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No. 09-158

IN THE

Supreme Court of the United States

BILLY JOE MAGWOOD,

Petitioner,

v.

TONY PATTERSON,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

For thirty years, the State has been trying to execute petitioner for an act that was not punishable by death under state law when he committed it. Pet. App. 45a. The State first tried to accomplish this feat by urging state courts to retroactively change state law. Having succeeded initially on that score, but now facing decisions from a federal district court and the Alabama Supreme Court making clear that petitioner's crime was not a capital offense, the State asks this Court to rewrite federal habeas law so it can carry out petitioner's unconstitutional sentence.

This Court should refuse to do so. Section 2244 provides that a claim may be dismissed as abusive only when it is presented in a "second or successive habeas corpus application." 28 U.S.C. § 2244(b). And for decades, courts and practitioners have understood that when, as here, a petition challenges a new state-court judgment, it is not "second or successive." It is a first petition, because it challenges a judgment that has never been challenged in a prior application.

The State's proposal to decide on a claim-by-claim basis whether prisoners who file petitions against new sentences had a "prior opportunity" to raise equivalent claims disregards all of this established statutory and decisional law. It would erase the "second or successive" threshold inquiry from Section 2244(b). It would revamp Section 2244(b)'s abuse-of-the-writ rules. And if all of that were not enough, the State's proposal would give rise to a multitude of administrative and jurisprudential difficulties, some of which even the State acknowledges it cannot answer – and *none* of which

any court has ever addressed, for the State's assertion that its proposal tracks a "prevailing rule" in the lower courts, Resp. Br. 17, is belied by the simple fact that no court besides the Eleventh Circuit has ever held that a habeas petition challenging a new sentence for the first time is successive. By contrast, the easily administrable "new judgment" principle has proved workable in the past and will continue to prove so in the future. This Court should reaffirm that previously unquestioned principle.

I. The State Mischaracterizes Two Important Aspects Of The Background Of This Case.

Before turning to the merits of the question presented, it is important to correct two distortions concerning the background of this case that infect the State's brief.

A. Petitioner Stands Sentenced To Death For A Crime That Was Not A Capital Offense When He Committed It.

The district court held that "[a]t the time Magwood committed his offense, . . . state law did not allow for him to be sentenced to death" because none of the aggravating circumstances listed in Ala. Code § 13-11-6 were present. Pet. App. 45a; *see also* Pet. App. 103a. Magwood's death sentence, therefore, violates the Due Process Clause as construed in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Fiore v. White*, 531 U.S. 225 (2001). The Eleventh Circuit did not disagree. Thus, as this case comes to this Court, the State is seeking to execute someone who is "'actually innocent' of the death penalty," Pet. App. 57a, on the ground that his habeas petition objecting to such state action is successive.

The State spends four pages trying to muddy the waters of this reality, arguing that the Alabama Code as of 1979 could have been construed to allow a court to impose capital punishment without finding any of the aggravating circumstances listed in Section 13-11-6. Section 13-11-2, the State asserts, also "[c]ontained . . . aggravating circumstances" that could support a death sentence. Resp. Br. 5. It takes, however, but a single sentence of the Alabama Code to respond: "If the court imposes a sentence of death, it shall set forth in writing, *as the basis for the sentence of death*, findings of fact from the trial and the sentence hearing, which shall at least include . . . [o]ne or more of the aggravating circumstances *enumerated in section 13-11-6*, which it finds exists in the case." Ala. Code § 13-11-4 (emphasis added). Accordingly, there can be no doubt that the only aggravating circumstances that would have sufficed to sentence petitioner (or anyone else) to death were those listed in Section 13-11-6. Indeed, contrary to the State's suggestion that Section 13-11-2 also set forth "aggravating circumstances," Resp. Br. 5, that term appeared nowhere in that section; that section listed only "aggravated *offenses*" – namely those crimes one of whose commission was necessary, but not sufficient, to expose defendants to the possibility of capital punishment. Ala. Code § 13-11-2 (emphasis added).

Any lingering doubt on this score was erased when the Alabama Supreme Court held in *Ex parte Stephens*, 982 So. 2d 1148 (2006), that Alabama's statutory scheme "permits the trial court and advisory jury to consider only those aggravating circumstances listed in § 13A-5-49," which is the

recodified version of Section 13-11-6. 982 So. 2d at 1153. The State asserts that *Stephens* limited itself to construing the new statutory scheme and that the statement in *Ex parte Kyzer*, 399 So. 2d 330 (1981), that an aggravating circumstance in Section 13-11-6 was unnecessary still controls as to the old scheme. Resp. Br. 7 n.4. The *Stephens* decision, however, speaks for itself. Suffice it to say that *Stephens* does not distinguish between the old and new versions of the Alabama Code. Instead, the Alabama Supreme Court squarely held that its "dicta" in *Kyzer* "was incorrect." *Stephens*, 982 So. 2d at 1153.[1]

B. No Part Of Petitioner's First Death Sentence Survived The First Grant Of Habeas Relief.

When the Eleventh Circuit was reviewing the district court's first grant of habeas relief, the State emphasized – and the Eleventh Circuit, of course, agreed – that "a federal district court or court of appeals has no appellate jurisdiction over a state criminal case and hence has no authority to 'remand' a case to the state courts." *Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986). Rather, federal law gives federal courts the power to issue a writ of habeas corpus to the extent – and only to the extent – a prisoner is being held "in violation of the Constitution." 28 U.S.C. § 2254(a). And when a writ

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[1] The State suggests that petitioner "never cited" *Stephens* to the Eleventh Circuit. Resp. Br. 7 n.4. This is not true. The decision was published after briefing was complete, so petitioner notified the Eleventh Circuit of this new authority in a letter filed under Fed. R. App. P. 28(j).

is issued, the writ leaves it entirely to the State and the state courts to decide how to proceed further. *See, e.g.*, *Wilkinson v. Dotson*, 544 U.S. 74, 86-87 (2005) (Scalia, J., concurring).

The State, however, now portrays petitioner's first grant of federal habeas relief as though it were a mandate on direct appeal that merely issued a "limited command" to the state trial court to "add two mitigating circumstances to Magwood's sentencing calculus." Resp. Br. 16, 19; *accord* Resp. Br. 43. Consequently, the State asserts, "[a]t that point," it became "entitled to the assurance of finality on every other issue" pertaining to Magwood's death sentence. *Id.* at 19 (internal quotation marks omitted).

This attempt to revise history has no basis in fact or law. The district court granted a "conditional writ" as to petitioner's first death sentence. *Magwood*, 791 F.2d at 1450. "Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one." *Wilkinson*, 544 U.S. at 87 (Scalia, J., concurring). Such writs do *not* allow federal habeas courts to order "forms of relief short of release." *Id.* So the State's only two choices upon the district court's grant of habeas relief were to release petitioner from his death sentence or to seek an entirely new sentence in a constitutional manner. *Id.*; *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 33.3 (5th ed. 2005) (A conditional writ as to a sentence "require[s] the state either to release the prisoner from [his sentence] or to . . . resentence [him] in a constitutional manner within a 'reasonable' period of time.").

The State elected to seek a new death sentence. Accordingly, the trial court, in its own words, "conducted a new sentencing hearing and offered the parties the opportunity to submit evidence, argument, and briefs." Pet. App. 103a. And as a "result of a complete and new assessment of all of the evidence, arguments of counsel, and law," *id.*, the court rendered a new judgment sentencing petitioner to death. Pet. App. 106a. Contrary to the State's wishes, therefore, it has no finality interest in anything that occurred at petitioner's first sentencing proceeding; the first sentencing judgment was entirely vacated long ago.

II. A Claim In A Habeas Petition Challenging A New Judgment For The First Time Cannot Be Treated As Part Of A Successive Petition.

A. The Eleventh Circuit's Ruling Contravenes AEDPA And This Court's Precedent.

Petitioner has explained that the Eleventh Circuit erred for the simple reason that a petition challenging a new sentencing judgment for the first time cannot be deemed successive. The State's attacks on this "new judgment" principle fail. And each of the alternative systems the State proposes for dealing with challenges to new judgments conflicts with AEDPA's text, structure, and history, as well as this Court's precedent.

1. The State raises three principal objections to deciding this case on the straightforward basis of the new judgment principle. None, however, has merit.

a. First, the State asserts that the term "judgment" is "foreign" to Section 2244, thereby rendering it improper to count applications with

respect to particular judgments. Resp. Br. 17, 52-54. Nothing could be further from the truth.

There are two basic types of petitions for writs of habeas corpus. The first type, which must be brought under 28 U.S.C. § 2241, asks the *executive* to supply its basis for holding an individual on its own volition and then subjects that asserted basis to legal scrutiny. *See, e.g.*, *Rasul v. Bush*, 542 U.S. 466, 473-74 (2004). The second type – the type at issue here – arises when a *warden* is incarcerating a prisoner, and is doing so for a particular (and facially legitimate) reason: a court's *judgment* establishing a criminal conviction and sentence directs him to do so. The existence of that judgment thus triggers proceedings to determine its validity.

Recognizing the importance of the category of habeas cases in which a state-court judgment of conviction and sentence is the basis for custody, Congress has established a detailed statutory regime and set of rules for adjudicating such controversies. The relevant statutory provisions are collected primarily in 28 U.S.C. § 2254, which governs "an application for a writ of habeas corpus in behalf of a person in custody *pursuant to the judgment of a State court*." 28 U.S.C. § 2254(a) (emphasis added); *see also* 28 U.S.C. § 2241(d) (establishing personal jurisdiction and venue for applications filed by a person "in custody under the judgment and sentence of a State court"); *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (the goal of a petition under Section 2254 is to "demonstrate the invalidity of [an] outstanding criminal judgment").

Because the very thing a petition brought under Section 2254 challenges is "the judgment of a State

court," the Rules Governing Section 2254 Cases in the United States District Courts naturally define each "application" based on the particular judgment the prisoner is challenging. Rule 2(b), for example, requires the prisoner to "ask for relief from the state-court judgment being contested." The instructions to the form appended to the Rules, which "[t]he petition must substantially follow," Rule 2(d), explain that the prisoner is "asking for relief from the conviction or sentence" of a state court. Instructions to Form Petition Under 28 U.S.C. § 2254. The form itself directs the prisoner to identify the "court that entered the judgment of conviction you are challenging," and the dates of the "judgment of conviction" and "sentencing." Form ¶¶ 1(a), 2(a), 2(b). Finally, "[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." Rule 2(e).

The State is simply wrong, therefore, in asserting that one cannot focus on the judgment a habeas applicant is challenging without improperly "judicially append[ing]" language to Section 2244's "second or successive" provisions. Resp. Br. 23. It is a standard canon of statutory construction that particular phrases must be construed in relation to the statute as a whole. *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 145 (1995). And, here, the word "application" in Section 2244(b)'s repeated phrase "second or successive habeas corpus application under section 2254" must refer to an application for *something*. That something is relief from a state-court judgment. Reading "against the same judgment" into Section 2244 is not amending it, but

merely following the cross-reference in order to understand what is necessary to make an application a "second or successive" one.

The State is, of course, correct that the history of habeas corpus includes instances in which prisoners were "not attacking a judgment of conviction or sentence." Resp. Br. 33. But such habeas petitions, as explained *supra* at 7, must be brought under 28 U.S.C. § 2241, not Section 2254. And this case involves only whether a "habeas corpus application *under section 2254*" is "second or successive." 28 U.S.C. § 2244 (emphasis added). The history as to *that* issue is clear: "Before AEDPA's enactment, the phrase 'second or successive' meant the same thing it does today – [a] subsequent federal habeas application *challenging a state-court judgment that had been previously challenged in a federal habeas application*." *Panetti v. Quarterman*, 551 U.S. 930, 964 (2007) (Thomas, J., dissenting) (emphasis added); *see also* Pet. Br. 18-21.

b. The State next contends that a prisoner's judgment cannot be the proper benchmark for deciding whether an application is successive because such an approach would have to allow a prisoner who is resentenced to challenge not only his new sentence but also his conviction in a second habeas petition. Resp. Br. 49.

This assertion, however, misapprehends habeas law and this Court's precedent. A state-court criminal judgment always has two components that may be challenged in a habeas petition – a conviction (enabling the *fact* of incarceration), and a sentence (establishing its *terms* or *duration*). *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 487-89 (1973). In

resolving a habeas challenge, a federal court may grant the writ as to "the conviction *or* the sentence." Instruction 1 to Form Petition Under 28 U.S.C. § 2254 (emphasis added). Indeed, if the sentence is the only part of the judgment that is unconstitutionally imposed, a federal court has the power to "invalidat[e] . . . the judgment authorizing the prisoner's confinement" only "in part," leaving the conviction intact. *Wilkinson*, 544 U.S. at 83. In this circumstance, the "judgment" that a prisoner challenges in a numerically second petition following resentencing is new only to the extent it replaces the invalidated sentence in the prior judgment.

Contrary to the State's contention, nothing about this reality conflicts with rule recited in *Burton v. Stewart*, 549 U.S. 147 (2007), that "[f]inal judgment in a criminal case means sentence." *Id.* at 156 (quotation marks and citation omitted). That rule determines when a state judgment becomes final for purposes of seeking federal habeas relief. If a state appellate court vacates a sentence *before it ever becomes final* and the trial court imposes a new one, the defendant's judgment does not become final for purposes of seeking federal habeas relief until the new sentence becomes final. *Id.* This finality rule minimizes federal/state friction by ensuring that state-court proceedings run their full course before prisoners may seek relief from federal courts.

This Court, however, has never suggested this finality rule means that federal courts must always treat state-court convictions and sentences as indivisible. To the contrary, when construing 28 U.S.C. § 1257(a), which limits this Court's jurisdiction over state-court decisions to "[f]inal

judgments," this Court has held that convictions and sentences should be treated independently of one another. *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963). Specifically, when a state court upholds a defendant's conviction but vacates his sentence, the judgment is final as to the conviction. *Id.* The case for independent treatment is even more compelling here, where creating a *Burton*-style indivisibility rule would dramatically increase, not decrease, federal intrusion into state affairs. Every time a federal court granted habeas relief as to a prisoner's sentence, that decision would necessarily vacate the prisoner's conviction as well. That, in turn, would require states in cases such as this to recharge and retry defendants for the underlying crimes themselves. Otherwise, reinstating the defendants' convictions after the grants of habeas relief would violate the Sixth Amendment right to trial by jury and the due process right to present a defense, among other constitutional guarantees. *See, e.g.*, *United States v. Dixon*, 509 U.S. 688, 710 n.15 (1993) ("[A] conviction in the first prosecution [does] not excuse the Government from proving the same facts the second time" in a second prosecution.).

In short, petitioner's recognition of the longstanding practice in habeas law that sentences can (indeed, must) be treated as distinct components of judgments neither contradicts the new judgment principle nor this Court's precedent. It comports with both.

c. Finally, the State argues that treating every claim in a habeas petition challenging a new sentence as a part of a first petition would contradict a "prevailing rule" in the lower courts, a so-called "one

opportunity" rule: "If a claim could have been, or was, raised in a prior habeas petition, it is barred by § 2244(b)(2) and § 2244(b)(1) respectively." Resp. Br. 17, 27-31.[2]

Only one of the cases the State cites, however, is a Section 2254 case, *see Walker v. Roth*, 133 F.3d 454, 455 (7th Cir. 1997), and, contrary to the State's portrayal, it is a perfect illustration of the new judgment principle that petitioner asks this Court to reaffirm. There, a state prisoner who had previously obtained habeas relief limited to his sentence sought to challenge his new sentence. In a short per curiam opinion, the Seventh Circuit held that the petition was not subject to Section 2244 because "a second petition attacking for the first time the constitutionality of a newly imposed sentence is not a second or successive petition." *Walker*, 133 F.3d at 455. The court did not pause to consider whether similar claims might have been available against the prisoner's first sentence.

The remaining cases the State cites involve habeas motions challenging new or amended *federal* judgments under 28 U.S.C. § 2255. Section 2255 requires federal courts to review their own judgments

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[2] Here, as elsewhere, the State's locution ignores that it is impossible to raise the same claim against two judgments; raising the identical legal argument against two judgments still raises different claims *See* Pet. Br. 22-24 & n.9. This locution illustrates the State's failure to come to terms with significance of a new judgment. But for present purposes, petitioner will treat the State as arguing for a rule in which a prisoner's failure to raise an *equivalent* claim against a prior judgment renders him unable to do so against a current one.

"as a further step in the movant's criminal case rather than a separate civil action." Advisory Committee's Note on Rule 1 of the Rules Governing Section 2255 Proceedings in the United States District Courts. This procedural framework allows federal courts not just to invalidate judgments but also to amend or modify them – actions they cannot take when reviewing state judgments. *Id.*; *compare supra* at 4-5 (discussing remedial authority in Section 2254 cases). And when a federal court in a first Section 2255 proceeding orders such limited relief, claim-preclusion issues may arise in subsequent Section 2255 proceedings that simply cannot arise in a second Section 2254 proceeding.

Nonetheless, the State's Section 2255 cases are consistent with the new judgment principle. In each of the decisions in which courts treated petitions following partial grants of habeas relief as successive, the petitions challenged undisturbed components of the original judgments. *See Dahler v. United States*, 259 F.3d 763, 764 (7th Cir. 2001) (habeas relief initially granted as to sentence only; subsequent petition challenging guilt/innocence phase of trial was successive); *Galtieri v. United States*, 128 F.3d 33, 37-38 (2d Cir. 1997) (habeas relief initially granted as to supervised release component of sentence only; subsequent petition challenging conviction and other components of sentence was successive).[3]

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[3] The State also cites two decisions holding that federal habeas motions were successive when the defendants' first such motions obtained reinstatements of their right to appeal (on the

By contrast, when prisoners, as here, who had obtained habeas relief as to their sentences challenged only their new sentences, the courts held the petitions to be first petitions. *See Lang v. United States*, 474 F.3d 348, 353 (6th Cir. 2007) (habeas relief initially granted as to sentence only; subsequent petition challenging new sentence was not successive); *In re Taylor*, 171 F.3d 185 (4th Cir. 1999) (same); *Esposito v. United States*, 135 F.3d 111, 113 (2d Cir. 1997) (same).

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ground that their first attorneys provided ineffective assistance by failing to file notices of appeal) and their second motions raised claims not included in their first motions. *See United States v. Orozco-Ramirez*, 211 F.3d 862, 867, 869 (5th Cir. 2000); *Pratt v. United States*, 129 F.3d 54, 62 (1st Cir. 1997). These decisions accept the general principle that "a numerically second petition is not 'second or successive' if it attacks a different criminal judgment," *Pratt*, 129 F.3d at 60 (internal quotation marks and citation omitted), but hold that a federal court's ministerial act of entering a new judgment identical to the original one in order to enable a timely direct appeal does not trigger the general principle. The State neglects to mention that five federal circuits have ruled otherwise, reasoning that even a ministerial new judgment "resets to zero the counter of collateral attacks pursued." *Shepeck v. United States*, 150 F.3d 800, 801 (7th Cir. 1998); *accord In re Olabode*, 325 F.3d 166, 172-73 (3d Cir. 2003); *McIver v. United States*, 307 F.3d 1327, 1331 (11th Cir. 2002); *In re Goddard*, 170 F.3d 435, 437 (4th Cir. 1999); *United States v. Scott*, 124 F.3d 1328, 1330 (10th Cir. 1997). At any rate, this debate has no relevance here, for even the two circuits in the minority recognize that a petition is not successive where habeas relief results in a full-blown retrial or resentencing, and then the defendant seeks to "attack the new judgment." *Sustache-Rivera v. United States*, 221 F.3d 8, 13 (1st Cir. 2000).

Hence, when the State quotes language from some of these decisions asking questions such as whether the prisoner's claim was "opened by the resentencing," Resp. Br. 28 (quoting *Esposito*, 135 F.3d at 114), the courts were not – as the State would have it – asking whether the prisoner could have challenged his earlier sentence on the same grounds. Rather, the courts were deciding the cases based upon whether the prisoner was challenging a new or old component of his judgment – precisely the inquiry the State seeks to avoid here. *See, e.g.*, *Lang*, 474 F.3d at 351-352 (summarizing this line of cases as holding that "petitions for habeas corpus [a]re not 'second or successive' when the second action challenges a judgment *or portion of a judgment* that arose as a result of a previous successful action") (emphasis added).

2. Neither of the State's alternative proposals for resolving this case withstands scrutiny.

a. The State first suggests that any "numerically second" petition could be deemed automatically successive. Resp. Br. 22-23. The State, however, immediately "acknowledge[s] a problem" with this proposal: This Court's holdings foreclose such a rule. *Id.* Even when a habeas petition challenges the same judgment as a previous petition, the petition is not always "second or successive." *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998) (petition containing a claim previously dismissed as unripe is a first petition); *Panetti*, 551 U.S. at 943-46 (petition containing a newly ripe claim for the first time is a first petition); *Slack v. McDaniel*, 529 U.S. 473, 486-87 (2000) (petition filed after initial petition

was dismissed for containing unexhausted claims is first petition).

But the problem with the State's proposal runs much deeper than the holdings in *Martinez-Villareal*, *Panetti*, and *Slack*. If all numerically second petitions against *different* judgments were successive, a person who obtained habeas relief could almost never file a subsequent petition challenging a new conviction or sentence on any ground. Even the dissenters in *Martinez-Villareal*, *Panetti*, and *Slack*, therefore, have implicitly recognized that a numerically second rule could not be applied outside of the context of multiple challenges to the *same* state-court judgment. *See Panetti*, 551 U.S. at 964 (Thomas, J., dissenting); *see also Burton*, 549 U.S. at 156 (assuming a petition is not successive when it challenges a "new judgment").[4]

b. After abandoning its own "numerically second" proposal, the State turns to its principal contention. It argues that this Court should fashion an approach for dealing with numerically successive petitions that "steps outside" or "looks beyond § 2244(b)'s plain language." Resp. Br. 23, 55.

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[4] The State also suggests, with the same halfhearted enthusiasm, that habeas petitions could be counted against each occasion of *custody*, rather than each judgment. Resp. Br. 53-54. At least when a prisoner was taken into custody pursuant to a judgment, such a rule would typically be no different than a "numerically second" rule. This is because prisoners do not ordinarily experience a break in custody when they obtain habeas relief and the state reconvicts or resentences them. Nor are prisoners released between serving two prison terms for separate convictions.

Specifically, the State contends that this Court should hold that even when a claim was properly raised and exhausted in state courts, the claim should be barred whenever an equivalent claim "could have been . . . adjudicated in a previous habeas petition." Resp. Br. 26.

There is no justification, however, for "step[ing] outside of" or "look[ing] beyond" the text of AEDPA. The judgment-focused approach to identifying successive petitions *does* comport with the plain text of Sections 2244 and 2254. *See supra* at 9; Pet. Br. 15-18. In cases involving Section 2244, moreover, this Court has consistently recognized – as it has in every other realm of statutory interpretation – that its holdings must "interpret[] AEDPA," not look beyond or ignore its language. *Panetti*, 551 U.S. at 945; *accord Slack*, 529 U.S. at 486; *Martinez-Villareal*, 523 U.S. at 644; *see also Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) ("[T]he fact that the writ has been called an 'equitable remedy' . . . does not authorize a court to ignore this body of statutes, rules, and precedents.") (citation omitted). Accordingly, this Court looks to policy considerations only to the extent that Section 2244 is susceptible to two interpretations and one "reasonable interpretation" of the statute would avoid "distortions and inefficiencies." *Panetti*, 551 U.S. at 943.

The State's "one opportunity" proposal is hardly a "reasonable interpretation" of Section 2244. Under Section 2244(b), courts must apply a two-step analysis to determine whether the writ is being abused. First, they must determine whether a habeas application is "second or successive." Second, if the *application* falls within that category, courts

must then determine whether any of its *claims* are abusive – that is, whether any claims should be dismissed as thwarting AEDPA's goal of streamlining challenges to state-court judgments. This case concerns only the first of those two steps – whether an application under certain circumstances is second or successive. Yet the State proposes to collapse these two steps entirely – that is, to change the statute from one that requires as an initial matter that an *application* be *successive*, into one that goes straight to analyzing whether particular *claims* in every numerically second application are *abusive*.

Put another way, although the State asserts at various points that its proposal is designed to determine whether particular "claims" are "second or successive," Resp. Br. 51, it really advocates erasing the "second or successive" concept entirely from Section 2244. After all, it is a foundational aspect of this case that this is the *first* time that petitioner has raised a due process objection to the State's desire to execute him. It thus is nonsense to say that his *claim* is "second or successive." What the State really argues is that petitioner's claim should be barred precisely because he did *not* previously raise it. In other words, the State proposes transforming Section 2244 from a system of sorting out claims in "successive" petitions into a pure system of waiver that applies to all numerically subsequent petitions.[5]

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[5] The State thus places great weight on the district court's order in petitioner's first federal habeas proceeding directing him to "present all conceivable claims" against his then-existing death sentence. Resp. Br. App. 5a-6a, 12a. That order is

Whatever one might think about the merits or demerits of disregarding the "second or successive application" inquiry and going straight to determining whether claims in all numerically subsequent petitions are abusive according to a pure waiver theory, that is certainly not the system that Congress enacted. This Court has emphasized that the "text" of Habeas Rule 9(b), the predecessor to Section 2244(b), "demonstrate[d]" that the framework for determining whether a claim is abusive "applies *only to 'a second or successive petition*.'" *Slack*, 529 U.S. at 486 (emphasis added); *see also Lonchar*, 517 U.S. at 330 (emphasizing that Rule 9(b) applied only to successive petitions).[6] The same is clearly true respecting Section 2244(b) itself. And Congress had good reason to limit the application of the abuse-of-the-writ doctrine to "second or successive" petitions: This limitation ensures that each prisoner gets one full and fair chance to challenge any state-court judgment under which he is incarcerated. The State's proposal ignores this critical limitation entirely. The State, in fact, does not even try to explain how its proposal could be shoehorned into the language of Section 2244.

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relevant only if the failure to raise a claim against a sentence somehow waives one's ability to raise a similar claim in a *different* case challenging a *subsequent* sentencing judgment.

[6] Prior to AEDPA's enactment, Rule 9(b) stated: "A second or successive petition [alleging new and different grounds] may be dismissed if . . . the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

The State nevertheless claims license from three lines of this Court's cases to create a brand new system for dealing with all numerically subsequent petitions. First, the State notes that *Slack*, *Martinez-Villareal*, and *Panetti* each "focused on the petitioner's opportunity to fully and fairly litigate the claim(s) [at issue] in his previous petition." Resp. Br. 37. In each case, however, this Court carefully stayed within Section 2244's "second or successive application" framework. Each opinion started from the presumption that petitions, such as the ones at issue there, challenging "a state-court judgment already challenged in a prior § 2254 application" are generally successive. *Panetti*, 551 U.S. at 944. But this Court held under the circumstances presented there that the petitions were first petitions (or continuations of first petitions).

To be sure, this Court treated the petitions in those cases as first petitions because the prisoners had not previously been able to litigate the claims therein. But that reasoning is inapposite when a prisoner challenges a *new* judgment for the first time. A prisoner under such circumstances is not challenging "a state-court judgment already challenged in a prior § 2254 application." *Panetti*, 551 U.S. at 944. (It would be impossible for such a prisoner to do so, for a habeas petition must allege "the unlawfulness of a *(not previously invalidated)* conviction or sentence." *Wilkinson*, 544 U.S. at 81 (emphasis added).) Thus, it makes no sense to ask whether such a prisoner had a prior opportunity to challenge the judgment at issue on any particular ground. The judgment did not exist when the prisoner brought his earlier petition.

Second, the State asserts that the "abuse of the writ" doctrine targets "numerically second (or later) petitions containing claims that could have been raised in earlier petitions." Resp. Br. 31-35 (citing *Burton*, 549 U.S. 147; *McCleskey v. Zant*, 499 U.S. 467 (1991); *Delo v. Stokes*, 495 U.S. 320 (1990) (per curiam); *Woodard v. Hutchins*, 464 U.S. 377 (1984) (per curiam); *Antone v. Dugger*, 465 U.S. 200 (1984) (per curiam); *Wong Doo v. United States*, 265 U.S. 239 (1924); *Salinger v. Loisel*, 265 U.S. 224 (1924)). This line of cases does not help the State either. Each of those cases involved a prisoner's filing repeated applications against the *same* judgment or order.[7] Thus, the applications were obviously successive. This Court asked whether the prisoners had had prior opportunities to raise their claims in order to determine whether the claims were abusive, not to determine whether they were part of successive petitions.

Third, the State argues that this Court's decisions in *Artuz v. Bennett*, 531 U.S. 4 (2000), and *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), imply that Section 2244 "is a claim-focused statute," in that, in *Pace*'s words, "the 'requirements' of [subsection 2244(b)] are not applicable to the application as a whole; instead they require inquiry into specific claim[s]." Resp. Br. 24. But the statute focuses on specific claims only *once they have been determined*

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[7] To be precise, the prisoners in *Salinger* and *Wong Doo* challenged an arrest warrant and a deportation order, respectively, multiple times. *Salinger*, 265 U.S. at 228-29; *Wong Doo*, 265 U.S. at 239-40.

to be part of a successive petition. And neither *Artuz* nor *Pace* suggests that Section 2244's "second or successive" inquiry itself proceeds on a claim-by-claim basis. To the contrary, this Court emphasized in *Artuz* that the word "application" in Subsection 2244(d) means something different than "claim," 531 U.S. at 10, thereby indicating that the word "application" in Subsection 2244(b) must be given independent meaning as well. *See* Pet. Br. 17-18.

Lest there be any doubt over whether this Court's case law allows (much less requires) the overhaul of habeas procedure that the State advocates, one final point should be dispositive: If a claim is not barred by ordinary res judicata principles, it cannot be barred by habeas law's less preclusive rules respecting subsequent litigation. *See* Pet. Br. 20. Yet, as petitioner has explained, and the State does not dispute, ordinary res judicata law would not bar subsequent litigation under the circumstances here, whereas the system the State proposes would. Pet. Br. 23-24. The State's implicit concession in this respect alone is enough to render its proposal illegitimate.

B. The Eleventh Circuit's Ruling Would Create A Multitude Of Difficulties, None Of Which Exist In The Judgment-Focused Approach To Identifying Successive Petitions.

The State contends that it is "telling" that petitioner relies on hypotheticals instead of real cases to illustrate the troublesome implications of the Eleventh Circuit's holding. Resp. Br. 44. According to the State, this reliance indicates that replacing the

current judgment-focused approach to administering Section 2244(b) with a "one opportunity" regime would not create difficulties. As should be plain by now, however, the reason petitioner used hypotheticals is because, prior to this decision, no court had ever held that a petition challenging a new judgment could be successive. Even the idea of raising such an argument was a stretch – witness, for example, the State's own omission of the issue in the district court, Pet. App. 63a. So the most petitioner can do – apart from pointing to decisions such as this Court's own in *Richmond v. Lewis*, 506 U.S. 40 (1992), in which courts treated claims such as petitioner's as part of first petitions without considering the argument the State makes; *see also* Pet. Reply 4 & n.2 – is to test the State's proposal against various scenarios that regularly arise in habeas cases.

The State's responses to these hypotheticals raise far more questions than they answer. By contrast, neither of the objections the State raises to the new judgment principle creates legitimate concerns.

1. a. Petitioner's opening brief posited the scenario in which a prisoner who previously obtained habeas relief sought to bring a second habeas petition following retrial to challenge his new judgment based on an intervening decision from this Court. Pet. Br. 30-31. This scenario occurs frequently. Consider, for example, prisoners who have received habeas relief over the past several years on grounds unrelated to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Booker v. United States*, 543 U.S. 220 (2005), and now seek to challenge their new sentences based on

those cases. Under current law, this scenario is easily dealt with: a prisoner's *Apprendi* or *Booker* claim is part of a first petition because it challenges a new judgment. Yet the State concedes that if this Court follows its proposal to disregard the benchmark of the specific judgment under attack, "it is not clear how this 'non-retroactive change in the law before retrial' scenario would play out." Resp. Br. 43.

This is a rather ominous admission. Worse yet, the State's suggestion that courts *might* allow a claim based on intervening authority to proceed as one that the prisoner did not have a prior opportunity to raise, *id.*, illustrates the complexities that its proposal raises. Intervening authority is only one scenario in which it would be very difficult to determine whether the prisoner had a "prior opportunity" to raise an equivalent claim the first time around. What if new facts come to light between the two habeas proceedings that make the legal argument much stronger (slightly stronger?) in the second proceeding? What if a claim would have been found procedurally defaulted during the first habeas proceeding, so the prisoner did not raise it, but the issue is cleanly preserved the second time around? What if the prisoner actually raised the argument and did not obtain relief on it – because the district court rejected it – but was unable to seek appellate review or certiorari on the claim because he prevailed on other grounds? *See* NACDL Br. 13-18. This Court would need to develop a whole new jurisprudence to deal with such questions.

b. The State next asserts that, under its proposal, claims that were "previously raised," but

were not adjudicated because the prisoner obtained habeas relief on other grounds could proceed in subsequent habeas petitions because the claims would be treated under *Slack* and *Martinez-Villareal* as part of first petitions. Resp. Br. 42. But even assuming that this Court would be willing to extend the holdings in those cases to treat *any* previously raised, but unadjudicated claim as part of a first petition, it is uncertain how courts would decide whether a claim was, in fact, "previously raised" (an issue that is irrelevant under *Slack*, 529 U.S. at 487-88, and *Martinez-Villareal*, *see Panetti*, 551 U.S. at 944-47). What happens, for instance, if the prisoner raises a claim similar to one raised the first time but that relies on new facts that came to light between the first and second trials? What about a claim that cites new legal authority? What if the claim challenges the same prosecutorial action (such as the introduction of certain evidence), but on different legal grounds? Each of these questions would embroil federal courts in time-consuming litigation, the outcome of which would be uncertain.

One thing, however, *is* certain: The State's proposal would encourage – indeed, require – lawyers filing habeas petitions to fill them up with claims that are procedurally defaulted, foreclosed by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), and otherwise hopelessly precluded from generating relief. Such claims, the State would probably be the first to say, impose a needless burden on states and the courts. Yet raising hopelessly precluded claims would be the only way to preserve the ability, if one's client obtained habeas relief on

other grounds, to raise equivalent claims in a future habeas petition.

c. The State's response to petitioner's hypothetical in which the state courts commit the same constitutional violation that triggered habeas relief in the first place, *see* Pet. Br. 31-32, is perhaps the most unsettling of all. Implicitly acknowledging that its proposal would not allow the prisoner to seek habeas relief a second time on the same constitutional basis (because the petitioner would be raising a claim that was raised in a previous petition and thus would be barred under subsection 2244(b)(1)), the State "assume[s]," without providing any citation, "that federal courts will consider a petitioner's claim that the state court violated *due process* by failing to honor the federal court's mandate . . . , thereby allowing the new claim to be raised in a numerically second petition as freshly ripened under the 'one opportunity' rule." Resp. Br. 42 (emphasis added). Suffice it to say that even if federal habeas courts could issue "mandate[s]" to state courts (which they cannot, *see supra* at 4-5), petitioner is not aware of any such due process principle. Indeed, it is generally thought that "[d]ecisions of a lower federal court are no more binding on a state court than they are on a [higher] federal court." *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990) (quotation marks and citation omitted). If nothing else, the novel due process rule the State imagines is not "clearly established" by this Court, as is required for a state prisoner to seek habeas relief on its basis. 28 U.S.C. § 2254(d)(1).

d. The State's proposal to dispense entirely with a prisoner's specific judgment as the benchmark for measuring whether his petitions are successive raises a final problem. Prisoners are often convicted of two or more crimes at separate trials, resulting in separate judgments. If some prosecutorial tactic, such as introducing a dubiously obtained confession, were common to both prosecutions, and the defendant failed to seek habeas relief on that ground when challenging his first judgment, the State's "one opportunity" proposal implies that he would be barred from raising the issue in a habeas petition challenging his second judgment. This result, however, would be hard to square with Habeas Rule 2(e), which deems "separate petition[s]" covering separate judgments independent of one another.

2. Neither of the State's objections to the judgment-centric approach to the "second or successive" concept withstands scrutiny.

a. The State argues that the new judgment principle allows prisoners to "resurrect[]" previously rejected claims. Resp. Br. 44. But the State does not dispute that *stare decisis* applies in habeas cases to the same extent as any other realm. Resp. Br. 51. So if a prisoner challenges his new conviction or sentence on the same grounds as an earlier, unsuccessful challenge, the decision resolving that earlier challenge has the same controlling effect as any other precedent that resolved a legal issue on identical facts. Pet. Br. 24 n.10. Furthermore, issue preclusion (otherwise known as collateral estoppel) applies to factual findings that were made in an earlier habeas proceeding. Pet. Br. 24 n.10. There is no way, therefore, that a prisoner who was

resentenced could tie up the federal courts with a petition that simply "staple[d] a new cover page" on the petition the prisoner filed against his first judgment, if the non-winning claims were rejected the first time around. Resp. Br. 47.

b. The State also complains that allowing a prisoner to challenge a new death sentence on grounds not raised in a prior, successful federal habeas petition thwarts finality. Resp. Br. 39-41, 46-47. But there is no question that when a resentencing following habeas relief results in a new death sentence, the prisoner may initiate a new round of habeas review. Indeed, the State has never disputed petitioner's ability to pursue the ineffective assistance challenge to his new sentence, on which he prevailed in the district court. Thus, it is quite wrong for the State to blame the new judgment principle for the time this litigation has consumed. Resp. Br. 48.

But the larger point – ultimately the controlling one here – is that whenever a state elects to resentence someone who has obtained habeas relief from a death sentence, comity and finality drop away insofar as the new death sentence the state seeks must comport with constitutional guarantees – *all* constitutional guarantees, regardless of whether they were put into play in prior habeas proceedings. Of course, if the defendant fails to raise constitutional objections during the resentencing proceeding, the state may invoke the procedural default doctrine to prevent litigation of such claims in a subsequent habeas petition. *See, e.g.*, *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). But when, as here, the defendant properly raises and preserves federal constitutional arguments during the new round of

state-court proceedings, the prisoner has the right, if necessary, to initiate a new round of federal habeas review on those grounds. That is the very purpose of Section 2254. And that is all petitioner seeks here.

CONCLUSION

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

Respectfully submitted,

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