No. 09-158

IN THE

Supreme Court of the United States

BILLY JOE MAGWOOD,

Petitioner,

v.

GRANT CULLIVER,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment part of a "second or successive" petition under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds?

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BRIEF FOR PETITIONER

Petitioner Billy Joe Magwood respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is published at 555 F.3d 968. The opinion of the United States District Court for the Middle District of Alabama (Pet. App. 23a) that addresses the question presented is published at 481 F. Supp. 2d 1262.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2009. Pet. App. 1a. A timely petition for rehearing was denied on March 24, 2009. Pet. App. 100a-101a. On June 15, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 7, 2009. *See* 08A1116. On November 16, 2009, this Court granted the petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2244(b) provides in relevant part:

"(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) 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 unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

28 U.S.C. § 2254(a) provides that: "[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Relevant provisions of Alabama's statutes governing capital punishment, as they existed at the time of petitioner's crime, are reproduced at Pet. App. 91a-99a.

STATEMENT OF THE CASE

An Alabama court sentenced Petitioner Billy Joe Magwood to death for an act that was not a death-eligible offense under Alabama law when he committed it. He obtained federal habeas relief from that sentence (on grounds unrelated to his death eligibility), but the state court again sentenced him to death for the same act. A federal district court then granted petitioner habeas relief from this new sentence, holding that it violates clearly established due process law to execute someone for an act that was not a death-eligible offense when he committed it. Without disputing the correctness of that constitutional holding, the Eleventh Circuit reversed the district court's decision and reinstated petitioner's death sentence. Even though this is petitioner's first habeas petition challenging his current sentence, the Eleventh Circuit held that petitioner's due process claim was part of a "successive" petition under 28 U.S.C. § 2244(b) because petitioner could have, but did not, challenge his earlier (and subsequently vacated) death sentence on the same constitutional ground.

1. Petitioner "was a sound person before his service with the United States Army in Viet Nam," for which he received a Purple Heart. Pet. App. 105a. After that service, however, he began to develop paranoid schizophrenia and started abusing his pain medication. *Id.* In 1975, he pleaded *nolo contendere* to illegally possessing the medication and was sentenced to four years in the Coffee County, Alabama jail. During that confinement, petitioner

was unable to obtain medication or treatment for his mental illness, and his condition worsened.

By the end of his jail term, petitioner had developed full-blown schizophrenia. He believed that the Army was sending him orders through surgically implanted communication devices and warning him that Coffee County authorities, including Sheriff Cornelius Grantham, were interfering with his "missions." Petitioner went so far as to send letters to the Veterans Administration, imploring it to release him from its command by removing the implanted communication devices.[1]

Petitioner was released from jail at the end of his sentence. On March 1, 1979, as petitioner's hallucinations grew more vivid, petitioner approached Sheriff Grantham in front of the jail. After exchanging greetings and in plain view of the sheriff's deputies, petitioner shot and killed the sheriff. Petitioner then exchanged fire with a deputy, got into his car, and drove home. Upon arriving there, petitioner sat unarmed on his front porch until arresting officers arrived.

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[1] Internal parole and probation reports, which the State did not turn over until after petitioner's resentencing, confirmed that, while incarcerated, petitioner "did not know his date of birth, what day of the week it was, the day of the month, or month of the year. [He] did not have any concept of what parole amounted to and his only interest was getting out of jail and to go to the Walter Reed Hospital for treatment." Habeas Pet. App. 109; *see also Magwood v. Jones*, 472 F. Supp. 2d 1333, 1335-37 (M.D. Ala. 2007).

2. At the time of the killing, Alabama law provided that an individual was subject to the death penalty only if two prerequisites were met.[2] First, the individual had to commit one of the fourteen types of aggravated murder listed in Ala. Code § 13-11-2(a) (1975). Even though crimes on this list were sometimes called "capital offenses," that was something of a misnomer. Before imposing a death sentence, the trial judge also had to make a second finding: that "[o]ne or more of the aggravating circumstances enumerated in section 13-11-6 . . . exist[ed] in the case" and outweighed any mitigating circumstances. *Id.* § 13-11-4; *see also* Pet. App. 51a-55a.[3] Murdering a sheriff while on duty or because of some official or job-related act was a form of capital murder under § 13-11-2(a)(5), but petitioner did not kill Sheriff Grantham under any of the aggravating

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[2] Alabama law as it existed in 1979 is reproduced in the appendix to the district court's opinion, which appears at Pet. App. 91a-99a. All references to Alabama statutes in this brief, unless otherwise noted, are to the law as it existed in 1979. These statutes were recodified and amended in 1981, without making any substantive changes that are relevant to this case.

[3] Alabama law still uses this nomenclature. Thus, "a capital offense under [Alabama's recodified and amended death penalty statutes] is not an offense for which a defendant is automatically 'eligible' for the death penalty." Ed Carnes, *Alabama's 1981 Capital Punishment Statute*, 42 Ala. Lawyer 456, 483 n.26 (1981). Instead, a defendant is eligible for the death penalty only if he is convicted of a capital offense *and* at least one enumerated aggravating circumstance exists. *Id.* at 483.

circumstances enumerated in § 13-11-6. Pet. App. 57a.[4]

The State nonetheless charged petitioner with capital murder *and* sought the death penalty. It appointed two lawyers to represent him – a childhood friend of Sheriff Grantham and someone who had known the sheriff socially and professionally for twenty-five years. At the same time, the State remitted petitioner to Searcy State Hospital, where three state psychiatrists unanimously confirmed his paranoid schizophrenia. The psychiatrists also concluded that petitioner "was insane at the time of his admission to their hospital, at the time [the doctors] issued their report, and probably at the time of the commission of the offense." Pet. App. 26a. Petitioner, one psychiatrist emphasized, was "not a borderline case"; he was "completely out of touch with reality." *Magwood v. State*, 426 So. 2d 918, 921, 923 (Ala. Crim. App. 1982).

After receiving the State's psychiatric report, the Alabama trial court ordered that petitioner be "restored to his right mind," Tr. Rec. 387, by means of antipsychotic drugs potent enough to "put anyone . . . totally asleep." *Magwood v. Smith*, 608 F. Supp. 218, 226 (M.D. Ala. 1985). After months of receiving such medication, the court deemed petitioner legally competent to stand trial. *Id.* at 227.

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[4] The aggravating circumstances that were enumerated in § 13-11-6 are reproduced at Pet. App. 97a-98a. They included having been convicted of another capital or serious felony; committing the crime for pecuniary gain; or committing the crime during the course of other enumerated felonies.

Petitioner's trial lasted a day and a half. "[T]he State's only evidence that [petitioner] was sane came from two general practitioners who examined [petitioner] for 15 and 30 minutes, respectively, and a clinical psychologist who conceded that [petitioner] suffered from paranoid schizophrenia and that he examined [petitioner] two years after the offense conduct and while he was strongly medicated." Pet. App. 26a. The trial court refused to compel testimony of any of the three doctors from Searcy State Hospital or to grant petitioner funds to hire a psychiatrist as an expert witness of his own. The jury, whose members included numerous acquaintances of the sheriff, *see Magwood v. State*, 426 So. 2d 918, 924 (Ala. Crim. App. 1982), rejected petitioner's insanity defense and found him guilty.

Even though it recognized that none of the aggravating circumstances in Section 13-11-6 accompanied petitioner's crime, the trial court sentenced petitioner to death. *Magwood*, 426 So. 2d at 928 (reprinting trial court sentencing order of June 30, 1981). The trial court justified this act by referencing a decision from the Alabama Supreme Court, *Ex parte Kyzer*, 399 So. 2d 330, 338 (Ala. 1981), that was handed down two years *after* petitioner's crime. In that decision, the Alabama Supreme Court stated that even though "[a] literal and technical reading" of Alabama statutes limited the universe of potential aggravators to those listed in Ala. Code § 13-11-6, Alabama law should not limit sentencing courts in this manner. *Kyzer*, 399 So. 2d at 337. Thus, the Alabama Supreme Court said that a trial court could treat the very commission of a crime listed in § 13-11-2(a) as an "aggravating

circumstance" rendering the defendant death-eligible. *Kyzer*, 399 So. 2d at 338.

3. After the Alabama courts upheld petitioner's conviction and sentence on direct and post-conviction review, petitioner filed a federal habeas petition. The U.S. District Court for the Middle District of Alabama left his conviction in place, noting that "while . . . the evidence seems particularly strong that petitioner was insane at the time of the offense, this issue is properly left to the state courts." *Magwood v. Smith*, 608 F. Supp. 218, 227 (M.D. Ala. 1985). But the district court granted habeas relief as to petitioner's death sentence. The district court held that the sentencing court had inexplicably failed to find any mitigating circumstances relating to petitioner's mental illness. *Id.* at 228. The Eleventh Circuit affirmed this decision and mandated "a new sentencing hearing in order to satisfy the constitutional standards for sentencing in death penalty cases." *Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986). The State declined to seek review in this Court.

4. In 1986, "the state trial court conducted a 'complete and new' sentencing hearing, including 'a new assessment of all of the evidence, arguments of counsel, and law' and a 'new . . . opportunity for the parties to submit evidence.'" Pet. App. 27a (quoting portion of state court order reproduced at Pet. App. 103a). Again applying *Kyzer*, the trial court sentenced petitioner to death notwithstanding the State's failure to allege, and the court's failure to find, any aggravating circumstance listed in former Ala. Code § 13-11-6. Pet. App. 102a-107a. The Alabama courts upheld this new sentence on direct

appeal. *Magwood v. State*, 548 So. 2d 512 (Ala. Crim. App. 1988); *Ex parte Magwood*, 548 So. 2d 516 (Ala. 1988).

5. Petitioner then sought post-conviction relief from his new death sentence in the Alabama courts. Among other things, he argued that "the absence of any statutory aggravating circumstance and the lack of notice given by the 1975 Act for the retroactive application of the decision in *Kyzer* rendered [his] sentence unconstitutional under the . . . 14th Amendment[]." Pet. App. 69a (quoting petitioner's brief). The Alabama Court of Criminal Appeals denied relief, rejecting the due process claim "on the merits." Pet. App. 68a; *see Magwood v. State*, 689 So. 2d 959 (Ala. Crim. App. 1996).

6. In 1997 (after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132 (1996)), petitioner filed the federal habeas petition at issue here in the U.S. District Court for the Middle District of Alabama. The petition does not challenge petitioner's conviction. Instead, it is limited to challenging the "1986 Judgment Sentencing Petitioner to Death." Petition at 1.[5] In this application, petitioner renewed, among other arguments, his Fourteenth Amendment due process claim.

The district court granted relief, holding that the Alabama courts violated clearly established Due

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[5] Petitioner separately, and simultaneously, sought leave to file a successive petition challenging his conviction only. The Eleventh Circuit denied that motion. *In re Magwood*, 113 F.3d 1544 (11th Cir. 1997).

Process Clause limitations on the retroactive application of new law by applying the formulation of Alabama law announced in *Kyzer* at petitioner's sentencing. The district court explained that *Kyzer* contravened "the literal meaning" and "plain text" of Alabama's death penalty statutes and "had no support in prior case law." Pet. App. 62a-63a. It therefore "seems beyond dispute," the district court continued, "that the judicial construction of [Alabama death penalty statutes] announced in *Kyzer* was 'unexpected and indefensible by reference to the law which had been expressed prior to' [petitioner's] offense conduct." Pet. App. 55a (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

The State had not argued that petitioner's due process claim was subject to AEDPA's restrictions on claims asserted in "second or successive" habeas petitions. Pet. App. 63a. The district court nonetheless "point[ed] out" that the claim was not subject to these restrictions. Pet. App. 63a. Relying on hornbook law, the district court explained that although "the state court committed the same [due process] error" at petitioner's first sentencing, "habeas petitions challenging the constitutionality of a resentencing proceeding are not successive to petitions that challenge[d] the . . . original sentence." Pet. App. 65a (citing 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 28.3b, at 1412 (5th ed. 2005)).

The district court also held that petitioner was entitled to habeas relief because his counsel had

provided constitutionally ineffective assistance of counsel at his resentencing. Pet. App. 82a-89a. It rejected various other claims.[6]

7. The State appealed. After the case was briefed but before the Eleventh Circuit heard oral argument, the Alabama Supreme Court published a decision repudiating *Kyzer*, describing *Kyzer*'s statement that a sentencing court did not need to find a statutory aggravating circumstance in order to impose the death penalty as "pure dicta," and, worse yet, simply wrong. *Ex parte Stephens*, 982 So. 2d 1148, 1153 (Ala. 2006).[7] Applying Alabama's recodified death penalty statutes, which it deemed identical in all relevant respects to the statutes on the books in 1979, the Alabama Supreme Court explained: "The statutory scheme clearly permits the trial court and advisory jury to consider *only those aggravating circumstances listed in § 13A-5-49* [formerly § 13-11-6]. Our dicta to the contrary in *Kyzer* was incorrect." *Stephens*, 982 So. 2d at 1153 (emphasis added). This decision made clear not only that Magwood's crime

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[6] These claims included: (1) a *Brady* challenge to the State's suppression of internal reports that belied testimony that its witnesses gave concerning petitioner's mental illness; and (2) an inadequate investigation claim concerning petitioner's counsel's failure to learn that he had a wife and children; to learn any details about his military service in Vietnam; or to learn about the recorded development of his hallucinations concerning the sheriff in the weeks leading up to the crime. Pet. App. 16a-22a, 80a-82a.

[7] *Stephens* is recorded as having been decided on July 28, 2006, but the decision was not released for publication until July 8, 2008.

was not a death-eligible offense when he committed it, but that it had *never* been a death-eligible offense.

The State nonetheless pressed ahead with its appeal, and the Eleventh Circuit reversed the district court's grant of habeas relief. The Eleventh Circuit did not question that petitioner's sentence violated clearly established due process principles, since he did not commit a death-eligible offense. Nor did the court of appeals question that petitioner's habeas application challenging his 1986 death sentence should generally be regarded as a first petition challenging that sentence. The Eleventh Circuit ruled, however, that petitioner's due process claim should be treated as though raised in a successive petition because the constitutional grounds for the claim had been "available at his original sentencing" as well as at his 1986 resentencing. Pet. App. 15a.

The Eleventh Circuit also held that all of petitioner's other claims lacked merit. Pet. App. 16a-22a. It later denied rehearing without comment. Pet. App. 100a-101a.

8. Petitioner sought this Court's review of the Eleventh Circuit's successive petition and ineffective assistance rulings. This Court granted certiorari limited to the successive petition ruling. 130 S. Ct. ____ (2009).

SUMMARY OF ARGUMENT

A claim in a prisoner's first habeas petition to challenge a newly imposed sentence cannot be deemed part of a second or successive petition.

A. The text of AEDPA, which allows the filing of "an application for a writ of habeas corpus on behalf

of a person in custody pursuant to *the judgment* of a State court," 28 U.S.C. § 2254 (emphasis added), indicates that habeas petitions are counted with respect to each particular state-court judgment. When a new judgment is entered, the counting of petitions begins afresh. Similarly, AEDPA directs courts to determine whether "applications," not claims, are successive. 28 U.S.C. § 2244(b). Thus, an application *as a whole* must be either a first one or a successive one. A particular *claim* in a first application challenging a new judgment cannot somehow be singled out as successive.

B. The history of the "second or successive" concept, which AEDPA incorporates, confirms this analysis. The "second or successive" concept developed as a means of administering the "abuse of the writ" doctrine, which is designed to curb repetitive challenges to the *same* judgment. Hence, a petitioner who keeps on losing cannot continue to challenge his judgment. But when a prisoner *succeeds* in obtaining relief from his sentence, thereby vacating that aspect of the original judgment, and is given an entirely new sentence, it makes no sense to limit his ability to bring a first constitutional challenge against that new sentencing judgment.

This Court's precedent is in accord. Since long before AEDPA was enacted, this Court has consistently referred to successive petitions as those challenging the *same* state-court judgment as an earlier petition. And this Court has twice resolved cases – once before AEDPA, once after – on the implicit assumption that a claim in an initial petition challenging a resentencing should be treated as part

of a first petition, even if the prisoner's initial sentence could have been attacked on the same grounds.

C. Requiring courts, as the Eleventh Circuit did here, to analyze initial petitions against new judgments on a claim-by-claim basis and to treat claims based on constitutional arguments that could have been raised against initial (but subsequently vacated) judgments as successive would not only upend the current understanding of the "second or successive" concept, but it would threaten numerous other settled understandings concerning habeas procedure. For instance, if the Eleventh Circuit's analysis were correct, prisoners would be barred from seeking relief from resentencings (or retrials) based on violations of constitutional rules established by intervening decisions from this Court. In addition, the Eleventh Circuit's rule, in conjunction with AEDPA's provision requiring the automatic dismissal of any claim that was presented in a prior habeas petition, would seemingly bar claims against new sentences that are based upon arguments that a prisoner raised in his petition challenging his original sentence – even those based upon the same ground which the prisoner had obtained relief from his original sentence. Such a system would immunize blatant constitutional transgressions at resentencings (or retrials) from federal scrutiny and would raise serious concerns with respect to unconstitutionally suspending the writ of habeas corpus.

ARGUMENT

A CLAIM IN A FIRST HABEAS APPLICATION CHALLENGING A NEW DEATH SENTENCE CANNOT BE TREATED AS PART OF A SECOND OR SUCCESSIVE APPLICATION

The judicial and statutory doctrines governing habeas corpus procedure have sometimes provoked intense debate among the members of this Court. But one basic principle has never been questioned: a successive application, by definition, "challeng[es] the *same* state court judgment" as challenged in a previous federal habeas application. *Panetti v. Quarterman*, 551 U.S. 930, 964 (2007) (Thomas, J., dissenting) (emphasis added). Thus, the leading treatise on habeas corpus practice and procedure explains that the "successive petition doctrine does not apply when . . . a habeas corpus petitioner, who succeeded in overturning a conviction (or sentence) and who is subsequently retried and reconvicted (or resentenced), files a second petition to challenge the new conviction (or sentence)." 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 28.3b, at 1412-13 (5th ed. 2005).

The text, history, and structure of AEDPA, as well as this Court's precedent, all reinforce this framework. The Eleventh Circuit had no warrant to disturb it here.

A. AEDPA's Text

Section 2254 of Title 28 of the United States Code, as amended by AEDPA, invests federal courts with the authority to "entertain an application for a writ of habeas corpus on behalf of a person in custody

pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). At the same time, Section 2244 directs courts, save in certain specified circumstances, to dismiss "[a] claim presented in a second or successive habeas corpus application under section 2254." *Id.* § 2244(b)(1) & (2).

Taken together, the text of these provisions demonstrates that a habeas application challenging a new judgment for the first time cannot be second or successive in any respect. Section 2254 authorizes the filing of a habeas application seeking relief from "*the* judgment of a State court" – not from "*a* judgment of a State court" and certainly not from "*a prior* judgment of a State court." As is often the case, the use of the definite, unadorned article is deliberate. *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 434-45 (2004). It indicates that any determination under Section 2244(b) of whether a habeas application "under Section 2254" is "successive" must be made with reference to a single, specific state court judgment. If and when a state court enters a *new* judgment, the counting of habeas applications starts over with respect to challenges to the new proceeding that led to that new judgment.

Section 2254's phrase "in custody pursuant to," which precedes the words "the judgment of a State court," reinforces this conclusion. It is elementary that once a state court vacates a judgment and replaces it with a new one, a prisoner is no longer "in custody pursuant to" the original judgment. Instead, he is in custody solely pursuant to the new judgment, even if its terms are the same as the previous one.

See, e.g., *Burton v. Stewart*, 549 U.S. 147, 153, 156 (2007) (prisoner was "in custody pursuant to" new sentencing judgment, not old one, as soon as new judgment was entered). An initial habeas challenge to that new judgment, therefore, must be a first application under Sections 2254 and 2244(b).

The Eleventh Circuit implicitly recognized this general principle by treating most of petitioner's claims in this case as arising in a first petition. Pet. App. 15a, 16a-22a. Yet the Eleventh Circuit held that petitioner's due process "claim . . . is successive" because he could have challenged his original death sentence on the same ground. Pet. App. 15a-16a. This reasoning cannot be squared with the statutory language just discussed. All of petitioner's current claims challenge the same judgment – the 1986 judgment sentencing him to death. *See* Pet. App. 106a. If petitioner's habeas application challenging that judgment is a first petition with respect to some of his claims that challenge his new sentence (as is undeniably the case), it must be a first petition with respect to *all* of his claims that challenge his new sentence.

Lest there be any doubt, this Court has emphasized that the words "application" and "claim" in AEDPA mean different things. "[F]or purposes of § 2244(b)," an "application" is an indivisible unit "that contains one or more 'claims.'" *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005); *see also Artuz v. Bennett*, 531 U.S. 4, 9-10 (2000) (same). Thus, in *Artuz*, when a state tried to argue that an application containing both procedurally barred and nonbarred claims was "'properly filed' *as to* the nonbarred claims, and not 'properly filed' *as to* the rest," this

Court rejected the argument as contrary to "[o]rdinary English." 531 U.S. at 10 (emphasis in original). Section 2244(d), this Court explained, "refers only to 'properly filed' applications and does not contain the peculiar suggestion that a single application can be both 'properly filed' and not 'properly filed.'" *Id.*

So too here. Section 2244(b) requires courts to decide whether a habeas "application" is successive. It nowhere contains the "peculiar suggestion," *Artuz*, 531 U.S. at 10, that a single application challenging a single judgment can be both successive and not successive. To the contrary, it requires a court first to determine whether an application – that is, a whole filing – is successive. If it is, then the Section provides rules for determining whether each individual "claim" in the application may go forward. 28 U.S.C. § 2244(b)(2). But if the application is *not* successive, then a court has no statutory authority to dismiss any particular "claim" on the ground that it is somehow "second or successive." Pet. App. 15a, 16a. This is especially so when, as here, the claim is being raised for the *first* time.

B. AEDPA's History and Precedent

The historical development of the "second or successive" phrase eliminates any indeterminacy in the text of AEDPA. "The phrase 'second or successive petition' is a term of art given substance in [this Court's] prior habeas corpus cases," *Slack v. McDaniel*, 529 U.S. 473, 486 (2000), "including decisions predating the enactment of [AEDPA]." *Panetti*, 551 U.S. at 943-44 (2007); *see also id.* at 964 (Thomas, J., dissenting) ("Before AEDPA's

enactment, the phrase 'second or successive' meant the same thing as it does today."); *see generally Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."). The evolution of the "second or successive" concept demonstrates that a habeas application cannot be second or successive if it does not challenge the same judgment as a previous application did.

1. The "second or successive" phrase has its roots in the origins of habeas corpus procedure itself – the procedure that developed centuries ago to allow prisoners to seek relief from illegal punishment. In light of this weighty purpose, the writ was revered as "the most celebrated writ in the English law," 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *129 (1768), and as a "great constitutional privilege" in the United States, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.).

Yet an order denying habeas relief was not appealable at common law, in either England or America. *McCleskey v. Zant*, 499 U.S. 467, 479 (1991). Instead, "[s]uccessive petitions served as a substitute for appeal." *Id.* "A person detained in custody [could] proceed from court to court until he obtained his liberty." *Cox v. Hakes*, (1890) 15 A.C. 506, 527 (H.L.). Even if the person was denied relief by one judge, "'[a] renewed application could be made to every other judge or court in the realm, and each

court or judge was bound to consider the question of the prisoner's right to a discharge independently, and not be influenced by the previous decisions refusing discharge.'" *McCleskey*, 499 U.S. at 479 (quoting W. CHURCH, WRIT OF HABEAS CORPUS § 386, at 570 (2d ed. 1893)). In other words, in English and American courts alike, traditional "res judicata did not attach to a court's denial of habeas relief." *Id.*

As appellate review of habeas denials became available in American courts, the rationale for unrestricted successive petitions eroded. *See id.* at 479-80. At the same time, this Court continued to recognize the status of the writ of habeas corpus "as a privileged writ of freedom," *Salinger v. Loisel*, 265 U.S. 224, 232 (1924), noting that "if government [is] always [to] be accountable to the judiciary for a man's imprisonment, access to the courts on habeas must not be . . . impeded" by "[c]onventional notions of finality in litigation," *Sanders v. United States*, 373 U.S. 1, 8 (1963) (internal quotation marks and citation omitted). Accordingly, this Court adopted some restrictions on successive filings, while continually adhering to the common-law principle that "res judicata is inapplicable to habeas proceedings," *Sanders*, 373 U.S. at 8 (internal quotation marks and citation omitted).

The "abuse of the writ" doctrine is the product of this compromise. The doctrine – as it developed and has now been codified in AEDPA, *see* 28 U.S.C. § 2244(b) – amounts to a "modified," or softer, "res judicata rule," *Felker v. Turpin*, 518 U.S. 651, 664 (1996). It is designed to curb needlessly repetitive litigation in situations in which prisoners have already been accorded a fair hearing and a right to

appeal a denial of relief, while still allowing the Great Writ to serve its historical purposes. *See McCleskey*, 499 U.S. at 480-82.

The substance of this compromise – that is, when claims in successive petitions are now allowed to proceed and when they are not – is not at issue here. The important point is that the limitations imposed by the abuse-of-the-writ doctrine on successive petitions are designed to restrict the kinds of repetitive challenges that, at best, took the place of appeals before prisoners obtained the ability genuinely to appeal denials of relief and, at worst, gave rise to endless piecemeal litigation with different claims being asserted in each new filing. These limitations, in other words, are designed to curb filings from prisoners who repeatedly challenge their same confinement and keep losing.

This purpose is not served to the extent an individual *obtained relief* from his original sentence and now seeks to challenge his new sentence for the first time.[8] A habeas petition challenging a new sentence, after all, challenges a judgment that had not yet been imposed at the time of the prisoner's initial habeas application. So it makes no sense to treat a claim in such a petition as though made in a successive petition.

Nothing in the Eleventh Circuit's opinion directly disputes this notion. The Eleventh Circuit, in fact,

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[8] Of course, when a prisoner, such as petitioner, obtains habeas relief from his sentence but not his conviction, any habeas petition after his resentencing that challenged his *conviction* would be successive.

seems to accept that a claim advanced against a new sentence cannot be deemed part of a successive petition. Pet. App. 12a, 15a. Yet the Eleventh Circuit still found petitioner's due process claim barred, asserting that the claim "challenge[s] [a] component of the original sentence that was not amended." Pet. App. 15a.

That assertion is simply incorrect. Unlike a situation where a sentence is composed of distinct pieces, such as a prison term and a supervised release term, a death sentence is a single, indivisible unit. Thus, when petitioner obtained habeas relief from his 1981 death sentence, that sentence was vacated in its entirety and replaced in 1986 with a wholly new death sentence. Indeed, as the Alabama trial court explained at the resentencing proceeding, the 1986 sentence was "the result of a complete and new assessment of all the evidence, arguments of counsel, and law as given by the United States Courts and Alabama Courts." Pet. App. 103a. Petitioner's due process claim thus unquestionably challenges a new and different sentence than the claims in his habeas petition seeking relief from his 1981 judgment challenged.[9]

Nothing about this reality encourages prisoners to "sleep on their claims," BIO 18, or contravenes

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[9] For these same reasons, the Eleventh Circuit also was incorrect when it asserted that petitioner's "[due process] claim was available at his original sentencing." Pet. App. 15a. Because petitioner's current due process claim challenges a different sentence than any claim he could have advanced against his 1981 sentence, it is a new and *different* claim.

AEDPA's policy of "restrict[ing] repetitive habeas petitions," Pet. App. 14a (internal quotation marks and citation omitted). Prisoners cannot challenge *resentencings* unless they first succeed in obtaining habeas relief from their existing sentences. They thus have every reason to raise every possible claim against their initial sentences. But when a prisoner obtains relief and a state seeks to resentence him to death, the state court must abide by the Constitution – every aspect of the Constitution – at the resentencing proceeding. If the court does not do so, the prisoner can seek and obtain habeas relief from his new injury on the basis of clearly established constitutional law, regardless of whether he could have challenged his original (now vacated) sentence on the same ground.

Any other analysis would turn the relationship between habeas corpus procedure and res judicata on its head, for petitioner's claim would not even be barred under ordinary res judicata principles. The doctrine of res judicata (or, more specifically, claim preclusion), allows a subsequent lawsuit between the same parties whenever the new lawsuit is based upon a "different cause or demand" than the first. *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948). That being so, this Court has held a prior lawsuit respecting one alleged injury does not bar a subsequent lawsuit challenging a new injury when the new injury occurred "subsequent to [the earlier] judgment." *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955). This is so even if the new injury is of the same nature as the first injury and was caused by the same allegedly wrongful conduct, such as may occur in the context of an abatable

nuisance or an antitrust conspiracy giving rise to multiple, identical acts of monopolization. *Id.* at 327-28. Nor does it make any difference whether the new claim relies on a legal argument that could have been advanced in the earlier lawsuit. *Id.*; *see also United States v. Stone & Downer Co.*, 274 U.S. 225 (1927) (prior judicial determination as to the proper classification of imported goods under tariff schedules did not bar a subsequent action involving a subsequent importation of identical goods); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE JURISPRUDENCE § 4406 (2d ed. 2007) ("If the second lawsuit involves a new claim or cause of action, the parties may raise assertions or defenses that were omitted from the first lawsuit even though they were equally relevant to the first cause of action.").

As applied to this case, the injury for which a habeas corpus application seeks relief is an unconstitutional sentence under the "judgment of a State court." 28 U.S.C. § 2254. Petitioner has filed two separate applications against two separate judgments, and the second judgment post-dates the first application. Therefore, the two judgments the State has obtained during its quest to execute petitioner for a crime that was not a death-eligible offense would be separate transactions even under the more restrictive successive-litigation doctrine of res judicata.[10]

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[10] Of course, ordinary collateral estoppel and *stare decisis* principles, which apply with full force in habeas proceedings,

3. This Court's decisions describing and applying the "second or successive" concept support the conclusion that petitioner's due process claim must be treated as part of a first petition. This Court has found habeas applications to be second or successive when they have challenged the *same* state-court judgment as a previous one. *See Burton*, 549 U.S. at 153 (application was successive because it "contest[ed] the same custody imposed by the same judgment of a state court" as did a previous application); *Panetti*, 551 U.S. at 964-65 (Thomas, J., dissenting) (application is successive when it challenges "a state-court judgment that had been previously challenged in a federal habeas application."). But this Court has never suggested, much less held, that an application challenging a different judgment could be successive.

Indeed, this Court twice has implicitly recognized that an application filed against a new state-court judgment cannot be deemed successive in any respect. In *Richmond v. Lewis*, 506 U.S. 40 (1992), a state prisoner who had previously obtained habeas relief challenged the new death sentence that had been imposed at resentencing. As the federal court of appeals' decisions in the case made clear, the prisoner's primary claim – that one of the

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still restrict a state prisoner's ability to renew any legal argument in a habeas application challenging a retrial or resentencing that was raised and rejected in habeas litigation over his initial conviction or sentence. *See Sunnen*, 333 U.S. at 597-98 (collateral estoppel); *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997) (*stare decisis*).

aggravating factors supporting his sentence was unconstitutionally vague – was based on an argument that he could have, but had not, raised against his original sentence. *See Richmond v. Lewis*, 948 F.2d 1473, 1480 (9th Cir. 1992); *Richmond v. Ricketts*, 774 F.2d 957, 960-61 (9th Cir. 1985); C.A. App. C (Petitioner's Specification of Claims Raised in this Petition and in *Richmond v. Cardwell*) at 11.

This Court reviewed the prisoner's vagueness claim on the merits and held that he was entitled to habeas relief. Neither the majority nor the concurring or dissenting opinions suggested that the prisoner's claim should be treated as anything other than part of a first petition, even though contemporaneous law gave this Court the authority to inquire *sua sponte* whether the petition was successive. *See, e.g.*, *Femia v. United States*, 47 F.3d 519, 524 (2d Cir. 1995); *Jones v. Estelle*, 692 F.2d 380, 384 n.5 (5th Cir. 1982). Under these circumstances, this Court's decision to grant review and to reach the merits indicates that it regarded the claim as part of a first petition. *Cf. Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962) ("While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, . . . neither should we disregard the implications of an exercise of judicial authority assumed to be proper.") (citations omitted).

This Court's decision in *Burton* likewise rests on the presumption that a claim in an initial habeas petition challenging a new judgment is necessarily a first petition. Burton was convicted and sentenced in state court in 1994. He obtained relief from his sentence, and was resentenced in 1998. Burton filed

a federal habeas application later in 1998. After that petition was denied, Burton filed another application in 2002, this time arguing that his new sentence violated the Sixth Amendment because it was based on facts found by the judge instead of his jury.

The state argued that Burton's 2002 application was successive. He responded that it was not, asserting that the 1998 application had challenged only the 1994 judgment – not the 1998 judgment that followed his resentencing. If the Eleventh Circuit's rule in this case were correct, then Burton's assertion would have been irrelevant, for Burton *could have* challenged the sentence in his 1994 judgment on the same Sixth Amendment ground as he was challenging his 1998 resentencing. But this Court assumed that it *did* matter which judgment the 1998 petition challenged, finding it necessary to assure itself that Burton's 1998 application actually had challenged the 1998 judgment (the *same* judgment his 2002 application challenged) before concluding that his 2002 application was successive. *Burton*, 549 U.S. at 156.

Even more recently, Justice Souter summarized this Court's understanding of the second or successive concept, explaining how it turns on whether a habeas application challenges the same state-court judgment as an earlier application:

> For purposes of claim preclusion in habeas cases, the scope of "transaction" is crucial in applying AEDPA's limitation on second or successive petitions . . . . *The provisions limiting second or successive habeas petitions regard the relevant "transaction" for purposes of habeas claim preclusion as*

> *the trial that yielded the conviction or sentence under attack; once a challenge to that conviction or sentence has been rejected, other challenges are barred even if they raise different claims.*

Mayle v. Felix, 545 U.S. 644, 673 (2005) (Souter, J., dissenting) (emphasis added). The flip side of this summary, which was accepted by everyone else on the Court, is that when an initial habeas application is successful, and then a later one challenges a *new* trial or sentencing proceeding, that later filing challenges a different transaction, so no part of it can be second or successive. That rule controls this case.

C. AEDPA's Structure

The "second or successive" rule the Eleventh Circuit adopted in this case is unprecedented, so there is no body of case law that illustrates its implications.[11] But a moment's reflection on the way

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[11] The Eleventh Circuit suggested (Pet. App. 14a-15a) that its holding was consistent with the Second Circuit's decision in *Galtieri v. United States*, 128 F.3d 33 (2d Cir. 1997). But *Galtieri* addressed a situation materially different from petitioner's: there, a prisoner's original sentence had merely been amended following habeas relief limited to imposing a new term of supervised release. The Second Circuit held that his new habeas filing was successive "to the extent that it challenge[d] the underlying conviction or s[ought] to vacate any component of the original sentence *that was not amended*" (that is, any component other than his new term of supervised release). *Id.* at 38 (emphasis added); *see also supra* at 22 (recognizing that new claims challenging unamended components of original judgments may be deemed successive). Nothing in *Galtieri* indicated that an application challenging an

AEDPA works reveals that the Eleventh Circuit's decision would illegitimately insulate a wide range of new judgments, following initial grants of habeas relief, from collateral attack.

As noted above, Section 2244(b) requires courts to decide as a threshold matter whether a habeas application – that is, the entire filing – is successive. *See supra* at 17-18. If it is, then the Section allows courts to analyze the filing on a claim-by-claim basis, determining whether each individual "claim" in the application may go forward. Generally speaking, subsection (1) provides that if a claim in a successive petition has already been litigated, it must be dismissed; subsection (2) provides that if the claim is new, it can proceed only if it is based on a new and retroactive decision from this Court or it is based on new evidence that clearly and convincingly establishes the applicant's innocence. *See* 28 U.S.C. §§ 2244(b)(1) & (2).

This framework makes clear that once a court determines that an application is generally a first application because it challenges a new sentence, the court may not treat *any* claims in the application as

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entirely new sentence could ever be treated as successive in any respect. Indeed, the Second Circuit allowed a claim in such an application to proceed as part of a first petition in *Esposito v. United States*, 135 F.3d 111 (2d Cir. 1997). *See also Vasquez v. Parrott*, 318 F.3d 387, 390 (2d Cir. 2003) ("[E]ven a petition that has been finally adjudicated on the merits will not count for purposes of the successive petition rule unless the second petition attacks the *same judgment* that was attacked in the prior petition.") (internal quotation marks and citation omitted) (emphasis added).

successive. The viability of individual claims comes into play under the abuse of the writ doctrine only if the application itself has already been deemed successive.

But if, as the Eleventh Circuit held, a claim in a first application challenging a new judgment on grounds "available at [the prisoner's] first sentencing" (Pet. App. 15a) must somehow be regarded as part of a second or successive petition (while other claims remain part of a first petition), then that rule would have to apply even when a claim in such an application is based on an intervening decision from this Court. Consider, for example, a hypothetical defendant who was convicted based in part on a nontestifying witness's custodial statement to the police. Assume that the defendant's conviction became final in 2000 and that he later received federal habeas relief on some other basis, having not challenged the custodial statement. Next, assume that the defendant was reconvicted in 2005 based on the same out-of-court testimony. Under the Eleventh Circuit's system, the prisoner would be unable to seek habeas relief on the basis of the 2005 trial's clear violation of the Confrontation Clause as explicated in *Crawford v. Washington*, 541 U.S. 36 (2004). After all, the prisoner could have argued that his initial conviction was invalid on confrontation grounds (although he presumably would have lost that claim given the state of the law in 2000). And *Crawford* is not – as Section 2244(b)(2) requires of claims in successive petitions – retroactive, *see*

Whorton v. Bockting, 549 U.S. 406 (2007), or relevant to establishing actual innocence.[12]

What is more, if a claim in a first application challenging a new judgment on a ground available at the prisoner's first sentencing must now be regarded as part of a second or successive petition, then – contrary to the Eleventh Circuit's implicit suggestions (*see* Pet. App. 10a, 13a) – it should be immaterial whether the prisoner challenged his first sentence on that ground, only to have the federal court grant relief on some other ground and thus decline to reach the argument. Indeed, prisoners who challenged their previous sentences on the same grounds would be, if anything, worse off than those who did not. Whereas Section 2244(b) allows new claims in successive petitions to proceed under highly limited circumstances, the Section requires courts *without exception* to dismiss claims that were "presented in a prior application." 28 U.S.C. § 2244(b)(1).

In fact, the Eleventh Circuit's reasoning would render new judgments committing *the same violations that triggered habeas relief in the first*

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[12] The State, in its brief in opposition to certiorari, disputed that the Eleventh Circuit's ruling would "prevent prisoners from being able to seek relief against their new judgments based on intervening decisions from this Court." BIO 17. But courts "routinely treat[]" applications as successive when they raise "claims alleged to be 'new' due to the Supreme Court's changing the law." *Sustache-Rivera v. United States*, 221 F.3d 8, 14 (1st Cir. 2000). And the State provided no reason why a prisoner in petitioner's position would be exempted from this general rule, except for receiving a new judgment.

place immune from collateral challenge. Just like a prisoner challenging his new sentence on grounds the first habeas court declined to reach, a prisoner challenging his new sentence on grounds on which he previously obtained relief would be challenging his sentence on a constitutional ground that was asserted against his original sentencing. Thus, once again, Section 2244(b)(1) would require the claim to be dismissed. This result would be not only starkly counterintuitive and unfair, but could well violate the constitutional prohibition against suspending the writ. *See* U.S. Const. art. I, § 9, cl. 2 (Suspension Clause).

* * *

Until the Eleventh Circuit's decision in this case, a simple, straightforward rule governed habeas challenges to retrials and resentencings: such challenges always constituted first petitions because they challenged new judgments. The Eleventh Circuit's decision throws this previously settled state of affairs into disarray – generating confusion for courts and potential unfairness to parties in an area already fraught with high-stakes procedural complexity. This Court should restore the *status quo ante.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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