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Sentence Structure: Prohibiting “Second or Successive” Habeas Petitions After *Patterson v. Secretary*

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Sentence Structure: Prohibiting “Second or Successive” Habeas Petitions After *Patterson v. Secretary*

CHRISTINA M. FROHOCK*

The Eleventh Circuit’s recent opinion in Patterson v. Secretary includes a heated dispute over the prohibition against “second or successive” habeas corpus petitions in 28 U.S.C. § 2244(b). Considering an amended criminal sentence from Florida state court, the majority and dissenting opinions structure that sentence differently and, thus, apply the prohibition differently. This Article argues that both the majority and the dissent conceal policy judgments beneath the surface of legal decision-making. First, the Article analyzes the statutory prohibition against “second or successive” habeas petitions, as applied previously by the U.S. Supreme Court in Magwood v. Patterson and by the Eleventh Circuit in Insignares v. Secretary. Next, the Article describes the majority and dissenting opinions in Patterson v. Secretary, focusing on section 2244(b) as the focal point of the judges’ dispute. Finally, the Article argues that the statutory language of section 2244(b) underdetermines interpretations, inviting rival normative views regarding whether to prohibit a particular habeas petition. Given such open statutory language, policy judgments are unavoidable.

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INTRODUCTION

“Sleight of hand” is a phrase often associated with Three-Card Monte and other magic tricks relying on concealment and misdirection. It is less often associated with federal court cases. When the phrase does appear in judicial opinions, it provides an illuminating analogy for the conduct of criminals or crafty attorneys.¹ So the appearance of the phrase in the dissenting opinion in *Patterson v. Secretary*, a recent decision from the U.S. Court of Appeals for the Eleventh Circuit, is noteworthy both for its rarity and its target: the majority opinion.² On one level, the dispute between the majority and dissenting opinions in *Patterson* concerns how to interpret the prohibition against “second or successive” habeas corpus petitions in 28 U.S.C. § 2244(b).³ Faced with an amended criminal sentence, the judges viewed the structure of that sentence differently and, thus, applied the prohibition differently.⁴ On a deeper level, the dispute reveals competing policy judgments in the habeas context.⁵

This Article argues that both the majority and dissenting opinions in *Patterson* engage in a sleight of hand, concealing policy judgments beneath the surface of legal decision-making. Part I describes the prohibition against “second or successive” habeas peti-

¹ See, e.g., *Hughes v. Kia Motors Corp.*, 766 F.3d 1317, 1325 (11th Cir. 2014); *United States v. Ross*, 131 F.3d 970, 979 (11th Cir. 1997).

² *Patterson v. Sec’y, Fla. Dep’t of Corr.*, 812 F.3d 885, 896 (11th Cir. 2016) (Pryor, J., dissenting).

³ *Id.* at 887, 896.

⁴ *Id.*

⁵ *Id.*

tions in 28 U.S.C. § 2244(b), as applied in two prior cases, *Magwood v. Patterson* and *Insignares v. Secretary*.⁶ Part II then describes the majority and dissenting opinions in *Patterson v. Secretary*, focusing on section 2244(b) as the focal point of the judges' disagreement. Finally, Part III argues that the statutory language of section 2244(b) underdetermines varying interpretations, inviting rival normative views regarding whether to prohibit a particular habeas petition. While concealment and misdirection may be optional, policy judgments are unavoidable given the open statutory language in section 2244(b).

I. PRIOR INTERPRETATIONS OF 28 U.S.C. § 2244(B)

As amended in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), section 2244(b) prohibits claims presented in multiple petitions or applications for a writ of habeas corpus.⁷ Congress intended the Act to streamline federal habeas proceedings and to ensure greater finality, restricting federal courts' power to grant habeas relief to state prisoners.⁸ Section 2244(b)(1) provides that "[a] claim presented in a second or successive habeas corpus

⁶ *Magwood v. Patterson*, 561 U.S. 320 (2010); *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273 (11th Cir. 2014).

⁷ Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(b). This Article follows the Supreme Court's lead in using "petition" and "application" interchangeably. *See Magwood*, 561 U.S. at 324 n.1 ("Although 28 U.S.C. § 2244(b) refers to a habeas 'application,' we use the word 'petition' interchangeably with the word 'application,' as we have in our prior cases.").

⁸ *See Rhines v. Weber*, 544 U.S. 269, 274 (2005) ("The enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions . . . [by] impos[ing] a 1-year statute of limitations on the filing of federal petitions . . ."); *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."); *Gilbert v. United States*, 640 F.3d 1293, 1311 (11th Cir. 2011) ("The statutory bar against second or successive motions is one of the most important AEDPA safeguards for finality of judgment."); *Gonzalez v. Sec'y for the Dep't of Corr.*, 366 F.3d 1253, 1269 (11th Cir. 2004) (en banc) ("The central purpose behind the AEDPA was to ensure greater finality of state and federal court judgments in criminal cases . . ."); *Maharaj v. Sec'y for the Dep't of Corr.*, 304 F.3d 1345, 1347 (11th Cir. 2002) ("[T]he AEDPA was designed to eliminate successive, piecemeal petitions for habeas corpus relief.").

application under section 2254 that was presented in a prior application shall be dismissed.”⁹ Section 2244(b)(2) provides that “[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed,” with narrow exceptions for (i) a new Supreme Court precedent applied retroactively or (ii) new factual discoveries that would have rendered a not-guilty verdict.¹⁰ To apply these prohibitions, a court must determine whether a habeas petition is second or successive.¹¹ If it is, and no exception applies, then the petition is properly dismissed.¹² If it is not, then the petition is viable and properly heard on the merits.¹³

“Second” and “successive” are common words, and the determination of a second or successive habeas petition appears simple at first glance: one petition is fine, but no others. Yet, the determination becomes complicated when a defendant files a habeas petition in federal court to collaterally attack his conviction or sentencing in state court, the state court then alters the criminal sentence, and the defendant then files a new habeas petition in federal court. To apply section 2244(b) in that scenario, the federal court must examine the state court judgments giving rise to the habeas challenges.

The Eleventh Circuit’s decision in *Patterson v. Secretary* is the latest in a series of decisions interpreting section 2244(b), following the precedents of *Magwood v. Patterson* from the U.S. Supreme Court and *Insignares v. Secretary* from the Eleventh Circuit. With a focus on habeas petitions filed in the wake of resentencing, both *Magwood* and *Insignares* set the stage for *Patterson*.

A. Supreme Court: *Magwood v. Patterson*

In *Magwood v. Patterson*, the Supreme Court considered habeas corpus petitions filed by a convicted murderer in Alabama.¹⁴ Billy

⁹ 28 U.S.C. § 2244(b)(1) (2013).

¹⁰ *Id.* § 2244(b)(2).

¹¹ *See Magwood*, 561 U.S. at 337 (stating that § 2244(b) requires a “threshold inquiry into whether an application is ‘second or successive’”).

¹² *See generally* 28 U.S.C. § 2244(b) (2013).

¹³ *See, e.g., Magwood*, 561 U.S. at 331 (“If, however, *Magwood*’s application was not second or successive, it was not subject to § 2244(b) at all, and his fair-warning claim was reviewable (absent procedural default).”).

¹⁴ *Magwood*, 561 U.S. at 330–42.

Joe Magwood fatally shot the sheriff who had overseen his prior incarceration for a drug offense.¹⁵ In 1981, a trial court sentenced Magwood to death.¹⁶ After the state courts denied direct and post-conviction relief, Magwood filed a petition for a writ of habeas corpus in federal district court, challenging both his murder conviction and the constitutionality of his death sentence.¹⁷ The district court conditionally granted the writ, upholding the conviction but vacating the sentence.¹⁸ In 1986, the Alabama court conducted a new sentencing hearing and again imposed the death penalty, stating that its “present judgment and sentence ha[ve] been the result of a complete and new assessment of all of the evidence, arguments of counsel, and law.”¹⁹

More than a decade later, Magwood moved in the Court of Appeals for the Eleventh Circuit for leave to file a second habeas petition challenging his original conviction.²⁰ Section 2244(b)(3)(A) requires that a petitioner obtain authorization from “the appropriate court of appeals” before filing a second or successive habeas petition in district court.²¹ Magwood correctly followed this authorization procedure to challenge his 1981 conviction, but the appellate court denied the motion.²² To challenge his 1986 sentence, however, Magwood went straight to district court.²³ He filed a habeas petition challenging the constitutionality of his new capital sentence, and again the district court conditionally granted the writ.²⁴

The Eleventh Circuit reversed, holding that Magwood’s habeas petition directed to his second death sentence was an impermissible second or successive petition under section 2244(b).²⁵ In that petition, Magwood argued that capital punishment was unconstitutional

¹⁵ *Id.* at 324.

¹⁶ *Id.*

¹⁷ *Id.* at 324–26.

¹⁸ *Id.* at 326.

¹⁹ *Id.*

²⁰ *Id.* at 327–28.

²¹ 28 U.S.C. § 2244(b)(3)(A) (2013).

²² *Magwood*, 561 U.S. at 328; *see In re Magwood*, 113 F.3d 1544, 1553 (11th Cir. 1997).

²³ *Magwood*, 561 U.S. at 328.

²⁴ *Id.*

²⁵ *Id.* at 329; *see Magwood v. Culliver*, 555 F.3d 968, 976 (11th Cir. 2009), *rev’d sub nom. Magwood v. Patterson*, 561 U.S. 320 (2010).

because he did not have fair warning that his crime rendered him eligible for death.²⁶ Finding that the trial court relied on the same aggravating factor to impose both death sentences, and that “the fair-warning claim was available at Magwood’s original sentencing,” the Court of Appeals held that section 2244(b) prohibited Magwood’s petition as second or successive.²⁷ The Supreme Court then granted certiorari and reversed.²⁸

Writing for the majority, Justice Thomas directed the Supreme Court’s analysis to the meaning of “second or successive” in section 2244(b).²⁹ A “claim” under section 2244(b) refers to “an asserted federal basis for relief from a state court’s judgment of conviction,” while an “application” is “a filing that contains one or more ‘claims.’”³⁰ The “second or successive” phrase modifies applications for a writ of habeas corpus, not claims raised in those applications.³¹ If Magwood’s claim arose in a second or successive habeas application, then the district court should have dismissed the application as procedurally defective.³² Section 2244(b)(3)(A) requires prior authorization from the court of appeals, which Magwood did not obtain.³³ On the other hand, if Magwood’s claim did not arise in a second or successive application, then it fell outside the scope of section 2244(b) and inside the district court’s jurisdiction.³⁴ The Court adopted the latter view.³⁵

²⁶ *Magwood v. Patterson* 561 U.S. 320, 328 (2010).

²⁷ *Magwood v. Culliver*, 555 F.3d 968, 975–76 (11th Cir. 2009); *see Magwood v. Patterson* 561 U.S. 320, 348–49 (2010) (Kennedy, J., dissenting) (“The argument was that he was not eligible for the death penalty because he did not have fair notice that his crime rendered him death eligible. There is no reason that Magwood could not have raised the identical argument in his first habeas petition.”).

²⁸ *Magwood*, 561 U.S. at 330, 343.

²⁹ *Id.* at 330–34.

³⁰ *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005).

³¹ *Magwood*, 561 U.S. at 334–35 & n.10.

³² *Id.* at 331.

³³ *Id.* at 330–31.

³⁴ *Id.*

³⁵ *Id.* at 331.

Section 2244(b) does not define “second or successive.”³⁶ Rather, the phrase is a “term of art” that absorbs meaning from statutory context and case law.³⁷ In *Magwood*, the Supreme Court found the existence of a new judgment to be dispositive.³⁸ The Court interpreted the prohibition against second or successive habeas petitions to apply only to petitions “challenging the same state-court judgment.”³⁹ By its terms, section 2244(b) covers applications filed under section 2254, and section 2254 describes “[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court.”⁴⁰ Habeas is, after all, a cry for release: the petition “seeks invalidation (in whole or in part) of the judgment authorizing the prisoner’s confinement.”⁴¹

Criminal judgments comprise both sentence and conviction.⁴² A change to any part of the judgment yields a new judgment and, hence, a new opportunity for habeas.⁴³ Because *Magwood*’s 1986

³⁶ See generally 28 U.S.C. § 2244(b) (2013).

³⁷ *Id.* at 332 (quoting *Slack v. McDaniel*, 529 U.S. 473, 486 (2000)); see also *Panetti v. Quarterman*, 551 U.S. 930, 943–44 (2007) (“The phrase ‘second or successive’ is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of the Antiterrorism and Effective Death Penalty Act of 1996.”).

³⁸ *Magwood*, 561 U.S. at 338, 342.

³⁹ *Id.* at 331 (emphasis in original).

⁴⁰ 28 U.S.C. § 2254(b)(1) (2013).

⁴¹ *Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005); see *Magwood*, 561 U.S. at 332.

⁴² See FED. R. CRIM. P. 32(k)(1) (“In the judgment of conviction, the court must set forth the plea, the jury verdict or the court’s findings, the adjudication, and the sentence.”); *Burton v. Stewart*, 549 U.S. 147, 156 (2007) (noting that petitioner’s “limitations period did not begin until both his conviction *and* sentence became final”); *Deal v. United States*, 508 U.S. 129, 132 (1993) (“A judgment of conviction includes both the adjudication of guilt and the sentence.”); *Insignares v. Sec’y, Fla. Dep’t of Corr.*, 755 F.3d 1273, 1281 (11th Cir. 2014) (court previously “overruled [its] incorrect understanding of separate judgments of conviction and sentence”); *Ferreira v. Sec’y, Fla. Dep’t of Corr.*, 494 F.3d 1286, 1292 (11th Cir. 2007) (noting that “the judgment to which AEDPA refers is the underlying conviction and most recent sentence that authorizes the petitioner’s current detention”).

⁴³ In the 1986 resentencing, the judge changed the previous judgment and found that *Magwood*’s mental state qualified as a statutory mitigating circumstance. See *Magwood*, 561 U.S. at 325–36. The court in *Magwood* agreed that the 1986 resentencing led to a new judgment. *Id.* at 331.

resentencing resulted in a new judgment, the habeas petition challenging his sentence within that new judgment could not be second or successive.⁴⁴ The petition must be first and, thus, outside the scope of section 2244(b). The conviction may be the same: unchallenged and untouched.⁴⁵ The sentencing outcome may be the same: capital punishment. The sentencing error may even be the same: fair warning.⁴⁶ But the Court was unmoved: “[a]n error made a second time is still a new error.”⁴⁷

The majority in *Magwood* found no occasion to address the state’s concern that its opinion would encourage petitioners who receive a new judgment to file habeas petitions challenging *both* a new sentence *and* an undisturbed conviction.⁴⁸ The case before the Court did not present those facts “because *Magwood* has not attempted to challenge his underlying conviction.”⁴⁹ Although seven Justices expressed a worry about future abuses of the writ, Justice Thomas shrugged off such worries as “greatly exaggerated.”⁵⁰ Considering only the habeas petitions filed by Billy Joe *Magwood* and the Alabama court’s intervening new judgment, the Court concluded that section 2244 did not bar review of his fair-warning claim.⁵¹

B. Eleventh Circuit: *Insignares v. Secretary*

In *Insignares v. Secretary*, the Court of Appeals for the Eleventh Circuit considered habeas corpus petitions filed *pro se* by a prisoner

⁴⁴ *Magwood*, 561 U.S. at 331, 339.

⁴⁵ *Id.* at 326.

⁴⁶ *Id.* at 328.

⁴⁷ *Id.* at 339.

⁴⁸ *Id.* at 342.

⁴⁹ *Id.*

⁵⁰ *Id.* at 340; *cf. id.* at 343 (Breyer, J., concurring in part and concurring in the judgment, joined by Stevens and Sotomayor, JJ.) (agreeing with the dissent that “if *Magwood* were challenging an undisturbed state-court judgment for the second time, abuse-of-the-writ principles would apply”); *id.* at 343–44 (Kennedy, J., dissenting, joined by Roberts, Ginsburg, and Alito, JJ.) (“The Court today decides that a state prisoner who succeeds in his first federal habeas petition on a discrete sentencing claim may later file a second petition raising numerous previously unraised claims, even if that petition is an abuse of the writ of habeas corpus.”).

⁵¹ *Id.* at 342.

in Florida.⁵² In July 2000, Mitchel Insignares followed a man home from a Miami strip club and shot at him ten or eleven times.⁵³ The victim escaped and later testified against Insignares at trial.⁵⁴ A Florida jury convicted Insignares of attempted first-degree murder with a firearm, criminal mischief, and discharging a firearm in public.⁵⁵ He sought direct and post-conviction relief in state courts, including motions to correct an illegal sentence and to challenge his conviction.⁵⁶ The state judge reduced Insignares' custodial sentence to twenty-seven years, including a twenty-year mandatory minimum sentence for attempted murder.⁵⁷ The state appellate court then reversed his conviction for criminal mischief.⁵⁸

In 2007, Insignares filed a habeas petition in the U.S. District Court for the Southern District of Florida.⁵⁹ The federal judge dismissed the petition as untimely.⁶⁰ In 2009, Insignares filed a second motion in state court to correct his sentence.⁶¹ The judge granted the motion and reduced Insignares' mandatory-minimum sentence for attempted murder from twenty years to ten years, but left intact his conviction and twenty-seven-year custodial sentence.⁶² A few months later, Insignares filed a second motion in state court to challenge his conviction.⁶³ The judge denied the motion.⁶⁴

In 2011, without seeking prior authorization from the federal appellate court, Insignares filed another habeas petition in federal district court.⁶⁵ Both his 2007 habeas petition and his 2011 habeas petition alleged the same errors; Insignares attacked his underlying

⁵² *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273, 1275–77 (11th Cir. 2014).

⁵³ *Id.* at 1275–76 (describing scene in which “Insignares shot at him four times,” the victim “took refuge behind a car, and Insignares fired another six or seven shots”).

⁵⁴ *Id.* at 1276.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1276–77.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1276.

⁵⁹ *Id.* at 1277.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1277, 1281.

⁶³ *Id.* at 1277.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1277–78.

conviction and made claims of ineffective counsel and cumulative error.⁶⁶ The district court heard the new petition and denied it on the merits.⁶⁷

Like the Supreme Court in *Magwood*, the Eleventh Circuit in *Insignares* concluded that a state court's resentencing resulted in a new judgment.⁶⁸ The Court of Appeals recognized "only one judgment," containing both sentence and conviction.⁶⁹ Insignares' 2011 habeas petition may have triggered *déjà vu* in federal court chambers, but nonetheless was the first to attack the Florida court's 2009 judgment.⁷⁰ Unlike the Supreme Court, however, the Eleventh Circuit answered the question of whether a habeas petition challenging an undisturbed conviction is second or successive when the intervening judgment alters only the sentence: "we conclude that when 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."⁷¹ Therefore, the district court had jurisdiction to decide the merits of Insignares' habeas petition.⁷²

In concurrence, Judge Fay expressed "some doubt and concern" about the Court of Appeals' interpretation of *Magwood*.⁷³ Because a change to any part of a judgment yields a new judgment, an intervening state court judgment wipes the habeas slate clean. A petitioner can then challenge whatever he wishes—even parts of a judgment that remained constant and that he challenged previously. The Florida court's resentencing opened the door for Insignares to file multiple habeas petitions raising exactly the same claims.⁷⁴ Facing

⁶⁶ *Id.*

⁶⁷ *Id.* at 1277.

⁶⁸ *Id.* at 1281.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1275; 1278–79.

⁷¹ *Id.* at 1281.

⁷² *Id.*

⁷³ *Id.* at 1285 (Fay, J., concurring).

⁷⁴ *Id.*; *cf.* *Patterson v. Sec'y, Fla. Dep't of Corr.*, 812 F.3d 885, 895 (11th Cir. 2016) (Haikala, J., concurring) ("[W]e must follow binding precedent even when application of that precedent may open the door—however briefly—to a second habeas petition.").

the same conviction and twenty-seven-year prison sentence, Insignares exploited the court's resentencing to engage in "clear abuse of the writ."⁷⁵ Only four years after *Magwood*, worries about abuses of the writ shifted from exaggerated to concrete.⁷⁶

II. SLEIGHT OF HAND IN *PATTERSON V. SECRETARY*

Following *Magwood* and *Insignares*, *Patterson* presented a familiar procedural pattern. Ace Patterson engaged in conduct that even a judge ruling in his favor called "heinous" and "reprehensible."⁷⁷ In 1997, Patterson broke into his cousin's home, kidnapped his cousin's eight-year-old daughter from her bedroom, and repeatedly and brutally raped her.⁷⁸ In 1998, a Florida jury convicted Patterson of burglary, aggravated kidnapping of a child, and two counts of capital sexual battery.⁷⁹ The court sentenced him to 311 months in prison, consecutive life terms in prison, and chemical castration.⁸⁰ Patterson appealed, and the state appellate court affirmed both his conviction and sentences.⁸¹

In 2007, Patterson filed a federal habeas petition, which the district court dismissed as untimely.⁸² Patterson then moved in state court to correct an illegal sentence, arguing that the trial court failed to satisfy the statutory requirements for chemical castration.⁸³ Neither the state nor the victim's guardian ad litem opposed Patterson's request to correct the illegal sentence, deeming it moot in light of Patterson's consecutive life sentences.⁸⁴ In 2009, the trial court granted the motion, ordering that Patterson would "not have to undergo [chemical castration] as previously ordered by the Court at his sentencing in the above styled matter."⁸⁵ The Florida court's 2009

⁷⁵ *Insignares*, 755 F.3d at 1285.

⁷⁶ See *Magwood v. Patterson*, 561 U.S. 320, 340 (2010).

⁷⁷ *Patterson*, 812 F.3d at 894 (Haikala, J., concurring).

⁷⁸ *Id.* at 897 (Pryor, J., dissenting).

⁷⁹ *Id.* at 886 (majority opinion).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*; cf. *id.* at 897 (Pryor, J., dissenting) (providing 2006 as the date of Patterson's first federal habeas petition).

⁸³ *Id.* at 886.

⁸⁴ *Id.* at 897–98 (Pryor, J., dissenting).

⁸⁵ *Id.* at 898.

order amended his sentence in only one respect, by vacating the punishment of chemical castration.⁸⁶ Patterson still faced life in prison, and his conviction remained intact.⁸⁷

In 2011, Patterson filed a new habeas petition in federal district court.⁸⁸ The district court dismissed the petition as second or successive.⁸⁹ On appeal, the Eleventh Circuit faced a familiar question: whether the new state court order amending Patterson's sentence resulted in a new judgment, thereby ensuring that Patterson's new habeas petition was not second or successive.⁹⁰

Writing for the majority, Judge Jordan analogized the facts before the court to the facts in *Insignares* and found no meaningful distinction.⁹¹ The Court of Appeals viewed the Florida court's 2009 order correcting a legal error and vacating the punishment of chemical castration as a resentencing.⁹² Indeed, the court failed to see how the order "can be considered anything but a resentencing."⁹³ The state court "substantively altered the punitive terms of Mr. Patterson's custody," and that corrected sentence now authorizes the Department of Corrections to hold Patterson.⁹⁴ Accordingly, the state court's 1998 judgment and 2009 order must be viewed together "in order to determine Mr. Patterson's present and legally authorized sentence."⁹⁵ The alteration of punitive terms in the 1998 judgment "resulted in a new sentence, which yielded a new judgment."⁹⁶ Because Patterson's 2011 habeas petition was the first to challenge that new judgment, it was not second or successive.⁹⁷

In dissent, Judge Pryor wrote a lengthy opinion landing somewhere between passionate and vitriolic. He described Patterson as the lucky winner of "the habeas lottery" and disparaged the majority

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 887 (majority opinion).

⁹¹ *Id.* at 889–90.

⁹² *Id.*

⁹³ *Id.* at 890.

⁹⁴ *Id.* at 891.

⁹⁵ *Id.*

⁹⁶ *Id.* at 893.

⁹⁷ *Id.* at 887.

opinion as “a sleight of hand” and “gimmickry.”⁹⁸ In reaching the opposite conclusion, Judge Pryor focused on the judgment relevant for habeas analysis: “the new judgment must be a new ‘judgment authorizing the prisoner’s confinement.’”⁹⁹ The Florida court’s 1998 judgment committed Patterson to the custody of the Florida Department of Corrections, and he remains in custody pursuant to that judgment.¹⁰⁰ In Judge Pryor’s view, the state court’s 2009 order vacating chemical castration did not authorize Patterson’s confinement and, thus, was irrelevant for habeas analysis.¹⁰¹ Accordingly, Patterson’s 2011 habeas petition should be deemed second or successive because his 2007 petition already attacked the 1998 judgment.¹⁰²

The crux of the dispute between *Patterson*’s majority and dissenting opinions lies in sentence structure: what counts as sufficient change to a criminal sentence to yield a new judgment and wipe the habeas slate clean? Judge Jordan conceded a gray area: “reasonable jurists can disagree about what constitutes a new judgment under *Magwood*.”¹⁰³ The majority and dissent set different thresholds, with Judge Pryor adamantly fixing a high bar.¹⁰⁴ The dissent criticized the majority for “hold[ing] that any order that *affects* the judgment authorizing a prisoner’s confinement somehow creates a new judgment authorizing his confinement.”¹⁰⁵ For its part, the majority criticized the dissent for leaving specifics for a later day: “it is unclear whether formalism is the guiding principle, and we are left to guess whether it is a piece of paper, or a vacatur, or a substantive

⁹⁸ *Id.* at 896, 904 (Pryor, J., dissenting).

⁹⁹ *Id.* at 899 (quoting *Magwood v. Patterson*, 561 U.S. 320, 332 (2010)).

¹⁰⁰ *Id.* at 897.

¹⁰¹ *Id.* at 899.

¹⁰² *Id.*

¹⁰³ *Id.* at 894 (majority opinion).

¹⁰⁴ *See id.* at 904 (Pryor, J., dissenting) (criticizing majority opinion for “[r]elaxing the bar on second or successive petitions”).

¹⁰⁵ *Id.* at 900 (emphasis in original); *see also id.* at 902 (“A prisoner will be able to file another petition for a writ of habeas corpus any time a state court issues an order affecting his sentence—for example, an order removing a restitution obligation or a fine, an order reducing a sentence for substantial assistance to the government or based on a reduced sentencing guideline, or an order shortening a term of probation.”).

change (or something else altogether) that matters.”¹⁰⁶ What matters for interpretation of 28 U.S.C. § 2244(b) is that the statute alone cannot resolve the dispute. The statutory language of section 2244(b) is open, and judges are forced to import their own policy judgments to evaluate habeas petitions—a sleight-of-hand maneuver evident in both the majority and dissenting opinions in *Patterson*.

III. UNDERDETERMINATION OF STATUTORY LANGUAGE

Underdetermination is a doctrine in philosophy that describes “the relations between theory and evidence.”¹⁰⁷ According to this doctrine, evidence underdetermines theory. Multiple, mutually inconsistent theories may all have an equal relation to a set of evidence.¹⁰⁸ That is, the evidence supports Theory 1 just as well as it supports Theory 2. While not all theories need be on a par, at least some fare equally well.¹⁰⁹ Thus, the evidence alone does not guide a choice among rival theories. Preference criteria must come from elsewhere.

The doctrine of underdetermination shifts neatly from philosophy to law, as statutes underdetermine interpretations.¹¹⁰ Multiple,

¹⁰⁶ *Id.* at 894; *accord* In re Lampton, 667 F.3d 585, 589–90 (5th Cir. 2012) (finding that because the district court did not enter an amended judgment of conviction nor impose a new sentence, “[t]he less fundamental change made to Lampton’s judgment of conviction is not enough to allow him to bypass AEDPA’s restrictions on piecemeal habeas litigation”); White v. United States, 745 F.3d 834, 836 (7th Cir. 2014) (noting “substantial differences between resentencing and sentence reduction” for purposes of section 2244).

¹⁰⁷ See Larry Laudan, *Underdetermination*, in 9 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 527, 527 (Edward Craig ed., 1998).

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 528–29 (describing different arguments of underdetermination).

¹¹⁰ See, e.g., Patrick S. Shin, *Discrimination Under a Description*, 47 GA. L. REV. 1, 26 (2012) (arguing in Title VII context that “[i]n the face of such underdetermination, the impermissibility of a disputed conduct will depend, as a matter of law, on which description of the conduct is given operative effect”); Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RES. L. REV. 85, 139 (2010) (arguing that attorney professionalism “standard acknowledges that there may be more than one legitimate interpretation of the legal authorities that bear on the client’s proposed conduct”); Lee J. Strang, *The Role of Common Good in Legal and Constitutional Interpretation*, 3 U. ST.

conflicting interpretations may all have an equal relation to statutory language; the words support Interpretation 1 just as well as they support Interpretation 2. Specifically, 28 U.S.C. § 2244(b) does not guide a choice among rival interpretations of its prohibition against second or successive habeas petitions. To choose a best interpretation, a judge must import his or her own preference criteria in the form of policy judgments.

Policy judgments—or subjective views reflecting a judge’s social, political, or economic beliefs—have long enjoyed a seat on the bench.¹¹¹ Historically, courts stepped in “to hold laws unconstitutional when they believe the legislature has acted unwisely.”¹¹² Judicial analysis prescribed a better world. More recently, courts have shied away from overt displays of policy for fear of transforming the judiciary into a quasi-legislative branch.¹¹³ Such reluctance may be

THOMAS L. J. 48, 49, 62–74 (2005) (arguing that in both statutory and constitutional interpretation, “the common good must play a role because of the underdetermined nature of legal adjudication”).

¹¹¹ Cf. Holly Doremus & A. Dan Tarlock, *Science, Judgment, and Controversy in Natural Resource Regulation*, 26 PUB. LAND & RESOURCES L. REV. 1, 13 (2005) (“Policy judgments are judgments about social goals, the relative importance of those goals, and the importance of avoiding specific types of errors. . . . By their very nature, policy judgments cannot be made on any objective basis.”); *United States v. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 811, 813 n.10 (1984) (analyzing discretionary function exception to Federal Tort Claims Act and recognizing that “[w]here there is room for policy judgment and decision there is discretion”) (quoting *Dalehite v. United States*, 346 U.S. 15, 36 (1953)).

¹¹² *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (describing due process analysis in the wake of *Lochner v. New York*, 198 U.S. 45 (1905)); see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2617 (2015) (Roberts, J., dissenting) (“By empowering judges to elevate their own policy judgments to the status of constitutionally protected ‘liberty,’ the *Lochner* line of cases left ‘no alternative to regarding the court as a . . . legislative chamber.’”) (quoting LEARNED HAND, *THE BILL OF RIGHTS* 42 (Harvard Univ. Press 1958)).

¹¹³ See, e.g., *Ferguson*, 372 U.S. at 730 (“We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”); *County of Sacramento v. Lewis*, 523 U.S. 833, 865 (1998) (Scalia, J., concurring) (“[F]or judges to overrule that democratically adopted policy judgment on the ground that it shocks *their* consciences is not judicial review but judicial governance.”) (emphasis in original); *United States v. Sotelo*, 436 U.S. 268, 279 (1978) (“However persuasive these considerations might be in a legislative forum, we as

futile, as “activist judge” has become a frequent epithet hurled at the authors of controversial opinions.¹¹⁴

In the context of statutory interpretation, policy judgments are an essential normative tool. Even the loudest champion of judicial restraint, the late Justice Scalia, conceded that “no statute can be entirely precise.”¹¹⁵ Some judgments, including “judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it.”¹¹⁶ The doctrine of unconstitutional delegation prohibits Congress from ceding all authority, as “basic policy decisions governing society are to be made by the Legislature.”¹¹⁷ But it may cede a great deal. The Supreme Court has resisted capping the degree of policy judgment that Congress may delegate to other branches of government.¹¹⁸ Rather, the degree reflects the language of the statute at issue.

judges cannot override the specific policy judgments made by Congress in enacting the statutory provisions with which we are here concerned.”).

¹¹⁴ See, e.g., S.M., *Those “Activist” Judges*, THE ECONOMIST (July 8, 2015, 9:25 P.M.), <http://www.economist.com/blogs/democracyinamerica/2015/07/judicial-politics-0> (“Critiques of judicial activism are, in the end, rarely critiques of judicial activism. They are cries of despair masked as principled stances against unelected judges deciding major questions for hundreds of millions of Americans.”).

¹¹⁵ *Mistretta v. United States*, 488 U.S. 361, 415, 420 (1989) (Scalia, J., dissenting) (rejecting Sentencing Commission standards on grounds of unconstitutional delegation “because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation”); accord ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 24 (2012) (“Despite an occasional judicial opinion recalling bygone glories, our system of separated powers never gave courts a part in either the drafting or the revision of legislation.”); Adam Cohen, *Psst . . . Justice Scalia . . . You Know, You’re an Activist Judge, Too*, N.Y. TIMES (Apr. 19, 2005), http://www.nytimes.com/2005/04/19/opinion/psst-justice-scalia-you-know-youre-an-activist-judge-too.html?_r=0 (“Last month, after the Supreme Court struck down the death penalty for those under 18, [Justice Scalia] lashed out at his colleagues for using the idea of a ‘living Constitution’ that evolves over time to hand down political decisions -- something he says he would never do.”).

¹¹⁶ *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 416–17 (noting that “a certain degree of discretion, and thus of law-making, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be”); see *id.* at 378 (stating

The language of section 2244(b) is wide open. Section 2244(b) requires, with narrow exceptions, that a court dismiss any habeas petition that is “second or successive.” The term-of-art phrase does not self-define nor reflect common usage.¹¹⁹ Standing alone, the words “second or successive” do not favor one interpretation over another. Courts must look elsewhere to determine meaning, including to statutory context and case law. Relying on context and case law, the courts in *Magwood*, *Insignares*, and *Patterson* all focused their analyses on state court judgments, specifically changes to the criminal sentence contained within a judgment.¹²⁰ But context and case law go only so far. To evaluate changes to the criminal sentence, courts look elsewhere still.

Both the majority and dissenting opinions in *Patterson* rest on policy judgments, though hidden beneath the veneer of “objective legal standards.”¹²¹ Each opinion reflects a different social belief regarding the proper beneficiary of our criminal justice system: the majority favors the prisoner’s perspective, while the dissent favors the victim’s perspective. Accordingly, the majority opinion promotes a robust and liberal habeas regime, in which prisoners are afforded considerable leeway to challenge their confinement and the government is tasked with carefully avoiding mistakes in sentencing. The victim stays in the shadows, without one mention in the majority opinion. Perhaps attempting to make this social belief more palatable, Judge Jordan uses the word “substantive” seven times to describe the state court’s amendment to Patterson’s sentence.¹²² The

that congressional delegations can “carry with them the need to exercise judgment on matters of policy”) (citing *Yakus v. United States*, 321 U.S. 414, 420 (1943) (approving congressional delegation to Price Administrator “to promulgate regulations fixing prices of commodities which ‘in his judgment will be generally fair and equitable and will effectuate the purposes of this Act’”), and *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216–17 (1943) (approving congressional delegation to Federal Communications Commission to act in “public interest”)).

¹¹⁹ See *Magwood v. Patterson*, 561 U.S. 320, 332 (2010); *Panetti v. Quarterman*, 551 U.S. 930, 943–44 (2007).

¹²⁰ See *Magwood*, 561 U.S. at 332–33; *Insignares v. Secretary*, 755 F.3d 1273, 1281 (11th Cir. 2014); *Patterson v. Secretary*, 812 F.3d 885, 891 (11th Cir. 2016).

¹²¹ *Patterson*, 812 F.3d at 895 (Haikala, J., concurring).

¹²² See *id.* at 887 (agreeing with *Patterson* that “the state trial court *substantively* amended his sentence”), 889 (noting that state court granted *Patterson*’s “motion to correct, *substantively* vacating a portion of the sentence”), 891 (stating that “the appropriate approach is to focus on the legal error corrected by, and the

description makes sense from Patterson's perspective. For him, the state court's vacatur of a pending chemical castration no doubt provided enormous relief.

By contrast, the dissenting opinion promotes a rigid and conservative habeas regime, in which prisoners are generally afforded a single opportunity to challenge their confinement and victims are granted respite and security. Perhaps attempting his own sweetener, Judge Pryor devotes considerable attention to the details of Patterson's violence and to the young victim of his crimes.¹²³ Curtailing habeas opportunities makes sense from the perspective of the victim, as well as the government. She has suffered enough, and state resources are precious and strained.¹²⁴ For both the victim and the government, the state court's vacatur of chemical castration was not sufficiently substantive to warrant opposing Patterson's motion to correct his sentence.

Neither the majority opinion nor the dissenting opinion is an outlier. Both policy judgments claim adherents.¹²⁵ Both policy judgments are also consistent with the language of 28 U.S.C. § 2244(b),

substantive effect of" state court's order; recognizing that "[w]here a state court corrects a legal error in an initial sentence, and imposes a new sentence that is *substantively* different than the one originally imposed, there is a new judgment"; and noting that state court's removal of chemical castration "punishment *substantively* altered the punitive terms of Mr. Patterson's custody"), 893 (finding that state court's "order *substantively* changed Mr. Patterson's sentence") (stating that "*substantive* alteration of the punitive terms of Mr. Patterson's original judgment resulted in a new sentence") (all emphases added).

¹²³ See *id.* at 897–98 (Pryor, J., dissenting) (describing "the trauma he caused the victim," an eight-year-old girl sleeping in her bed) (noting that "[o]rdinarily, that decision would have brought closure to the victim of his crimes, who was by then eighteen years old," and that the victim's guardian ad litem "believed that contesting his motion was not worth 'expos[ing] the victim to the painful remembrance of the Defendant's actions against her'") (citing case law that finality "benefits the victim"), 902 (criticizing majority opinion for likely "forcing the victim to relive the crime and prosecution"), 904 (claiming majority opinion "will threaten a twenty-six-year-old woman to relive the horror of his monstrous crimes").

¹²⁴ See *id.* at 902–03.

¹²⁵ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens."); Min-

as the majority and dissent find equal textual support. The majority interprets “second or successive” to mean a later habeas petition filed without any change in sentencing that the *prisoner* would find substantive. A substantive change from the prisoner’s perspective yields a new judgment and renders section 2244(b) inapplicable. The dissent interprets “second or successive” to mean a later habeas petition filed without any change in sentencing that the *victim* would find substantive. A substantive change from the victim’s perspective yields a new judgment and renders section 2244(b) inapplicable. Reasonable jurists can indeed disagree.¹²⁶ Because section 2244(b) underdetermines what constitutes a new judgment intervening between habeas petitions, a judge’s subjective views guide the choice.

Thus, the doctrine of underdetermination shines a light on statutory interpretation. The animating interpretive force is equal parts statutory language and policy judgment. Given that the words of the statute stay neutral among preference criteria, there is no need for concealment or misdirection. Bring the preference criteria to light, and the full opinion emerges.

CONCLUSION

In the end, the *Patterson* dissent’s “sleight of hand” remark proves less insult than insight. A judge’s worldview fills the interpretive vacuum of open statutory language. Judges, like all of us, fill gaps as they see fit. Both the majority and dissenting opinions hide

nesota v. Carter, 525 U.S. 83, 88 (1998) (describing Fourth Amendment protections for defendants); *Dennis v. United States*, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting) (“The boast of our criminal procedure is that it protects an accused, so far as legal procedure can, from a bias operating against such a group to which he belongs.”); Thomas Jefferson, *A Bill for Proportioning Crimes and Punishments* (1778), FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-02-0132-0004-0064> (“government would be defective in it[s] principal purpose were it not to restrain such criminal acts, by inflicting due punishments on those who perpetrate them”); U.S. Dep’t of Justice, National Institute of Justice, *The Rights of Crime Victims—Does Legal Protection Make a Difference?* (Dec. 1998), <https://www.ncjrs.gov/pdffiles/173839.pdf> (“The President’s Task Force on Victims of Crime concluded in its 1982 Final Report that there was a serious imbalance between the rights of criminal defendants and the rights of crime victims.”).

¹²⁶ See *Patterson*, 812 F.3d at 894.

policy judgments within their legal judgments. The statutory prohibition against second or successive habeas petitions is consistent with, and in fact invites, these rival policy judgments. The illusion is that judicial opinions are based solely on the law.