlocutory posture, should this Court grant certiorari to consider whether, following the entry of a new criminal judgment, a petitioner's first federal habeas corpus application challenging that new judgment is a "second or successive" application if it includes a challenge to the conviction underlying the judgment, where the Sixth Circuit below and other courts of appeals (except the Seventh Circuit) have concluded that such a challenge is not a second or successive application, where the issue has rarely arisen in the Seventh Circuit, where the Seventh Circuit is the forum for remedying the Seventh Circuit's error, and where Respondent William Allen will simply be allowed to be heard on his claim that as an African-American, he was subjected to pernicious racism in the selection of his grand jury, where the Sixth Circuit has concluded elsewhere that the particular grand jury that indicted him was unconstitutionally composed?

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STATEMENT OF THE CASE

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Proceedings On William Allen's Initial Judgment Of Conviction And Sentence Of 99-Years Imprisonment

A.
Pre-Trial, Trial, And Direct Appeal Proceedings

On March 22, 1968, the grand jury for Davidson County, Tennessee, indicted Respondent William Allen, an African-American, for killing Charles Wayne Thomasson. R. 41-1, p. 8, PageID #639 (presentment); R. 41-20, p. 19, PageID #2989 (order).

In pre-trial proceedings, Mr. Allen filed a plea in abatement asserting that the "key man" system under which the State assembled grand juries in Davidson County, Tennessee,[1] systematically excluded African-Americans from serving on grand juries ("grand jury discrimination claim"). R. 41-1, pp. 21-22, PageID #652-653 (plea in abatement). In support of his plea in abatement, Mr. Allen submitted a stipulation between the State and him agreeing that (1) as of the most current census, African-Americans comprised approximately 19% of the Davidson County, Tennessee, population; (2) from 1958 to 1968, no more than ten African-Americans served on Davidson County grand juries; and (3) only one African-American served on the grand jury that indicted Mr. Allen. R. 41-1, pp. 38-40, PageID #669-671 (stipulation). The State presented no evidence. See R. 41-1, pp. 37, 47, PageID #668, 678 (minutes); R. 41-18, PageID #2891-2892, 2938-2942 (state's direct appeal brief). The trial court denied Mr. Allen's plea in abatement (R. 41-1, p. 47, PageID #678: minutes) and upon the jury's verdict it sentenced him to ninety-nine (99) years imprisonment. R. 41-1, pp. 91-92, PageID #722-723 (minutes).

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[1] Under the "key man" system, judges personally selected grand jurors from the community. See Jefferson v. Morgan, 962 F.2d 1185, 1187 (6th Cir. 1992).

On direct appeal, Mr. Allen asserted that he had established in the trial court a *prima facie* showing that the "key man" system had systematically excluded African-Americans from grand jury service, and the State failed to present any evidence rebutting that showing. R. 41-17, pp. 5-14, PageID #2846-2855 (direct appeal brief). The Tennessee Court of Criminal Appeals held that Mr. Allen had not "borne the requisite burden of proof to establish purposeful and systematic exclusion of members of his race from Davidson County Grand Juries." R. 41-19, p. 14, PageID #2969 (direct appeal opinion).

B.
Post-Conviction Proceedings

On December 21, 1971, Mr. Allen filed a post-conviction petition again asserting his grand jury discrimination claim. R. 41-20, pp. 6, 8, PageID #2976, 2978 (post-conviction petition). At an evidentiary hearing Mr. Allen presented: (1) a stipulation that the 1970 Census established that 19.9 % of Davidson County's population was African-American (R. 32-1, pp. 78-79, PageID #232-233: post-conviction transcript); (2) an order the court entered in a prior case, State v. Givens & Walden ("*Givens* Order"), establishing that from September 1958 to March 1967, eight African-Americans served on twenty-six (3 x 8 2/3 years) Davidson County grand juries (See R. 32-1, pp. 126-129, 148-149, PageID #280-283, 302-303: post-conviction transcript; R. 32-1, p. 15, PageID #169: stipulation; R. 32-2, p. 101, PageID #407: post-conviction appeal opinion);[2] (3) testimony from the Criminal Court

[2] The post-conviction court took judicial notice of its prior Givens Order setting out this history, and it ordered the clerk to furnish a copy of that order to the post-conviction record. Post-Conviction Transcript, R. 32-1, pp. 126-129, PageID # 280-283. While the clerk apparently failed to do so, (see R. 32-2, p. 100, PageID # 406: post-conviction appeal opinion), at the post-conviction hearing Mr. Allen's counsel recited the relevant facts in the *Givens* Order (R. 32-1, p. 149, PageID #303: post-conviction transcript), the stipulation Mr.
(continued...)

Clerk that: (a) each calendar year, Davidson County judges empaneled three grand juries (R. 32-1, pp. 94-95, 102-103, PageID #248-249, 256-257: post-conviction transcript); and (b) thirteen persons serve on each Davidson County grand jury (Id., p. 112, PageID #266); and (4) testimony from two Criminal Court judges: (a) acknowledging that the "key man" system gave them "wide latitude" to select personally grand jury members, and they were the "sole judge" of who became a grand jury member (Id., pp. 144-145, PageID #298-299); (b) identifying six African-Americans from court records that listed grand jury members who served on twenty-four grand juries that existed from September 1, 1959, to December 31, 1967 (R. 32-2, pp. 2-6, 9, 48-54, PageID #308-312, 315, 354-360: post-conviction transcript);[3] and (c) identifying one African-American from court records that listed members of the January 1968 grand jury that indicted Mr. Allen. Id., pp. 2-3, PageID #308-309.

The general population stipulation and *Givens* Order established that while African-Americans comprised approximately 19.9% of the Davidson County population, they comprised 2.4% of the grand jurors serving on twenty-six consecutive Davidson County grand juries empaneled between September

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[2](...continued)
Allen cites sets out the same facts from the *Givens* Order, (see R. 32-1, p. 15, PageID #169: stipulation), and the Tennessee Court of Criminal Appeals relied on these facts on appeal. See R. 32-2, p. 101, PageID #407 (post-conviction appeal opinion).

[3] In addition to identifying African-Americans selected as full-term grand jury members, the judges identified African-Americans they selected using the "key man" system to serve as temporary grand jurors on days that a regular member could not attend to his/her grand jury service. One judge testified that he had to appoint a temporary substitute only once, and he did not indicate that substitute's race. R. 32-2, p. 13, PageID # 319 (post-conviction transcript). The other judge identified two African-Americans who temporarily served during this period. Id., pp. 52-53, PageID #358-359.

1958 and March 1967. The judges' testimony confirmed this disparity, independently establishing that African-Americans comprised 2.2% of the grand jurors serving on twenty-five Davidson County grand juries, culminating with the January 1968 grand jury that indicted Mr. Allen.

One judge testified that he did not intend to discriminate against African-Americans (Id., p. 17, PageID #323), but he recognized that he may have done so and apologized for any discrimination that occurred. Id. (discrimination would have resulted from an "error of the head and not of the heart"); Id., p. 19, PageID #325 ("if I've failed, I'm sorry, but I've tried"). Another judge, who began assembling grand juries in January 1969, expressly acknowledged that discrimination had colored the grand jury selection process. He candidly admitted that African-Americans were treated more harshly than White jurors:

> In my own conscious [sic] I did not actually discriminate, but I will recognize Senator Williams' contention that there's some whites that were picked for the Grand Jury that had they been black they would have not been picked.

Id., p. 42, PageID #348.

On April 13, 1972, the post-conviction trial court entered an order denying Mr. Allen post-conviction relief. The court concluded that "petitioner's complaint is wholly without merit" because some African-Americans had served on "various Grand Juries." R. 32-2, pp. 79-80, PageID #385-386 (order).

On February 1, 1973, the Tennessee Court of Criminal Appeals affirmed the post-conviction trial court's denial of relief. It ruled that the evidence Mr. Allen presented at the post-conviction hearing failed to make a *prima facie* case of systematic exclusion of African-Americans from serving on Davidson County grand juries. Id., pp. 92, 97, 105, PageID #398, 403, 411 (post-conviction appeal opinion).

C.
Federal Habeas Corpus Proceeding

At the conclusion of the State post-conviction proceeding, Mr. Allen filed in the United States District Court a petition for writ of habeas corpus asserting his grand jury discrimination claim. R. 41-26, pp. 2-5, PageID #3227-3230 (federal habeas corpus petition). After reviewing the evidence presented in state court (see Id., p. 7-8, Page ID #3232-3233), the District Court recognized that the percentage of African-Americans on Davidson County grand juries was "substantially less" than the percentage of African-Americans in the Davidson County general population. R. 41-26, p. 11, PageID #3236 (order). The District Court nonetheless denied Mr. Allen habeas corpus relief upon its belief that Mr. Allen had failed to establish that this imbalance resulted from discrimination. Id.

On April 30, 1974, the Sixth Circuit affirmed the District Court's denial of habeas relief in an unpublished opinion. Like the District Court, it recognized a statistical imbalance in the number of African-Americans that served on Davidson County grand juries. But the court of appeals found a "countervailing explanation" for this imbalance in the judges' testimony that they claimed they did not intentionally discriminate, they said they attempted to achieve balanced grand juries, but it was difficult to get African-Americans to serve. R. 41-30, pp. 2-5, PageID #3334-3337 (court of appeals opinion).

D.
In *Jefferson v. Morgan*, 962 F.2d 1185 (6th Cir. 1992), The Sixth Circuit Then Declared This Very Davidson County Grand Jury Unconstitutional

The same grand jury that indicted Mr. Allen also indicted James Thomas Jefferson. R. 48, pp. 15-16, PageID #4533-4534 (response to statement of material facts). In a federal habeas corpus proceeding, Jefferson asserted that the under the "key man" system, African-

Americans were systematically excluded from serving on Davidson County grand juries. In support of his claim Jefferson presented evidence similar to the evidence Mr. Allen presented during his state court proceedings and to the United States District Court. Compare Jefferson v. Morgan, 962 F.2d 1185, 1187 (6th Cir. 1992) with R. 32-1, pp. 15-17, PageID #169-171 (stipulation); R. 32-1, pp. 78-79, 112, 144-145, 148-149, PageID #232-233, 266, 298-299, 302-303 (post-conviction transcript); R. 32-2, pp. 2-6, 9, 48-54, PageID #308-312, 315, 354-360 (post-conviction transcript). The District Court granted Jefferson habeas relief.

On appeal, the Sixth Circuit held that Jefferson had established a *prima facie* case of discrimination by showing that (1) African-Americans are a recognizable, distinct class capable of being singled out for discrimination; (2) the "key man" system was susceptible of abuse; and (3) there existed over a significant period of time under-representation of African-Americans on Davidson County grand juries. Jefferson, 962 F.2d at 1188-1191.[4] The Sixth Circuit thereafter rejected the state's argument that it had rebutted Jefferson's *prima facie* showing with testimony from two judges who selected grand jurors under the "key man" system, both of whom testified at Mr. Allen's post-conviction proceeding, that they had not discriminated in selecting grand jury members. Jefferson, 962 F.2d at 1191 (discussing the testimonies of Judges Draper and Leathers); see R. 32-1, pp. 142-152, PageID #296-306 (testimony of Judge Draper); R. 32-2, pp. 2-22, PageID #308-328 (same); Id., pp. 47-59, PageID #353-365 (testimony of Judge Leathers). Upon doing so, it

[4] Using a sophisticated standard deviation analysis, this Court concluded that the odds were 1,000,000,000 to 1 that over the ten year period that preceded Jefferson's indictment Davidson County would have randomly selected the number of African-Americans that served on Davidson County grand juries. Jefferson, 962 F.2d at 1190.

held that Jefferson had established his grand jury discrimination claim, and it affirmed the District Court's grant of habeas corpus relief. Jefferson, 962 F.2d at 1192.

E.
In A Second State Post-Conviction Proceeding, The State Trial Court Granted Mr. Allen Relief And Entered A New Judgment And Sentence Against Him

On June 22, 1989, Mr. Allen initiated a second state post-conviction proceeding. Post-Conviction Petition, R. 42-1, p. 4, PageID #3347. Mr. Allen asserted, among other things (1) his grand jury discrimination claim (R. 42-9, pp. 5-6, PageID #3633-3634: consolidated post-conviction petition) and (2) a claim that the trial court did not have jurisdiction to sentence him for first-degree murder but only for second-degree murder ("sentencing claim"). Id., pp. 14-17, PageID #3647-3650.

As to the grand jury discrimination claim, the post-conviction court entered an Agreed Order that the facts in *Jefferson* were established for the purpose of it. R. 42-10, pp. 99-100, PageID #3804-3805 (agreed order). The court nonetheless denied relief holding that Mr. Allen had failed to substantiate his grand jury discrimination claim – which was a clearly winning claim under *Jefferson*. R. 42-9, pp. 73-74, PageID #3701-3702 (order). As to the sentencing claim, however, the State conceded that the statute under which the trial court had sentenced Mr. Allen to ninety-nine years was unconstitutional. See R. 42-9, p. 48, PageID #3676 (consent to modify sentence).

On April 3, 2007, the post-conviction court then entered a new judgment of conviction with a new sentence. The April 3, 2007 Amended Judgment (R. 42-9, p. 50, PageID #3678) has adjudged Mr. Allen guilty of first-degree murder and sentenced him to life imprisonment.

II.
Proceedings On William Allen's New April 3, 2007 Judgment And Life Sentence

A.
Initial State Court Appeal Of The New Judgment

Mr. Allen appealed the post-conviction trial court's denial of relief on his grand jury discrimination claim as well as its decision to replace his unconstitutional ninety-nine year sentence with a life sentence. R. 42-17, pp. 21-31, PageID #4404-4414 (appellant's brief). The Tennessee Court of Criminal Appeals held that (1) Mr. Allen's grand jury discrimination claim was "previously determined" under the Tennessee Post-Conviction Procedures Act and therefore not available for merits review (R. 42-19, pp. 7-10, PageID #4476-4479: post-conviction appeal opinion); and (2) a prior Tennessee Supreme Court opinion constrained it to deny Mr. Allen relief on his sentencing claim. Id., pp. 10-11, PageID #4479-4480. The Tennessee Supreme Court denied an application for permission to appeal on August 25, 2011. Id., p. 2, PageID #4471.

B.
Federal Habeas Corpus Proceedings Challenging The New April 3, 2007 Judgment

1.
Initial Federal Habeas Proceedings In The United States District Court

On March 5, 2012, Mr. Allen filed a *pro se* petition for writ of habeas corpus in the United States District Court. *Pro Se* Petition, R. 1, PageID #1. The District Court appointed the Office of the Federal Public Defender as counsel (Order, R. 15, PageID # 75-77), and on August 15, 2012, counsel filed an amended petition. Amended Petition, R. 24, PageID #91 *et seq*. Both Mr. Allen's original *pro se* petition and the amended petition asserted Mr. Allen's grand jury discrimination and sentencing claims. *Pro Se* Petition, R. 1, pp. 1-3, PageID #5-8; Amended Petition, R. 24, pp. 10-11, 15-17, PageID #100-101, 105-107.

Believing that Mr. Allen's habeas application was a "second or successive petition" under 28 U.S.C. §2244(b) of the AEDPA, the State moved the District Court to transfer the habeas petition to the Sixth Circuit for authorization proceedings under 28 U.S.C. § 2244(b)(3). R. 19, pp. 1-3, PageID #81-83 (motion to transfer). When Mr. Allen responded that his habeas application was the first to challenge the April 3, 2007 Judgment, the State moved to withdraw its transfer motion. R. 25, pp. 1-8, PageID #108-115 (response to motion to transfer); R. 27, pp. 1-8, PageID #122-129 (motion to withdraw). The District Court granted the State's motion to withdraw (R. 29, PageID #131: order), and Mr. Allen thereafter moved for summary judgment on his grand jury discrimination claim. R. 30, pp. 1-2, PageID #132-133 (petitioner's summary judgment motion).

In support of his summary judgment motion, Mr. Allen filed (1) a statement of material facts, supported by citations to the record and attached exhibits (R. 32, PageID #144-154; R. 32-1, PageID #155-306; R. 32-2, PageID #307-456; R. 32-3, PageID #457-516); and (2) a memorandum demonstrating that the undisputed material facts entitled him to relief on his grand jury discrimination claim. R. 31, PageID #134-143 (memorandum).

The State thereafter filed its Answer (R. 40, PageID #536-625) and its summary judgment response, arguing that (1) Mr. Allen's grand jury discrimination claim was subject to the AEDPA's "second or successive" provisions and therefore not properly before the District Court and (2) Mr. Allen was not entitled to habeas relief on the merits of his claim. Id., R. 50, PageID #4543-4557 (summary judgment response).

The District Court believed that Mr. Allen's grand jury discrimination claim rendered his petition "second or successive" under 28 U.S.C. § 2244(b). The court informed Mr. Allen that unless he filed an amended habeas petition that did not include the grand jury

discrimination claim, it would transfer his habeas proceeding to the Sixth Circuit 28 U.S.C. § 2244(b)(3) authorization proceedings. R. 54, PageID #4599 (memorandum). When Mr. Allen declined to file an amended petition without the grand jury discrimination claim, the District Court transferred Mr. Allen's habeas application to the court of appeals. R. 63, PageID #4621 (court of appeals order).

2.
Proceedings In The Sixth Circuit And A Partial Remand

Mr. Allen moved the Sixth Circuit to remand his habeas corpus application, in its entirety, back to the District Court. Mr. Allen asserted that under Magwood v. Patterson, 561 U.S. 320 (2010), his habeas application was the first to challenge the April 3, 2007, Amended Judgment and, as such, the application and the individual claims it contained were not subject to AEDPA "second or successive" provisions. 6th Cir. No. 13-6226, R. 7 (motion to remand). A panel of the court disagreed, believing that only claims that related to the 2007 amended judgment were exempt from the "second or successive" provisions. The panel determined that Mr. Allen's sentencing claim was the only claim that did so, and it remanded that claim alone to the District Court for further consideration. R. 73, PageID # 4662-4663 (order).

3.
Proceedings On Remand In The United States District Court

In addition to pressing his sentencing claim in the District Court, Mr. Allen argued again that the court should grant him summary judgment on his grand jury discrimination claim. R. 85, PageID #4703-4705 (summary judgment memorandum). The District Court considered only Mr. Allen's sentencing claim, granted the State summary judgment on that claim and denied Mr. Allen a certificate of appealability (COA). R. 92, PageID #4746, 4755

(memorandum); R. 93, PageID #4756 (order).

4.
Further Proceedings In The Sixth Circuit: The Sixth Circuit Ultimately Granted A COA On Mr. Allen's Grand Jury Discrimination Claim And Has Remanded For Further Proceedings

In the Sixth Circuit, Mr. Allen requested a certificate of appealability for his grand jury discrimination and sentencing claims. 6th Cir. No. 15-5356, R. 9 (COA application). As to the former, Mr. Allen argued that *Magwood v. Patterson* established that AEDPA "second or successive" provisions apply to *applications* – not individual claims contained in an application – and that the court's previous decision during the authorization proceedings was erroneous. 6th Cir. No. 15-5356, R. 9, pp. 6-14 (COA application). Citing the law of the case doctrine, the Sixth Circuit declined to reconsider its previous determination that the grand jury discrimination claim was subject to AEDPA "second or successive" provisions, and it denied Mr. Allen a COA. R. 98, PageID #4768 (order).

Mr. Allen petitioned for rehearing and rehearing *en banc*. 6th Cir. No. 15-5356, R. 13 (petition for rehearing). While Mr. Allen's rehearing petition was pending, the Sixth Circuit decided King v. Morgan, 807 F.3d 154 (6th Cir. 2015). In *King*, a unanimous panel of the Sixth Circuit (Sutton, Boggs, White, JJ.), concluded that AEDPA's "second or successive" provisions do not apply to any claims in a habeas corpus application that is the first application to challenge a new judgment – irrespective of whether the claims relate to the new sentence or the conviction that underlies the new judgment and sentence. Id. at 157-160.

As Judge Sutton explained in *King*, in Magwood v. Patterson, 561 U.S. 320 (2010), this Court explicitly held that following the entry of a new state judgment, a federal petition

for writ of habeas corpus is not "second or successive" "so long as it is the first [habeas petition] to challenge the new judgment." King, 807 F.3d at 157. *King* quoted from *Magwood* this "Court's words: "[W]here . . . there is a new judgment intervening between the two habeas petitions, . . . an application challenging the resulting new judgment is not 'second or successive' at all." King, 807 F.3d at 157, *quoting* Magwood, 561 U.S. at 341-342.

Judge Sutton went on to explain that a judgment is a judgment, and this "judgment-based reasoning," adopted by this Court in *Magwood* applies to "all new judgments, whether they capture new sentences or new convictions or merely reinstate one or the other." King, 807 F.3d at 157. He further explained that in *Magwood*, this Court specifically rejected a "claims-based" approach to petitions, because it does not "respect the language of the statute [28 U.S.C. §2244] and thus would 'elide the difference between an 'application' and a 'claim,' a distinction that the statute makes important because 'AEDPA uses the phrase 'second or successive' to modify 'application.'" King, 807 F.3d at 157, *quoting* Magwood, 561 U.S. at 334. Judge Sutton also noted (as this Court has stated repeatedly) that a judgment involves both the adjudication of guilt and the sentence, so one cannot divorce the two when a new judgment is entered. King, 807 F.3d at 157-158. Moreover, there are practical problems to taking the different approach advocated by the state, and such an approach is not faithful to the text of the statute. Id. at 158-159.

Recognizing *King's* applicability to Mr. Allen's case, a panel granted rehearing and issued Mr. Allen a COA on his grand jury discrimination claim. 6th Cir. No. 15-5356, R. 16-1. On appeal, the Sixth Circuit panel then ruled in Mr. Allen's favor, doing so in an unpublished opinion. Pet. App. 1-10. Applying *King*, the Sixth Circuit held that Mr. Allen's grand jury discrimination claim was not barred as part of a "second or successive" habeas

application, and the court remanded to the District Court for consideration of all the remaining arguments in the case on the merits of Mr. Allen's grand jury discrimination claim. Pet. App. 6-10.

REASONS FOR DENYING THE WRIT

This Court should deny certiorari for many reasons. First, this case comes to the Court in an interlocutory posture. Second, Petitioner never raised any alleged circuit split before the Sixth Circuit when he had a clear opportunity to do so. Third, Petitioner waived his "abuse of the writ" argument by failing to raise it in the District Court. Fourth, Petitioner overstates an alleged circuit split, and in reality, the only circuit on the wrong side of any split is the Seventh Circuit. The issue is rare in that circuit, and this petition is an inappropriate vehicle for righting the law in the Seventh Circuit, which has the responsibility to reconsider its own law as necessary. Fifth, where the Sixth Circuit has properly concluded that Mr. Allen's grand jury discrimination claim is not part of a second or successive application, and where Mr. Allen has been subjected to invidious racial discrimination, this case is not a proper vehicle for addressing any issue presented by the Petitioner. Certiorari should be denied.

I. Certiorari Should Be Denied Because The Case Comes To This Court In An Interlocutory Posture

In exercising control over its discretionary docket, this Court has a well-settled practice of not granting certiorari in cases which come to this Court in an interlocutory posture. Wrotten v. New York, 560 U.S. 959 (2010)(Sotomayor, J., respecting denial of certiorari); DTD Enterprises v. Wells, 558 U.S. 964 (2009)(Kennedy, J., Roberts. C.J., and Sotomayor, J., respecting denial of certiorari); Columbia Union College v. Clark, 527 U.S.

1013, 1015 (1999)(Thomas, J., dissenting)(noting that certiorari was denied likely because "the case comes to us in an interlocutory posture")

As in *Wrotten*, *DTD Enterprises*, and *Columbia Union College*, this Court should therefore deny certiorari, as this case comes to the Court in an interlocutory posture: The Sixth Circuit has remanded the case for further proceedings in the District Court, leaving open any number of additional issues for consideration by the District Court in the first instance. See Pet. App. 9-10 & n. 12 ("The parties shall address all other issues to the district court. We **REMAND** for further proceedings."). The District Court's treatment of this case on remand will certainly resolve all now-disputed issues, while clarifying the facts and providing this Court clearer view of this case later on. See Wrotten v. New York, 560 U.S. at 959 (Sotomayor, J., respecting denial of certiorari). In the meantime, given the interlocutory posture of this case, the petition should be denied.

II. Certiorari Should Be Denied Because Petitioner Did Not Seek Rehearing Below Based Upon The Very Arguments He Now Raises For The First Time In This Court

Petitioner requests that this Court grant certiorari to resolve what Petitioner claims is a circuit split that warrants the exercise of this Court's certiorari jurisdiction. As noted *infra*, Petitioner overstates the actual split in the circuits, but even so, Petitioner improperly invokes this Court's discretionary review power now, because he failed to seek redress below on the very issue he now claims must be redressed by this Court.

The Federal Rules of Appellate Procedure informed Petitioner that grounds for *en banc* review include "an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed.R.App.P. 35(b)(1)(B). While Petitioner tries to make such a claim to this Court,

Petitioner did not ask the *en banc* Sixth Circuit to weigh in on the very arguments he makes now in this Court. And indeed, had Petitioner done so, he may have secured the relief he now requests from this Court.

In other words, on rehearing under Fed.R.App.P. 35(b)(1)(B), Petitioner could have raised the very issues he now claims must be resolved only by his Court, but he failed to invoke that remedy below. Having failed to invoke an available remedy below, Petitioner has forfeited and/or waived his arguments in this Court, and at the very least has shown that this Court need not intervene in a case where Petitioner didn't even make the effort to get the *en banc* court of appeals involved – precisely when *en banc* review was potentially available under Rule 35.

To be sure, a petitioner need not seek rehearing to seek certiorari. Nevertheless, by failing to seek rehearing for the very reasons he seeks review in this Court, Petitioner has demonstrated that the issue was not significant enough to raise before the *en banc* court of appeals. As such, it is not worthy of this Court's consideration now. The issue should be considered waived or forfeited in this Court under the circumstances, but even so, it is clear that Petitioner is requesting this Court to intervene where relief in this Court may have been obviated if Petitioner invoked an available remedy below. Whether as a matter of waiver or forfeiture, or as a matter of prudence, under these circumstances, this Court should deny certiorari.

III. Certiorari Should Be Denied Because Petitioner Waived Any "Abuse Of The Writ" Argument In The District Court

A large section of the petition is devoted to Petitioner's assertion that Allen's winning grand jury discrimination claim is an "abuse of the writ." Pet. 14-19. Petitioner, however,

never raised this issue in his answer in the District Court. Rather, Petitioner's sole procedural argument was that Allen's winning grand jury discrimination claim was "second or successive." Allen v. Colson, M.D. Tenn. No. 3:12-cv-00242, R. 40, pp. 59-60, PageID #594-595 (second or successive). Consequently, Petitioner has waived the "abuse of the writ" argument which is not properly before this Court on certiorari. As such, certiorari should be denied, as this Court cannot reach that issue.

IV. Petitioner Overstates Any Alleged Circuit Split, The Seventh Circuit Is The Only Circuit On The Wrong Side Of Any Split, And This Petition Presents An Inappropriate Vehicle For This Court To Change The Law In The Seventh Circuit, Where The Issue Rarely Arises Anyway

Petitioner is misleading when claiming the extent of any circuit split. Petitioner rightly acknowledges that the majority of the circuits side with the Sixth Circuit's approach here – as even the Sixth Circuit has acknowledged. All these circuits (Second, Third, Fourth, Sixth, Ninth, Eleventh) apply *Magwood* and 28 U.S.C. §2244 as they are written – which clearly provide that a first habeas corpus application attacking a new state court judgment does not make that application second or successive.

Petitioner nevertheless asserts a circuit split, claiming that the Fifth, Seventh, and Tenth Circuits take a different approach. A more careful look shows otherwise. The Fifth and Tenth Circuits merely ask (as do the Second, Third, Fourth, Sixth, Ninth, Eleventh Circuits) whether there has, in fact, been a new judgment entered by the state courts that allows a first federal habeas challenge to that judgment. For example, in the Tenth Circuit's decision in In Re Martin, 398 F. App'x 326 (10th Cir. 2010), the Tenth Circuit merely held that an amended judgment based on a clerical mistake is not a "new judgment" within the meaning of *Magwood*. This only makes sense: a new piece of paper is not a new judgment

with legal consequences. Similarly, in its decision in In Re Lampton, 667 F.3d 585 (5th Cir. 2012), the Fifth Circuit made clear that on the facts, there was simply no "new judgment" on the conviction that Lampton sought to challenge, because there was no new sentence as to that particular conviction. This also follows this Court's precedent that a judgment involves both a conviction and sentence. If there has been no new sentence, there has been no new judgment. Not so in Mr. Allen's case. The Fifth and Tenth Circuits, therefore, do not take any different approach from the circuits that apply the rule applied by the Sixth Circuit. The Fifth and Tenth Circuits merely concluded, on the facts, that there was no "new judgment" taking the petitioner's application outside the purview of 28 U.S.C. §2244. As such, the Fifth and Tenth Circuits are not part of any alleged split.

This ultimately means that, in reality, it is only the Seventh Circuit, with its decision in Suggs v. United States, 705 F.3d 279 (7th Cir. 2013), that may stand at the opposite side of a circuit split on the question whether a "new judgment" including a conviction and sentence is subject to §2244. Because there is no "full-blown circuit split" as Petitioner claims (Pet. 14), on that basis alone, certiorari should be denied.[5]

When the Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits have answered the question posed by Petitioner, those circuits have been faithful to the language of §2244 as elucidated in *Magwood*. *Suggs*, however, reached the opposite conclusion by applying a 20-year-old precedent in Walker v. Roth, 133 F.3d 454 (7th Cir. 1997) and by failing to

[5] It is worth noting that both *Suggs* and *Lampton* involved the question whether a §2255 motion was second or successive, not whether a §2254 motion was second or successive, which is the issue posed here. In a technical sense, therefore, the issue addressed in *Suggs* and *Lampton* is not identical to the issue here, thus further undermining the assertion of an alleged circuit split.

apply §2244 by its own terms – where the statute provides that a new judgment may be challenged in federal habeas proceedings. As *Magwood* states, AEDPA's text "commands a . . . straightforward rule, where . . . there is a new judgment intervening between the two habeas petitions . . . an application challenging the new judgment is not 'second or successive' at all." Magwood, 561 U.S. at 341-342. As *Magwood* explains, the text of §2244 is the text, and it doesn't change, regardless of the claimed consequences of ignoring the text, as Petitioner would ultimately request here. Id. at 342.

At bottom, therefore, it is the Seventh Circuit alone that has decided the issue erroneously. Because it is the Seventh Circuit that is in the wrong, this petition from the Sixth Circuit is any thing but an appropriate vehicle for reversing *Suggs* and overruling the Seventh Circuit's circuit pre-*Magwood* precedent in *Walker*. In fact, it appears that it is only potential petitioners in the Seventh Circuit that may face misapplication of the law under the circumstances presented here. Petitioners in the Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits are receiving the proper application of the law required by §2244 as its text has been explained in *Magwood*, and petitioners in the Fifth and Tenth will as well should they make a first application challenging an actual "new judgment" entered by a state court.

Even so, the issue arises very rarely in the Seventh Circuit. Since *Magwood*, the issue has presented itself in the Seventh Circuit in only two published cases: *Suggs* (from 2013) and *Kramer* (from 2015). The issue, therefore, appears to arise at most around 3 times a decade in the Seventh Circuit – which is perhaps the reason why this Court denied certiorari in both *Suggs* and *Kramer*. See Suggs v. United States, 569 U.S. 972 (2013); Kramer v. United States, 577 U.S. ___ (2016). It may also be that this Court denied certiorari in

Suggs and *Kramer* because in neither case did the parties ask the *en banc* Seventh Circuit for review. Compare Section II, *supra*.

Nevertheless, it clearly appears that the Seventh Circuit is the place for this issue to be resolved for petitioners from the Seventh Circuit where the Seventh Circuit can, in an appropriate case, grant *en banc* review to overrule its erroneous decisions in *Suggs* and *Walker*. This Court is not the place to resolve an issue that, in the Seventh Circuit, is being wrongly decided – especially via a petition coming from the Sixth Circuit which has properly decided the issue. Given the current state of affairs, the time for this Court to grant certiorari, if at all, is if the *en banc* Seventh Circuit should refuse to overrule *Walker* and refuse to apply the text of §2244. Hittson v. Chatman, 576 U.S. ___, ___, 135 S.Ct. 2126, 2128 (2015)(Ginsburg, J., concurring in denial of certiorari)(certiorari denied where it appeared that court of appeals *en banc* might resolve the issue, given pending *en banc* petition that gave that particular court of appeals "an opportunity to correct its error without the need for this Court to intervene").

For now, though, this case from the Sixth Circuit is a most circuitous route for reigning in the Seventh Circuit and resolving an issue that is rare in the Seventh Circuit and may not arise there anytime soon. Certiorari should therefore be denied.

VI. Where The Sixth Circuit Correctly Determined That Mr. Allen's Grand Jury Discrimination Claim Must Be Assessed On The Merits, This Case Is An Inappropriate Vehicle For Review Where Mr. Allen Has Been The Victim Of Invidious Racial Discrimination

Without rehashing all of Judge Sutton's analysis in King v. Morgan, 807 F.3d 154 (6th Cir. 2015) or the reasoning of the other circuits which *King* follows, suffice it to say that the Sixth Circuit has correctly decided the question whether a new judgment allows a first

habeas application challenging that new judgment. *Magwood* supports that result, the language of §2244 requires that result, practical considerations require that result, and the circuits that have faithfully applied *Magwood* and §2244 have all reached that exact result. King, 807 F.3d at 157-160.

And in fact, were the circuits incorrect, then in this case we would require a claim-based dissection of Mr. Allen's habeas application – which is precisely the type of cumbersome analysis this Court wholeheartedly rejected in *Magwood* because the text of §2244 applies to *applications* as a whole, not to *claims* in applications. Congress' intent is that an application following a new judgment is a first application. Certiorari should thus be denied, because the Sixth Circuit correctly concluded that Mr. Allen's application challenging the new 2007 judgment is not a second or successive challenge to that new judgment.

Certiorari should especially be denied given the underlying claim for which the Sixth Circuit has ordered federal review. As this Court recently explained in Buck v. Davis, 580 U.S. ___ (2017), racial discrimination in the justice system is a scourge on our nation, and it must be removed. See also Tharpe v. Sellers, 582 U.S. ___ (2017)(U.S. Nos. 17-6075, 17A330)(granting stay of execution on claim that death sentence was infected by racism). Here, there is no question that African-Americans were treated as less worthy than whites in the selection of grand juries. See p. 4, *supra*. And the Sixth Circuit has already found this exact grand jury to have been composed in violation of the Sixth and Fourteenth Amendments. Jefferson v. Morgan, 962 F.2d 1185 (6th Cir. 1992).

That result is not surprising, where one judge candidly admitted that when grand juries were picked in the late 1960s in Davidson County, Tennessee, African-Americans

were viewed as less worthy of serving on grand juries compared to identical white jurors. It really doesn't get more racist than that. And the discrimination in the selection of the grand jury here flew in the face of this Court's settled precedent of Sims v. Georgia, 389 U.S. 404 (1967), Jones v. Georgia, 389 U.S. 24 (1967) and Whitus v. Georgia, 385 U.S. 545 (1967), where claimants obtained relief under similar circumstances.

This means that the result of the Sixth Circuit's correct decision is that Mr. Allen will simply receive review of already-acknowledged racism in the selection of the grand jury in this case. As such, this case is anything but an "ideal vehicle" for review of a procedural issue that was correctly decided below, as Petitioner claims. Pet. 19. Far from it. Mr. Allen is entitled to his day in court and to be heard on his claim that, as an African-American, he was subjected to racism in the selection of the grand jury. This is especially true where his claim is based on a proper application of the law in *Jefferson*. Certiorari should be denied so that this racism may be addressed and remedied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief in Opposition was served upon Nicholas W. Spangler, Office of the Attorney General, P. O. Box 20207, Nashville, Tennessee 37202, this the 7th day of November, 2017.