No. 09-158

In The
Supreme Court of the United States

BILLY JOE MAGWOOD,

Petitioner,

v.

GRANTT CULLIVER, WARDEN, ET. AL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FEDERAL PUBLIC DEFENDERS AND COMMUNITY DEFENDERS, AND THE ASSOCIATION OF FEDERAL PUBLIC DEFENDERS IN SUPPORT OF THE PETITIONER

JOHN H. BLUME
(*Counsel of Record*)
KEIR M. WEYBLE
CORNELL LAW SCHOOL
MYRON TAYLOR HALL
Ithaca, NY 14853
(607) 255-1030

TIMOTHY K. FORD
MACDONALD, HOAGUE & BAYLESS
1500 Hoge Building
705 2nd Ave.
Seattle, WA 98104
(206) 622-1604

JONATHAN D. HACKER
Co-Chair, SUPREME COURT AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1625 Eye St., N.W.
Washington, DC 20006
(202) 383-5300

HENRY A. MARTIN
Federal Public Defender
MIDDLE DISTRICT OF TENNESSEE
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; to promote the proper and fair administration of criminal justice; and to emphasize the continued recognition and adherence to the Bill of Rights that is necessary to sustain the quality of the American system of justice. NACDL's membership includes a number of criminal defense attorneys who have expertise in federal habeas corpus litigation. These NACDL members – whether they are academics, engaged in private practice or employed by state or federal defender organizations – not only provide direct representation in capital and non-capital federal habeas proceedings, but also provide consultation services to and training programs for

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged by the parties with the Clerk of the Court pursuant to Rule 37.3.

counsel appointed to represent habeas petitioners in state and federal collateral proceedings.

Because the Court's ruling in this case could impact a significant number of federal habeas petitioners, the appointed Federal Public Defender for every district which has a federal public defender's office or community defender program ("Defenders") join in this filing. The Defenders represent thousands of men and women in federal collateral proceedings brought under 28 U.S.C. §§2254 and 2255. Currently, seventeen, Defender offices have established Capital Habeas Units. Most Defender offices in death penalty jurisdictions handle at least some capital habeas matters.[2] In addition to providing direct representation, Defenders also provide training, consultation, and assistance to Criminal Justice Act practitioners who represent persons in both capital and non-capital 28 U.S.C. §§2254 and 2255 proceedings.

In addition to the Defenders, the National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. §3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work

[2] Appendix A designates the Chief Federal Defender for each federal district that has a federal public defender or community defender program.

for federal public and community defender organizations authorized under the Criminal Justice Act. The NAFD's membership represents petitioners and movants under 28 U.S.C. §§2254 and 2255, respectively. This experience spans both capital and non-capital cases. One of the guiding principles of the NAFD is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal-law issues, particularly as those issues affect indigent defendants in federal court.

SUMMARY OF ARGUMENT

This Court has previously determined that some second "in time" federal habeas petitions are not "second or successive" petitions governed by the restrictions on such petitions contained in 28 U.S.C. §2244. *See*, *e.g.*, *Panetti v. Quarterman*, 551 U.S. 930 (2007) (§2244 did not govern a 28 U.S.C. §2254 application raising a newly ripe *Ford v. Wainwright* claim which had not been raised in the first habeas petition attacking the same judgment.); *Slack v. McDaniel*, 529 U.S. 473 (2000) (second-in-time habeas petition was not subject to dismissal where previously filed petition which attacked the same judgment had been dismissed for failure to exhaust); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (incompetency to be executed claim raised, but dismissed as unripe, in first habeas petition was not subject to dismissal when raised in a second-in-time habeas petition). Because "second or successive" is a "term of

art," *Slack*, 529 U.S. at 486, determining whether a second-in-time petition is a second or successive petition must be gauged by looking at the relevant statutory language and structure, the policies underlying AEDPA, and the "practical effects," *Panetti*, 551 U.S. at 945, of treating a second petition as subject to the limitations of §2244.

In *Burton v. Stewart*, 549 U.S. 147 (2007), this Court held that a habeas petition attacking the same judgment was a second or successive petition. Therefore, because Burton's second federal petition attacked the same 1998 judgment which he previously had challenged in his first federal filing, his second habeas petition was dismissed as second or successive. The "same judgment/different judgment" rule adopted in *Burton* is both sensible and easy to administer. In this case, however, the Eleventh Circuit departed from *Burton*, and deemed Magwood's due process claim subject to dismissal under 28 U.S.C. §2244 because it had not been raised in a prior habeas petition in which Magwood successfully challenged a different state court judgment. If this Court were to adopt the rule utilized by the Eleventh Circuit in Magwood's case, the "'implications for habeas practice would be far reaching and . . . perverse.'" *Panetti*, 551 U.S. at 943, *quoting Martinez-Villareal*, 523 U.S. at 644. Successful habeas petitioners would have to ask federal district and appellate courts to decide moot and unripe claims in advance of their retrials or resentencing proceedings. If they did not do so, or if the federal courts declined

to issue these advisory opinions, the state would be free to repeat even clear constitutional errors, forever exempt from federal review. The only workable rule which will not further prolong and complicate federal habeas litigation is the same principle applied in *Burton*: a second habeas petition attacking a new state court judgment "is to be treated as 'any other first petition' and is not a second or successive petition." *Slack*, 529 U.S. at 487.

ARGUMENT

Billy Joe Magwood was sentenced to death in Coffee County, Alabama in 1981. After exhausting his state remedies, Magwood sought federal habeas review of his conviction and death sentence. The United States District Court for the Middle District of Alabama granted the writ of habeas corpus as to the death sentence, *Magwood v. Smith*, 608 F.Supp. 218 (M.D. Ala. 1985), and the Eleventh Circuit affirmed. *Magwood v. Smith*, 791 F.2d 1438 (11th Cir. 1986). At Magwood's second sentencing hearing, which occurred in 1986, a second judgment of death was imposed. After exhausting available state remedies, Magwood filed a federal habeas petition attacking the 1986 judgment. The District Court granted the writ of habeas corpus, finding that Magwood's new death sentence violated the Due Process Clause. *Magwood v. Jones*, 472 F.Supp. 1333 (M.D. Ala. 2007). Pet. App. 55a. On appeal, however, despite the fact that Magwood was attacking an entirely new judgment of

death, the Eleventh Circuit held that Magwood's due process claim should be dismissed as successive because it was "available at his original sentencing" and thus could have been raised in the prior federal petition in which Magwood successfully challenged the prior 1981 judgment. Pet. App. 15a.

As Magwood has persuasively demonstrated in his brief on the merits, the Eleventh Circuit's decision is fundamentally at odds with this Court's precedent. Furthermore, if this Court embraces the Eleventh Circuit's reasoning in Magwood's case, unfair outcomes will necessarily result; the effects on habeas practice in the federal district courts, federal courts of appeal and this Court will be far-reaching and pernicious; and, several longstanding and accepted aspects of habeas practice and procedure will need to be overhauled.

I. The Eleventh Circuit's Refusal to Acknowledge the Significance of a New Judgment Is Inconsistent with Established Habeas Corpus Practice and Procedure.

The same judgment/different judgment principle for distinguishing between first and second or successive petitions that this Court applied in *Burton v. Stewart*, 549 U.S. 147 (2007), is clear, concise and workable. It is also consistent with this Court's jurisprudence as well as the policies underlying the AEDPA. Magwood's due process claim – the claim at

issue in this case – was raised against a new judgment, one that did not exist at the time he obtained habeas relief from the 1981 death sentence. Rather, the claim arose because, and only because, the state elected to seek a second death sentence. It obtained that new death sentence in 1986. This new sentence created a new judgment because "[f]inal judgment in a criminal case means sentence." *Burton*, 549 U.S. at 156, *quoting Berman*, 302 U.S. at 212. In fact, this Court has held in a number of different contexts that a criminal judgment includes both a conviction and associated sentence. *See, e.g., Teague v. Lane*, 489 U.S. 288, 314, n.2; *Berman v. United States*, 302 U.S. 211, 212-213 (1937).[3]

The significance of the judgment (and of a new judgment) is recognized in both 28 U.S.C. §2244(a) and the Habeas Rules. Section 2244(a) states:

> No circuit or district judge shall be required to entertain an ***application*** for a writ of habeas corpus to inquire into the detention of a person pursuant to a ***judgment*** of a court of the United States if it appears that the legality of such detention has been determined by the judge or court of the United States on a prior application for a writ of

[3] The Federal Rules of Criminal Procedure also indicate that a judgment includes the sentence. F.R.Crim.P. 32(k)(1) (a judgment "must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence)."

> habeas corpus, except as provided in section 2255.

Id. (emphasis added). Rule 1 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") sets forth the proper scope of a habeas petition, framing a petition in terms of "a person in custody under a state-court judgment," Habeas Rule 1(a)(1), or a "person in custody under a state-court or federal-court judgment." Habeas Rule 1(a)(2). Habeas Rule 2, which sets forth the form of a petition (or application) also uses the "state-court judgment" as its frame of reference. Rule 2 further requires separate petitions for separate state-court judgments: "A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court." *Id.*

This Court has also defined a "claim" in terms of the judgment at issue:

> [I]t is clear that for purposes of § 2244(b) an "application" for habeas relief is a filing that contains one or more "claims." That definition is consistent with the use of the term "application" in the other habeas statutes in chapter 153 of title 28. *See, e.g., Woodford v. Garceau*, 538 U.S. 202 (2003) (for purposes of § 2254(d), an application for habeas corpus relief is a filing that seeks "an adjudication on the merits of the petitioner's claims"). These statutes, and our own decisions, make clear that a *"claim" as used in § 2244(b) is an*

> *asserted federal basis for relief from a state court's judgment of conviction*.

Gonzales v. Crosby, 524 U.S. 524, 530 (2005) (parallel citations omitted) (emphasis added).

Thus, the same judgment/different judgment dividing line is well established in the federal habeas corpus context. An application for habeas relief is directed at one or more state-court judgments. If the habeas petitioner is successful, and the state court judgment is found to be constitutionally defective, then, under most circumstances, the state may seek a new judgment of conviction, or, in a capital case, a new judgment of death. But any subsequent conviction (or death sentence) creates a new judgment which may, should the inmate decide to do so, be challenged again in federal habeas corpus proceedings. The Eleventh Circuit, however, rejected the straightforward same judgment/different judgment principle and treated Magwood's new death sentence as a composition of component parts, as to some of which a new habeas petition was successive and as to some of which it was not. Pet. App. 14a-15a. This idiosyncratic approach is at odds with this Court's precedent and will lead to unnecessary confusion,[4]

[4] The Court of Appeals purported to derive its analysis from *Galtieri v. United States*, 128 F.3d 33 (2nd Cir. 1997), which rejected a defendant's attempt to file a subsequent §2255 petition challenging his conviction after successfully challenging one part of his sentence – a term of lifetime supervised release – in a first §2255 petition. The *Galtieri* court held that the second

(Continued on following page)

grossly unfair and irrational results, protective filings and needless appeals. It will also require substantial changes to existing habeas practice.

II. The Reasoning Used by the Eleventh Circuit Would Deprive Deserving Individuals of Federal Habeas Review of Meritorious Constitutional Claims and Would Necessarily Create Confusion Regarding Appropriate Procedures and Practices in Certain Categories of Cases.

Were this Court to adopt the Eleventh Circuit's approach in this case, the federal courts would soon see significant changes in habeas practice. A key driving factor would be §2244's treatment of claims which have been presented in a prior petition. The Eleventh Circuit's reasoning extends not only to claims such as those raised by Magwood in this case, i.e., to claims which were not raised in a first-in-time habeas petition attacking a previous judgment, but also to claims which *were* raised in a prior petition. If a new judgment does not entitle a petitioner to merits review of claims that were not previously raised, then

---

petition was barred as successive to the extent it challenged "components" of the original judgment – the death sentence – that *was* disturbed by the first habeas judgment. *See* Pet. App. 15a. Even more puzzling, the decision below said in a footnote that a second petition that was exactly like Galitier's challenging only the conviction after a previous petition successfully challenged only the sentence, *would not* be subject to its preclusive rule. *Id.*, n.4.

it is not clear why a successful petitioner should be entitled to merits review of claims which were raised, but not sustained, in the prior petition attacking the original judgment. The Eleventh Circuit's treatment of Magwood's claim contains no limiting principle that would answer that question. Nor can *amici* discern such a principle. If a new judgment does not wipe the slate clean, thus rendering §2244 inapplicable to claims attacking a new judgment, then AEDPA's limitations on second or successive petitions would apply both to claims which were raised and those which were not. Furthermore, §2244's treatment of "same" claims is even more unforgiving than its treatment of different claims. Indeed, while §2244 does allow federal courts to entertain the merits of claims which were not raised in a first petition under certain *very limited* circumstances, *see*, *e.g.*, *Schlup v. Delo*, 513 U.S. 298, 319 (1995), there are no exceptions at all in the statute for the review of a claim in a second petition which was previously raised. *See* 28 U.S.C. §2244(b)(1) ("A claim presented in a second or successive habeas application under 2254 that was presented in a prior application shall be dismissed"). Thus, whether Magwood raised the claim in his first petition challenging the original 1981 death judgment is of no moment; had he done so (even if he had done so successfully), by the Eleventh Circuit's construction of §2244, the claim would be barred.

The unfairness of the Eleventh Circuit's rule is easily demonstrated. In fact, as *amici* will

demonstrate, it would in some cases penalize habeas petitioners who had the most diligent and prescient counsel. In the time period between this Court's decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989) and *Atkins v. Virginia*, 536 U.S. 304 (2002), as the legal landscape began to change, some habeas petitioners presented claims alleging that their death sentence violated the Eighth Amendment because they were mentally retarded. A petitioner who did so, if the Eleventh Circuit's rule is adopted, did so at his or her great peril. If, for example, a post-*Penry*/pre-*Atkins* petitioner alleged both that his trial counsel was ineffective for failing to develop and present evidence that he was mentally retarded and that his death sentence violated the Eighth Amendment because he was a person with mental retardation, he ran the risk of forever losing the right to federal review of his categorical ineligibility claim. If a federal court deemed the ineffective assistance of counsel claim to be meritorious, but rejected, as it surely would have, the mental retardation claim because of this Court's decision in *Penry*, the claim could never again be presented to a federal court in a federal habeas petition. If the same petitioner was then sentenced to death a second time in state court, exhausted available state remedies, and then filed a second habeas petition attacking the second death sentence on the basis that he was ineligible for the death penalty as a result of his mental retardation

(now relying on *Atkins*), the claim would be subject to dismissal as second or successive using the Eleventh Circuit's reasoning.[5]

Thus, the logic of the decision below would create a new category habeas petitioners subject to a new and unique procedural rule that would foreclose them from federal habeas relief on any claim that either was, or could have been, raised in the petition that led to their retrials or resentencings. In petitions brought subsequent to federally ordered retrials or resentencings, that default rule would swallow or preempt other limitations of habeas relief. It would no longer matter whether a petitioner complied with state procedural rules in raising his federal claims at his retrial, or whether the state court ruled on them, or whether those decisions were contrary to clearly established law set down by this Court, or whether this Court's controlling decisions had been made retroactive. All that would matter is that the claims were, or could have been, raised in the petition that led to the retrial or resentencing. Only claims that were raised and finally resolved the first time in the petitioner's favor could be raised again in a subsequent petition challenging the new conviction or sentence.

The only way counsel for a habeas petitioner could have any chance of avoiding that bar would be

---

[5] There is no exception for the review of same claims for retroactive new rules. *See* §2244(b)(1).

to continue to press every constitutional issue in a case as far through the federal appellate process as possible, even after a retrial or resentencing is ordered. But it is not at all clear that even that extreme measure would work because of the well-established rule that a party who prevails is not a party aggrieved. *See Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980) ("[O]nly a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. *A party who receives all that he has sought generally is not aggrieved by the judgment affording relief and cannot appeal from it*.") (emphasis added); *see also Parr v. United States*, 351 U.S. 513, 517 (1956) ("Only one injured by the judgment sought to be reviewed can appeal. . . .": finding no injury to criminal defendant seeking to appeal the dismissal of his indictment after new indictment had been obtained in alternate jurisdiction).[6]

---

[6] In a capital habeas case, for example, if a district court were to grant habeas relief as to one of several sentencing phase issues in the petition, but deny the remaining sentencing claims, the petitioner has no right to challenge the correctness of the district court's decision as to the remaining claims on appeal. If the Warden chose not to appeal the district court's decision, the petitioner would have no right to seek appellate review as he was the prevailing party below. But, if the same petitioner were then re-tried, convicted and sentenced to death, and the exact same constitutional errors occurred at the second sentencing proceeding, when (or if) the petitioner returned to federal court and challenged the second judgment of death in a second federal petition, federal review of the claims would be barred under

(Continued on following page)

The same result would follow if the district court granted the writ as to one of the claims in the petition but declined to adjudicate the remaining claims on the basis that they were moot. This practice is common in cases where the petitioner prevails on one claim.[7] In the interest of judicial economy, federal

---

§2244's same claim rule (as would any and all claims which arguably could have been raised in the first petition challenging the first death judgment and which reoccurred at the second sentencing proceeding).

[7] A review of district court cases from just one jurisdiction – Pennsylvania – reveals how common this practice is. *See e.g.*, *Thomas v. Beard*, 388 F.Supp.2d 489, 516, 530 (E.D.Pa. 2005) (two penalty phase claims "dismissed without prejudice" because relief granted on a different penalty phase claim); *Stevens v. Horn*, 319 F.Supp.2d 592, 595 (W.D. Pa. 2004) ("My disposition of the above-cited claims and the conclusion that a writ of habeas corpus is issued with respect to the death sentences renders it unnecessary to address the remaining sentencing-phase claims."); *Porter v. Horn*, 276 F.Supp.2d 278, 299 (E.D. Pa. 2003) ("Since I have vacated Petitioner's death sentence premised upon Claim V, the aforementioned Claims I, II, IX, X and XI are rendered moot and will not be discussed."); *Henry v. Horn*, 218 F.Supp.2d 671, 686 (E.D. Pa. 2002) ("the petition shall be granted with regard to this claim and Henry's death sentence shall be vacated. Claims II, IV, XI, XII and XIV . . . are rendered moot by my resolution of the first claim and will not be discussed."); *Whitney v. Horn*, 170 F.Supp.2d 492, 503 (E.D. Pa. 2000) ("We conclude that Whitney has successfully established his claim of ineffective assistance of counsel under the Sixth and Fourteenth Amendments. As a result, we need not reach his multiple other claims."); *Jermyn v. Horn*, 1998 WL 754567, *19 (M.D. Pa. Oct. 27, 1998) ("[I]f we had not already decided Claim One in Jermyn's favor, we would have held a hearing on this due process issue. However, the issue is moot since we have decided that Jermyn is entitled to a new penalty hearing. If a death sentence is not imposed at that hearing, there will never be a

(Continued on following page)

courts often choose not to reach the merits of the remaining issues in the petition if the court determines one of the claims has merit. If the state did not appeal, the petitioner would have no right, as the prevailing party, to seek appellate review of the remaining issues. If the same error occurred at the second trial or sentencing proceeding, the claim would be subject to dismissal as second or successive in a second habeas petition challenging the new judgment of conviction or sentence.

In effect, if this Court were to affirm the Eleventh Circuit's dismissal of Magwood's due process claim as second or successive, it would potentially deprive a category of habeas petitioners – those who were successful in their first federal petitions – of federal review of many claims that go to the validity of a new judgment.[8] Doing so would be inconsistent

---

need to resolve this issue."). The practice of reserving judgment on mooted claims is also prevalent in cases in which relief is granted or affirmed at the circuit level. *See*, *e.g.*, *Hamilton v. Ayers*, 583 F.3d 1100, 1102 (9th Cir. 2009) ("Because we grant relief based on the ineffective assistance of counsel claim, we do not reach Hamilton's claim of prosecutorial misconduct at the penalty phase"); *Spears v. Mullin*, 343 F.3rd 1215, 1234 (10th Cir. 2003) ("Because we affirm the grant of relief from Spears' sentence, we need not decide Spears' argument that the failure to sever effected the trial's second stage"); *Lindstadt v. Keane*, 239 F.3d 191, 206 (2nd Cir. 2001) ("Because we grant Lindstadt's motion on an unrelated ground, it is unnecessary to reach the merits of his Confrontation Clause claim").

[8] While the category of persons potentially affected may be relatively small, it is not insignificant. In addition to Magwood, a Westlaw search revealed numerous individuals who sought

(Continued on following page)

with the manner in which this Court has proceeded in similar contexts. In *Castro v. United States,* 540 U.S. 375, 380-81 (2003), the Court stated:

> Moreover, reading the statute as the Government suggests would produce troublesome results. . . . It would close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent. *Cf. Felker v. Turpin*, 518 U.S. 651, 660-661. And any such conclusion would prove difficult to reconcile with the basic principle that we "read limitations on our jurisdiction to review narrowly." *Utah v. Evans*, 536 U.S. 452, 463 (2002).

Affirming the judgment below will inevitably lead to more work, often for no good reason, for counsel for petitioners, counsel for the state, and for the federal courts. First, as a matter of basic fairness, if

---

and obtained habeas relief, and following a retrial or resentencing, again filed a federal petition challenging the new judgment. *See, e.g., Palmer v. Clarke*, 408 F.3d 423 (8th Cir. 2005); *Moore v. Kinney*, 320 F.3d 767 (8th Cir. 2003); *Kenley v. Bowersox*, 275 F.3d 709 (8th Cir. 2002); *Kenley v. Bowersox*, 228 F.3d 934 (8th Cir. 2000); *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991); *Chambers v. Bowersox*, 197 F.3d 308 (8th Cir. 1999); *Chambers v. Bowersox*, 157 F.3d 560 (8th Cir. 1998); *Chambers v. Armontrout*, 907 F.2d 825 (8th Cir. 1990); *Henderson v. Norris*, 118 F.3d 1283 (8th Cir. 1997); *Stockton v. Murray*, 41 F.3d 920 (4th Cir. 1994); *Stockton v. Murray*, 852 F.2d 740 (4th Cir. 1988); *Osborn v. Shillinger*, 997 F.2d 1324 (10th Cir. 1993); *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988); *Clabourne v. Ryan*, 2009 U.S. Dist. LEXIS 95838 (D. Az. Sept. 29, 2009).

the Court were to affirm the judgment below, to avoid the unconscionable results discussed above, it would necessarily need to modify the rule that the prevailing party (at least if the prevailing party is a habeas petitioner) cannot appeal. The practice of treating issues as moot when the petitioner prevails on one or more claims would also have to be jettisoned. This would create additional work for the district courts in cases where there was a clearly meritorious issue and it would make appeals much more cumbersome. In fact, counsel for petitioners would be obligated to litigate (or make every effort to litigate) all potentially viable issues at every stage of the litigation, even in cases where their client prevailed on another issue. Why? To attempt to convince a federal court that the remaining issues have merit (and to say so), thus arming counsel at the second state proceeding with the tools to attempt to prevent constitutional error from occurring at the retrial. Using the Eleventh Circuit's reasoning, most issues will be deemed successive in any subsequent federal collateral attack on the new judgment because they either could have been raised or were raised. Thus, counsel for petitioners will be ethically obligated to attempt to obtain a ruling on all issues. This will have a significant impact on practice in the district court, the court of appeals and even certiorari practice in this Court.[9]

---

[9] The same effects will be seen in cases where the petitioner prevails and the state does appeal. Under current practice, a

(Continued on following page)

Finally, if claims are no longer tied to particular judgments, as is the case with the Eleventh Circuit's reasoning in *Magwood*, then how does a court distinguish between: a) claims that were available but not previously raised; b) claims that were not available; and, c) claims that were previously raised? Consider the following scenario. The habeas petitioner prevailed on his claim that the prosecutor's closing argument at the sentencing phase of his capital trial violated the Due Process Clause. But, the federal court rejected his claim that counsel was ineffective in investigating, developing and presenting mitigating evidence. At the resentencing proceeding, trial counsel presented the exact same case in mitigation that was presented at the first trial. The client is again sentenced to death. If the petitioner subsequently seeks federal habeas review of his second death sentence, is this same claim that was raised in the first petition (and thus subject to dismissal as successive)? Yes, it goes to a new judgment, but so did Magwood's claim. What if the ineffective assistance of counsel claim had not been raised in the first habeas petition? Would it be subject to dismissal on the basis that it could have been raised but was not? It is true that the claim is challenging a second death sentence,

---

petitioner might reasonably decide not to cross-appeal depending on counsel's assessment of the strength of the likelihood of the district court's decision being affirmed on appeal. But, if this Court were to affirm the judgment below, counsel would, for the reasons described above, be required to litigate all potentially viable issues via a cross-appeal.

but the factual basis of the claim is more or less the same. Once the same judgment/different judgment principle is jettisoned, the lines between claims which have been previously adjudicated, those which have not, and those which could have been raised, become hopelessly blurred.

III. The Reasoning Utilized by the Eleventh Circuit in Magwood's Case Will Create Confusion Regarding the Limitations Period and Will Result in Additional Filing of "Mixed" Petitions.

In *Burton*, this Court held that the statute of limitations runs from the date of the sentencing judgment. The underlying rationale of the Eleventh Circuit's opinion in *Magwood* is that Magwood's due process claim was challenging an amended judgment, not a new judgment. If it were true that Magwood's judgment were merely amended, then Magwood's entire habeas petition would be untimely because his original sentence became final in 1981. Moreover, the imprecise line between a new judgment and an amended judgment would create additional confusion in an already murky and heavily litigated area of habeas jurisprudence. *See, e.g.*, *Reber v. Steele*, 570 F.3d 1206, 1209-10 (10th Cir. 2009) (following *Burton*, holds that habeas petition prematurely filed because sentence was not final at time of filing); *Phanhmixay v. Robert*, 298 Fed. Appx. 830, 830-32 (11th Cir. 2008) (district court erred by not calculating limitations period from date of resentencing,);

Robbins v. Sec'y, DOC, 483 F.3d 737, 738 (11th Cir. 2007) (judgment not final until time for appealing resentencing expires, even when subsequent habeas petition challenges only the conviction and not the sentence); *United States v. Messervey*, 269 Fed. Appx. 379 (5th Cir. 2008) (when a conviction is affirmed on appeal but the case is remanded for resentencing, the conviction becomes final for limitation purposes under AEDPA "when both the conviction and sentence become final."); *United States v. LaFromboise*, 427 F.3d 680, 682 (9th Cir. 2005) (conviction was not final and statute of limitations did not begin to run until an amended judgment was entered and defendant was resentenced); *United States v. Dodson*, 291 F.3d 268, 272 (4th Cir. 2002) (judgment of conviction not final for Section 2255 purposes until both conviction and sentence final); *United States v. Outen*, 286 F.3d 622, 631-32 (2nd Cir. 2002) (because defendant's appeal was in abeyance, Section 2255 statute of limitations never began to run).

Thus, if this Court were to affirm the judgment below, *Burton*'s bright line rule that the limitations period does not begin to run until both the conviction and sentence are final, 549 U.S. at 156, would be eroded. *Amici*'s members, for example, would be compelled in some cases to advise counsel for a death-sentenced inmate who prevailed in state post-conviction on a sentencing phase claim, to file a federal habeas petition prior to any additional state court proceedings. Given the inherently vague nature of the difference between an amended judgment and a new

judgment, it would be malpractice in many cases to complete the state court proceedings before filing a federal habeas petition. These protectively filed petitions would in many cases contain not only claims challenging the conviction (as the judgment of conviction was affirmed), but also any and all sentencing phase issues (even though the inmate was no longer under a sentence of death). Failing to do so, could potentially deprive the petitioner of federal review of all claims, because if a new death sentence is determined to be merely an amendment of the prior sentence, then the limitations period was never tolled. As absurd as this may sound, and as inefficient as it may be to flood the courts with what would appear to be mixed petitions,[10] until numerous additional questions are answered, a decision of this Court affirming the judgment below would necessarily create limitations period confusion.

---

[10] In *Mohawk Industries, Inc. v. Carpenter*, No. 08-678, 130 S.Ct. 599 (Dec. 8, 2009), a group of retired Article III judges filed an *Amicus Curiae* brief in support of the respondent, Norman Carpenter. In their submission, the Article III judges described the near-crises facing the federal courts due to crushing caseloads and limited resources. It would not seem to be in anyone's interest to add additional cases to federal dockets that will in many instances languish for years while additional litigation is ongoing in the state courts.

IV. A Decision in Magwood's Favor Will Not Encourage Strategic Withholding of Meritorious Claims.

In the brief-in-opposition, Respondent claimed that if this Court were to reverse the judgment below, habeas petitioners would be encouraged to strategically withhold meritorious claims and save them, if needed, for a return trip to federal court. BIO at 18. Such an approach is neither strategically sound nor consistent with effective representation by collateral counsel. Collectively, *Amici*'s members have represented hundreds, if not thousands, of capital and non-capital habeas petitioners. They have consulted in literally hundreds of other habeas cases. The idea that one would forego a valid issue on the outside chance that another claim in the petition will yield a favorable result is not strategically sound in any respect.

Given the vagaries of federal habeas litigation, and the existing obstacles to obtaining federal habeas relief (*e.g.*, the statute of limitations, procedural default, non-retroactivity and §2254(d)'s limitation on relief), no litigant would strategically "sandbag" on an issue of merit or fail to include a potentially viable claim in a federal habeas petition as "insurance" against an adverse result at a new trial or sentencing hearing. Sandbagging, under any circumstances is a bad gamble. To hold back a potentially winning issue in a habeas petition, much less a capital habeas petition, on the set of assumptions that: a) the petition will succeed on another ground; b) the undisclosed error will be repeated at a retrial; c) the state courts

will act unreasonably in failing to recognize and correct the error; but, d) the federal courts will do so in a second petition, is such a longshot and foolhardy that no competent lawyer would do it.

In any event, there is no indication that anything like this is happening in capital habeas cases generally, or that anything like that happened in this case. Indeed, the Court of Appeals below held that it was understandable and excusable that, as late as the resentencing, Magwood's lawyers accepted that the "fair warning" argument "ha[d] already been decided adversely to his client's position by a state's highest court. . . ." Pet. App. 20a. If it was not ineffective for Magwood's trial lawyers to have accepted this aspect of the state court decision even at the resentencing, surely it cannot be assumed to have been abusive for his first habeas lawyers to have done the same thing in the stage of the case that went just before.

CONCLUSION

WHEREFORE, for the foregoing reasons, *amicus curiae* National Association of Criminal Defense Lawyers, the Federal Public Defenders and Community Defenders, and the National Association of Federal Public Defenders, support Magwood's request that the judgment of the Eleventh Circuit Court of Appeals be reversed.

Respectfully submitted,

JOHN H. BLUME
(*Counsel of Record*)
KEIR M. WEYBLE
CORNELL LAW SCHOOL
MYRON TAYLOR HALL
Ithaca, NY 14853
(607) 255-1030

TIMOTHY K. FORD
MACDONALD, HOAGUE & BAYLESS
1500 Hoge Building
705 2nd Ave.
Seattle, WA 98104
(206) 622-1604

HENRY A. MARTIN
Federal Public Defender
MIDDLE DISTRICT OF TENNESSEE
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047

JONATHAN D. HACKER
Co-Chair, SUPREME COURT
AMICUS COMMITTEE
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 Eye St., N.W.
Washington, DC 20006
(202) 383-5300

Attorneys for Amici Curiae
National Association of Criminal Defense Lawyers,
Federal Public Defenders and Community Defenders,
and the Association of Federal Public Defenders

Christine A. Freeman
Executive Director,
Federal Defender
Program, Inc.
Middle District
of Alabama

Carlos Williams
Executive Director,
Southern Federal
Defender Program
Southern District
of Alabama

Fred Richard Curtner, III
Federal Public Defender
District of Alaska

Jon M. Sands
Federal Public Defender
District of Arizona

Jenniffer Morris Horan
Federal Public Defender
Eastern District
of Arkansas

Sean K. Kennedy
Federal Public Defender
Central District
of California

Daniel Broderick
Federal Public Defender
Eastern District
of California

Barry J. Portman
Federal Public Defender
Northern District
of California

Reuben Camper Cahn
Executive Director,
Federal Defenders of
San Diego, Inc.
Southern District
of California

Raymond P. Moore
Federal Public Defender
Districts of Colorado
and Wyoming

Thomas G. Dennis
Federal Public Defender
District of Connecticut

Edson A. Bostic
Federal Public Defender
District of Delaware

A.J. Kramer
Federal Public Defender
District of District
of Columbia

Donna Lee Elm
Federal Public Defender,
Middle District of Florida

Randolph P. Murrell
Federal Public Defender
Northern District
of Florida

Kathleen M. Williams
Federal Public Defender
Southern District
of Florida

Cynthia Roseberry
Executive Director,
Federal Defenders of
the Middle District of
Georgia, Inc.
Middle District of Georgia

Stephanie Kearns
Executive Director,
Georgia Federal
Defender Program, Inc.
Northern District
of Georgia

John T. Gorman
Federal Public Defender
District of Guam

Peter C. Wolff
Federal Public Defender
District of Hawaii

Samuel Richard Rubin
Executive Director,
Federal Defender
Services of Idaho, Inc.
District of Idaho

Richard H. Parsons
Federal Public Defender
Central District of Illinois

Carol Brook
Executive Director,
Illinois Federal
Defender Program, Inc.
Northern District
of Illinois

Phillip Kavanaugh
Federal Public Defender
Southern District
of Illinois

Jerome T. Flynn
Executive Director,
Federal Community
Defenders, Inc.
Northern District
of Indiana

William E. Marsh
Executive Director,
Indiana Federal
Community Defender, Inc.
Southern District
of Indiana

Nicholas T. Drees
Federal Public Defender
Southern District of Iowa

Cyd Gilman
Federal Public Defender
District of Kansas

Scott T. Wendelsdorf
Executive Director,
Western Kentucky
Federal Community
Defender, Inc.
Western District
of Kentucky

Virginia L. Schlueter
Federal Public Defender
Eastern District
of Louisiana

Rebecca L. Hudsmith
Federal Public Defender
Middle and Western
Districts of Louisiana

David Beneman
Federal Public Defender
District of Maine

James Wyda
Federal Public Defender
District of Maryland

Miriam Conrad
Federal Public Defender
Districts of Massachusetts,
New Hampshire and
Rhode Island

Miriam L. Siefer
Chief Federal Defender,
Legal Aid & Defender
Assoc. of Detroit
Eastern District
of Michigan

Raymond Kent
Federal Public Defender
Western District
of Michigan

Katherian D. Roe,
Federal Public Defender
District of Minnesota

Samuel Dennis Joiner
Federal Public Defender
Southern District
of Mississippi

Lee Lawless
Federal Public Defender
Eastern District
of Missouri

Raymond C. Conrad
Federal Public Defender
Western District
of Missouri

Anthony R. Gallagher
Executive Director,
Federal Defenders
of Montana
District of Montana

David R. Stickman
Federal Public Defender
District of Nebraska

Frances A. Forsman
Federal Public Defender
District of Nevada

Richard Coughlin
Federal Public Defender
District of New Jersey

Stephen P. McCue
Federal Public Defender
District of New Mexico

Alexander Bunin
Federal Public Defender
Northern District
of New York

Leonard F. Joy
Federal Public Defender
Eastern and Southern
Districts of New York

Marianne Mariano
Federal Public Defender
Western District
of New York

Thomas P. McNamara
Federal Public Defender
Eastern District of
North Carolina

Louis C. Allen III
Federal Public Defender
Middle District of
North Carolina

Claire J. Rauscher
Executive Director, Federal
Defenders of Western
North Carolina, Inc.
Western District of
North Carolina

Dennis G. Terez
Federal Public Defender
Northern District of Ohio

S. S. Nolder,
Federal Public Defender
Southern District of Ohio

Julia L. O'Connell
Federal Public Defender
Northern and Eastern
Districts of Oklahoma

Susan M. Otto
Federal Public Defender
Western District
of Oklahoma

Steven T. Wax
Federal Public Defender
District of Oregon

Leigh Skipper
Chief Federal Defender,
Defender Association
of Philadelphia,
Eastern District
of Pennsylvania

James V. Wade
Federal Public Defender
Middle District
of Pennsylvania

Lisa B. Freeland
Federal Public Defender
Western District
of Pennsylvania

Hector E. Guzman
Acting Federal
Public Defender
District of Puerto Rico

Parks N. Small
Federal Public Defender
District of South Carolina

Jana M. Miner
Acting Federal
Public Defender
Districts of North Dakota
and South Dakota

Elizabeth B. Ford
Executive Director,
Federal Defender
Services of Eastern
Tennessee, Inc.,
Eastern District
of Tennessee

Henry A. Martin
Federal Public Defender
Middle District
of Tennessee

Stephen B. Shankman
Federal Public Defender
Western District
of Tennessee

G. Patrick Black
Federal Public Defender
Eastern District of Texas

Richard A. Anderson
Federal Public Defender
Northern District of Texas

Marjorie A. Meyers
Federal Public Defender
Southern District of Texas

Henry J. Bemporad
Federal Public Defender
Western District of Texas

Steven B. Killpack
Federal Public Defender
District of Utah

Michael L. Desautels
Federal Public Defender
District of Vermont

Thurston T. McKelvin
Federal Public Defender
District of Virgin Islands

Michael S. Nachmanoff
Federal Public Defender
Eastern District of Virginia

Larry W. Shelton
Federal Public Defender
Western District of Virginia

Roger Peven
Executive Director,
Federal Defenders of
Eastern Washington
and Idaho
Eastern District of
Washington and Idaho

Thomas W. Hillier II
Federal Public Defender
Western District
of Washington

Brian J. Kornbrath
Federal Public Defender
Northern District of
West Virginia

Mary Lou Newberger
Federal Public Defender
Southern District of
West Virginia

Daniel Stiller
Executive Director,
Federal Defender Services of Wisconsin, Inc.
Eastern and Western
Districts of Wisconsin