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No. 09-158

In the
Supreme Court of the United States

BILLY JOE MAGWOOD,
Petitioner,
v.
TONY PATTERSON, Warden, *et al.*,
Respondents.

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

BRIEF OF RESPONDENTS

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(CAPITAL CASE)

QUESTION PRESENTED

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

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented centers on 28 U.S.C. §2244(b), the Antiterrorism and Effective Death Penalty Act's ban on the filing of "second or successive" habeas petitions by state prisoners. To assist the Court, Respondents reproduce §2244(b) and AEDPA's similar provisions for federal prisoners, 28 U.S.C. §2244(a) and §2255(h), in the appendix. App. 1a-4a.

INTRODUCTION

Billy Joe Magwood murdered Sheriff Neil Grantham. Magwood was sentenced to death after an Alabama trial court determined that the aggravating circumstance of murdering of a sheriff outweighed the two mitigating circumstances of age (27) and lack of a violent criminal history. A federal district court granted Magwood a conditional writ of habeas corpus after finding that the state court failed to consider two additional mitigating circumstances. The writ contained a single condition: Reweigh the same aggravating circumstance against four mitigating circumstances, not two. The state court complied and again sentenced Magwood to death.

That was 24 years ago.

For the past 13 years, this case has been mired in a second round of federal habeas litigation in which the primary (and only remaining) claim is one that could have been adjudicated in the mid-1980s. Specifically, Magwood claims that he did not have fair warning in 1978 that murdering a sheriff rendered him eligible for the death penalty under Alabama law. Magwood concedes in the question presented that he "could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds" in his first habeas petition. Pet. i. In fact, Magwood was *ordered* to raise all possible grounds in his first petition. App. 12a. He simply failed to do so.

Section 2244(b)(2) bars any claim raised in a "second or successive application under section 2254" that was not raised in the petitioner's "prior application," unless one of two exceptions are met. Magwood cannot meet either exception. Instead, Magwood argues that his fair-warning claim lies outside of §2244(b)(2)'s reach because his second habeas petition is the first to attack the judgment springing from resentencing.

The court of appeals rejected Magwood's interpretation of §2244(b), recognizing that it "would permit every defendant who succeeds in having any component of his sentence modified to . . . rais[e] grounds that were either available for presentation on the first petition or even specifically rejected on that petition." Pet. App. 14a. Joining its sister circuits, the court of appeals interpreted §2244(b) to bar claims that either were, or could have been,

raised in the first habeas petition, while allowing claims that are novel to resentencing. Pet. App. 15a. Magwood's fair-warning claim was thus barred under §2244(b)(2) because Magwood could have raised the claim in his first federal habeas petition but did not. The court of appeals correctly interpreted §2244(b). Its decision should be affirmed.

STATEMENT OF THE CASE

A. THE MURDER OF SHERIFF NEIL GRANTHAM

Billy Joe Magwood was convicted of possessing illegal narcotics in February 1975 and was sentenced to four years' imprisonment. Magwood openly begrudged his jailors, especially Coffee County Sheriff Neil Grantham. Magwood complained to fellow inmate Billy Ray Cooper on multiple occasions that "he was being held without any reason," and that he would "get even and kill that S.O.B.," Sheriff Grantham. *Magwood v. State*, 426 So. 2d 918, 920 (Ala. Crim. App. 1982). Magwood informed fellow inmate James Kenneth Holder that "he didn't belong there, and that he was going to get even one way or the other." *Id.* Shortly after his release, he did.

On the morning of March 1, 1979, Magwood lay in wait for Sheriff Grantham in the Coffee County Jail parking lot. When Sheriff Grantham arrived for work, Magwood got out of his car and confronted Sheriff Grantham. Magwood shot the sheriff three times, once each in the head, face, and chest. He then fled. As Magwood sped away, he exchanged gunfire with Deputy Thomas Weeks, who witnessed the murder. Magwood was arrested and charged

with the capital offense of intentionally murdering a sheriff. Ala. Code §13-11-2 (1975) (repealed 1981).[1]

B. ALABAMA'S DEATH PENALTY LAW

This case presents a purely procedural question. The merits of Magwood's fair-warning claim are not before the Court. *See* Pet. i. Nor can Magwood challenge his death-penalty eligibility, a purely state law issue, in this federal court. *See Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). Nevertheless, Magwood repeatedly asserts that murdering a sheriff was "an act that was not a death-eligible offense under Alabama law when he committed it" in 1978. Blue Br. 3 (*see also* Blue Br. 5-8, 10-12). Respondents disagree. More importantly, so have Alabama's highest courts, which ruled against Magwood on this state law issue. *See infra* at 9, 12-13. For the Court's benefit, we explain why.

Murdering a sheriff has always been a crime punishable by death in Alabama. *See Beck v. State,* 396 So. 2d 645, 649-52 (Ala. 1980). In fact, until 1975, Alabama law provided that the intentional murder of *any* human was punishable by death. *Id.*

In the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), the Alabama Legislature rewrote Alabama's death penalty statute in 1975 to limit the number of homicide offenses that were eligible for the death penalty. The 1975 Code contained two lists of

[1]Unless otherwise stated, all citations to the Alabama Code refer to the 1975 Code under which Magwood was prosecuted.

aggravating circumstances; one in §13-11-2, the other in §13-11-6. Section 13-11-2 was captioned: "Aggravated offenses for which death penalty to be imposed." Contained within §13-11-2 were 14 "aggravated circumstances," that rendered a person eligible for the death penalty when conjoined with an intentional murder. Ala. Code §§13-11-1, 13-11-2. Murdering a sheriff was on this list of aggravating circumstances. Ala. Code §13-11-2(a)(5).

Believing *Furman* required it, the 1975 Alabama Legislature mandated that the jury "shall fix the punishment at death" if the jury determined that the defendant was guilty of intentional murder plus one of the §13-11-2 aggravated circumstances. Ala. Code §13-11-2.[2] The legislature vested the trial court with the discretion to either follow, or disagree with, the jury's mandatory death sentence. Ala. Code §13-11-4. If the court accepted the jury's mandatory death sentence, the court was required to enter a written order that contained, among other things, "one or more of the aggravating circumstances enumerated in 13-11-6"—*i.e.*, the second list of aggravating circumstances. *Id.* No language, however, expressly denied the court the ability to consider a §13-11-2 aggravating circumstance.

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[2]The Alabama Supreme Court later ruled that the jury's sentencing decision must be discretionary and that the jury must be allowed to consider both aggravating and mitigating circumstances. *See Beck v. State*, 396 So. 2d 645, 663 (1980). Magwood's jury was afforded this discretion after a sentencing hearing.

The Alabama Supreme Court twice addressed the statute's two lists of aggravating circumstances. In *Beck v. State*, 396 So. 2d 645 (1980), the supreme court stated that "[t]he jury verdict that the defendant was guilty of committing the capital offense would mean that the State had already established at least one aggravating circumstance." *Id.* at 663. "In addition, the State would be permitted to offer evidence of any other aggravating circumstance contained in §13-11-6." *Id.* In *Kyzer v. State*, 399 So. 2d 330 (1981), the supreme court stated that it would be "completely illogical and would mean the legislature did a completely useless act" if a §13-11-2 aggravating circumstance mandated that the jury sentence the defendant to death, but then could not be considered by the trial court in its sentencing determination. *Id.* at 337. Accordingly, the supreme court stated that "[i]t is apparent that the legislature intended to permit the trial judge to find the same 'aggravated circumstances enumerated in § 13-11-2.' Code 1975, § 13-11-1. We so hold."[3] *Id.* at 338.

Later that year (1981), the state legislature re-wrote Alabama's death penalty statute. Relevant here, the legislature erased the terms "aggravated circumstance" and "aggravated offense" from §13-11-1 and §13-11-2 and "confin[ed] use of the concept of aggravation to the sentencing factors listed in section

[3]Four years before the *Beck* and *Kyzer* decisions, and two years before Magwood murdered Sheriff Grantham, this Court upheld Texas' use of its capital offense list as statutory aggravating circumstances. *See Jurek v. Texas*, 428 U.S. 262, 268-74 (1976).

11 of the new act [formerly §13-11-6]." Ed Carnes, *Alabama's 1981 Capital Punishment Statute*, 42 Ala. Lawyer 456, 460 (1981). As reported by then-Assistant Attorney General (now Circuit Judge) Ed Carnes, this deletion was intentional, *id.* at 459-60, as was new language that prescribed that "no defendant may be sentenced to death unless at least one section 11 aggravating circumstance exists." *Id.* at 483; *see* Ala. Code §13A-5-45(f) (2006) (confining the use of "aggravating circumstances" to one section). In other words, the legislature changed Alabama's death penalty law in 1981 by confining all aggravating circumstances to one subsection: "In this regard, the new act differs from the 1975 statute as interpreted in *Kyzer v. State*." Carnes, *supra*, at 483.[4]

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[4]Magwood contends that *Ex parte Stephens*, 982 So. 2d 1148, 1153 (Ala. 2006), proves that murdering a sheriff "had never been a death-eligible offense" under former §13-11-2(a)(5). Blue Br. 11-12. *Stephens*, however, addressed the error of instructing a jury to consider the capital offense as an aggravating circumstance under *modern* (post-1981) Alabama law. When the *Stephens* court stated that its dicta in *Kyzer* "was incorrect," it was applying *Kyzer* to the post-1981 language that confined aggravating circumstances to one statutory list: "Section 13A-5-49, Ala. Code 1975, states that '[a]ggravating circumstances shall be the following.' The language 'shall be'-as opposed to 'shall include'-indicates that the list is intended to be exclusive." *Stephens*, *supra*, at 1153. Again, that exclusivity language was added in 1981, *see* Carnes, *supra*, at 460, three years after Magwood murdered Sheriff Grantham. Furthermore, regardless of what date *Stephens* appeared in the Southern Reporter, *see* Blue Br. 11, n.7, *Stephens* was decided and released more than a year before briefing in the circuit court, yet Magwood never cited it. Nor has Magwood claimed to the State courts that *Stephens* repudiated their decisions affirming his death sentence. *See infra* at 9, 12-13.

C. MAGWOOD'S TRIAL

Magwood was prosecuted under the 1975 Code in June 1981. During the guilt phase, Magwood argued that he was not guilty by reason of insanity. The jury rejected Magwood's insanity defense and found him guilty of capital murder.

A separate penalty-phase hearing was held before the jury. The jury's guilt-phase verdict necessarily proved the aggravating circumstance of murdering a sheriff. Ala. Code §13-11-2(a)(5). Relying on a penalty-phase witness and the four experts who testified regarding Magwood's sanity during the guilt phase, Magwood argued in mitigation that he did not have previous violent tendencies, nor did he understand the consequences of his actions when he murdered Sheriff Grantham. (1983-R: Doc. 38, Exh. A at 348-50.)[5]

The jury unanimously sentenced Magwood to death. The trial court agreed. Based on the jury's rejection of Magwood's insanity defense, the trial court rejected the statutory mitigating circumstances of "extreme mental or emotional disturbance" and "the capacity of the defendant to appreciate the criminality of his conduct." *Magwood*, 426 So. 2d at 928 (referring to Ala. Code §13-11-7(2), (6)). The trial court determined that death was the appropriate sentence because the aggravating

[5]The Court has two records before it: (1) the record stemming from Magwood's 1983 petition and (2) the record stemming from Magwood's 1997 petitions. Respondents cite first to the relevant record, then its docket entry.

circumstance of murdering a sheriff outweighed the two mitigating circumstances of Magwood's age (27) and his lack of a prior violent criminal history. *Id.*

D. STATE APPEALS: ROUND 1

1. *Direct Appeal*: Both the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Magwood's conviction and death sentence on direct appeal. *See Magwood*, 426 So. 2d at 928; *Ex parte Magwood*, 426 So. 2d 929 (Ala. 1983). Regarding Magwood's sentence, the state supreme court held that "the trial court properly considered any aggravating and mitigating circumstances prior to imposing the death penalty." *Magwood*, 426 So. 2d at 932. This Court denied certiorari review. *See Magwood v. Alabama*, 462 U.S. 1124 (1983).

2. State Post-Conviction: Nine days before his scheduled execution, Magwood filed a state post-conviction petition. In that petition, Magwood challenged, among other things, his competency to be executed and the effectiveness of his trial counsel. (1983-R: Doc. 38, Ex. O at 170-76.) After an evidentiary hearing, the trial court found that Magwood was sane and denied Magwood's petition on all grounds. *Id.* at 178-80. The Alabama Court of Criminal Appeals affirmed. *See Magwood v. State*, 449 So. 2d 1267 (Ala. Crim. App. 1984). The state supreme court denied review. *See Ex parte Magwood*, 453 So. 2d 1349 (Ala. 1984).

Magwood did not challenge his eligibility for the death penalty under state law at trial, on direct appeal, or in his post-conviction proceedings. Nor

did Magwood allege under federal law that he lacked fair warning that he could receive the death penalty for murdering a sheriff.

E. FEDERAL HABEAS PROCEEDINGS: ROUND 1

1. *District Court*: As Magwood litigated his state post-conviction petition, he simultaneously filed his first §2254 habeas petition ("1983 Petition") and a motion to stay his execution. The district court granted Magwood's motion for a stay and held his petition in abeyance until the state courts finalized their post-conviction review. *See Magwood v. Smith*, 608 F. Supp. 218, 219-20 (M.D. Ala. 1985). Citing our desire that "piecemeal litigation of claims and issues be avoided," Respondents requested an "order compelling [Magwood] to present all conceivable claims and issues under penalty of having them barred from future proceedings if he fails to present them now." App. 6a. The district court granted our request and ordered Magwood "to present all possible grounds for habeas corpus relief." App. 12a. In a motion for additional time, Magwood acknowledged the court's order and gave his "unqualified promise" to "present every issue he can conceive" in the 1983 Petition. (1983-R: Doc. 77 at 2.)

Magwood ultimately raised nine grounds for relief in the 1983 Petition, none of which challenged his eligibility for the death penalty or the warning he received regarding his death-penalty eligibility. *See Magwood*, 608 F. Supp. at 220. After ordering its own mental evaluation, the district court found that Magwood was sane. *Id.* at 219-20, 224. The court

granted habeas relief, however, finding that, even though Magwood was sane, the state trial court erred when it rejected the statutory mitigating circumstances regarding Magwood's mental condition and his capacity to understand the criminality of his conduct. *Id.* at 224-28. Accordingly, the district court "remanded to the state trial court for resentencing based upon the existence of these four mitigating circumstances (§ 13-11-7(1), (2), (6), and (7)), rather than just the two originally considered." *Id.* at 228.

2. *Circuit Court*: Treating the district court's remand order as a "conditional writ of habeas corpus," the court of appeals affirmed. *See Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986). To comply with the conditional writ, the circuit court ordered the state trial court to conduct a "new sentencing hearing," *id.*, but went on to note that "we do not imply or suggest that the state trial court may not sentence Magwood to death after weighing the four mitigating factors against the aggravating circumstances." *Id.* at 1450. Regarding the unchallenged aggravating circumstance, the circuit court noted that "Ala. Code §13-11-2(a)(5) permits the imposition of the death penalty for 'the murder of any . . . sheriff.'" *Id.* at 1441, n.4.

F. RESENTENCING AND STATE APPEALS: ROUND 2

1. *Resentencing*: In compliance with the conditional writ, the state trial court conducted a hearing in September 1986 to "resentence Magwood in light of two now-established mitigating factors concerning Magwood's mental condition." Pet. App.

103a. Weighing four mitigating factors against the original aggravating factor, the court determined that "the aggravating circumstance of the intentional murder of Sheriff Neil Grantham outweighs all mitigating circumstances." Pet. App. 106a. Accordingly, the trial court again sentenced Magwood to death. *Id.*

Magwood did not challenge his eligibility for the death penalty, or his warning of that eligibility, at resentencing. To the contrary, Magwood acknowledged that "the capital offense itself is an aggravating circumstance and that this court has every right to consider it as an aggravating circumstance." (1997-R: Doc. 17, Tab #R-1 at 17-18.)

2. *Direct Appeal*: Magwood did not challenge his death-penalty eligibility, or his warning of that eligibility, to either state court on direct appeal. Nevertheless, as required by Alabama law, the Alabama Court of Criminal Appeals "review[ed] the propriety of the death sentence." *Magwood v. State*, 548 So. 2d 512, 513 (Ala. Crim. App. 1988). In finding that death was the appropriate sentence, the court noted that the murder of a sheriff was (1) "on its face a capital offense" under the 1975 Code, (2) a "statutory aggravating circumstance, as allowed by *Ex parte Kyzer*," and (3) a crime for which "the death penalty is generally imposed throughout the state." *Id.* The Alabama Supreme Court affirmed. *Ex parte Magwood*, 548 So. 2d 516 (Ala. 1988).

Eight years after his trial, Magwood first challenged his death-penalty eligibility under

Alabama law, and his warning of that eligibility under the federal due process clause, in his petition for a writ of certiorari to this Court. (1997-R: Doc. 17, Tab #R-6 at 11-18.) This Court denied certiorari review. *Magwood v. Alabama*, 493 U.S. 923 (1989).

3. *Post-Conviction*: Magwood filed a state post-conviction petition in June 1990, which he amended seven times over the next two years. The parties disagree on whether Magwood fairly presented a federal due process "fair-warning" claim to the state courts (Magwood's view), as opposed to a challenge against his eligibility for the death penalty under Alabama law (Respondents' view). That argument is not before the Court.

Relevant here, the state trial court held that Magwood's claim of an "illegal death sentence" was meritless, as well as procedurally barred under Alabama law because the claim was available at Magwood's 1981 trial. *Magwood v. State*, 689 So. 2d 959, 976-77, 984 (Ala. Crim. App. 1996). The Alabama Court of Criminal Appeals affirmed. *Id.* at 964-66. That court noted that Magwood's various attacks on his sentence were subject to state law preclusion because they were available at the 1981 trial. *Id.* at 964-65. The court then noted that using the murder of a sheriff as an aggravating circumstance was an "issue [it had] previously decided adversely to [Magwood]" on direct appeal from resentencing. *Id.* at 965. Both the Alabama Supreme Court and this Court denied certiorari review.

G. FEDERAL HABEAS PROCEEDINGS: ROUND 2

1. *District Court*: Magwood simultaneously filed two §2254 petitions on April 23, 1997: one purporting to attack his 1981 conviction, the other purporting to attack his 1986 resentence. Pet. App. 28a. Pursuant to 28 U.S.C. §2244(b)(3), Magwood requested that the circuit court authorize the district court to consider the petition purporting to attack his 1981 conviction. *See In re Magwood*, 113 F.3d 1544 (11th Cir. 1997). The circuit court denied authorization. *Id.* at 1553.

Magwood did not seek authorization to pursue the claims presented in the petition purporting to attack his 1986 resentence ("1997 Petition"). Ten years after Magwood filed the 1997 Petition, the district court granted habeas relief on Magwood's fair-warning claim and his corresponding ineffective assistance of counsel claim.[6] Pet. App. 44a-72a, 82a-89a. Relevant here, the district court noted that, even though Magwood could have raised his fair-warning claim in his 1983 Petition, the claim was not barred as successive under §2244(b)(2) because "the habeas petition on resentencing challenges a different judgment." Pet. App. 65a.

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[6]Respondents unsuccessfully sought a petition for writ of mandamus directing the district court to rule in 2006. (1997-R: Doc. 101.) One year later, Respondents notified the district court that it again would seek mandamus relief if the court did not rule promptly. (1997-R: Doc. 111.) The court granted the writ three months later. (1997-R: Doc. 116.)

2. *Circuit Court*: The Court of Appeals for the Eleventh Circuit reversed. The court unanimously held that Magwood's fair-warning claim was successive under §2244(b)(2).[7] Pet. App. 10a-16a. The court adopted the Second Circuit's reading of §2244(b) that a numerically second petition would be considered a "'first' petition only to the extent that it seeks to vacate the new, amended component of the sentence, and will be regarded as a 'second' petition to the extent that it challenges . . . any component of the original sentence that was not amended." Pet. App. 15a (*quoting Galtieri v. United States*, 128 F.3d 33, 37-38 (2d Cir. 1997)). The court held that Magwood's fair-warning claim was barred under §2244(b) because the claim "was available at his original sentencing" and the claim did not meet either of §2244(b)(2)'s exceptions. *Id.* The court addressed the merits of all claims that originated at Magwood's 1986 resentencing, and in so doing, reversed the district court's finding of ineffective assistance of counsel for failing to raise the fair-warning claim. Pet. App. 16a-22a.

This Court limited certiorari review to the first question raised in Magwood's petition: Did the court of appeals correctly determine that §2244(b)(2) bars review of Magwood's fair-warning claim?

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[7]The circuit court did not address Respondents' additional arguments that Magwood's fair-warning claim was meritless and procedurally defaulted. Pet. App. 6a, n.2.

SUMMARY OF THE ARGUMENT

Federal habeas petitioners are entitled to one, but only one, full and fair opportunity to litigate a claim. When that opportunity ends, the door to habeas review closes. Future attempts to raise a claim that could have been adjudicated in a previous petition are barred as an abuse of the writ. Magwood's fair-warning claim is a classic abuse of the writ via inexcusable neglect. Magwood could have, but did not, raise the claim in his 1983 Petition. That petition was adjudicated in 1986. Thus, Magwood's attempt to litigate the same claim in his 1997 Petition is barred by §2244(b)(2), AEDPA's version of the abuse of the writ doctrine.

Of course, this case presents a wrinkle. Magwood's 1983 Petition achieved limited relief: a resentencing hearing to add two mitigating circumstances to Magwood's sentencing calculus. Section 2244(b)'s plain language does not account for resentencing. It would bar all claims in a numerically "second or successive" petition, even claims novel to the resentencing hearing, absent one of §2244(b)(2)'s exceptions for newly discovered facts or law. Accordingly, in line with its most recent §2244(b) decision, the Court must find an interpretation of §2244(b) that (1) is consistent with its abuse of the writ precedent, which §2244(b)(2) tightened, (2) achieves AEDPA's goals of "comity, finality, and federalism," and (3) avoids "troublesome results." *Panetti v. Quarterman*, 551 U.S. 930, 944-46 (2007) (citations omitted). The Court should

adopt the interpretation applied by the circuits for more than a decade.

1. When faced with a numerically second or successive habeas petition arising after resentencing, the prevailing rule is to focus on the nature of the pleaded claims. 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. If a claim is novel to resentencing, and therefore could not have been raised in a prior habeas petition, it is not barred by §2244(b).

The prevailing rule properly balances competing interests. Limiting preclusion to claims that could have been, or were, previously adjudicated in federal court vindicates AEDPA's goals of "comity, finality, and federalism" *id.* at 945, while avoiding the "troublesome result" of denying a petitioner his one opportunity to adjudicate freshly ripened claims. *Id.* at 946. The prevailing rule also aligns with the Court's historic abuse of the writ and successive petition doctrines, both of which have turned on a habeas petitioner's opportunity to adjudicate claims in a previous petition.

2. Magwood asks the Court to focus solely on the number of paper petitions challenging "the same judgment." But the term "judgment" is foreign to §2244(b)'s text, and Magwood's approach fails each interpretive guideline this Court espoused in *Panetti*. Magwood's "new judgment" theory emasculates §2244(b)(1) and §2244(b)(2) after resentencing, thereby resurrecting all habeas claims that could

have been, or even were, adjudicated in a previous petition. This resurrection result is so "troublesome," *id.* at 946, that Magwood retreats from his own "new judgment" theory by carving a distinction between convictions and sentence that conflicts with the Court's precedent and the realities of capital litigation. Magwood's theory also flouts AEDPA's goals of "comity, federalism, and finality," *id.* at 945, by thrusting States into a second round of federal habeas litigation over claims that could have been, or were, previously adjudicated. And his theory is historically inaccurate, as the abuse of the writ and successive petition doctrines stem from habeas proceedings that did not challenge a judgment of conviction and sentence. Finally, allowing Magwood to adjudicate his abusive claim creates a "procedural anomal[y]," *id.* at 946, when Magwood is compared to six petitioners whose habeas claims this Court barred because they abused the writ in a similar manner. *See Wong Doo v. United States*, 265 U.S. 239 (1924); *Antone v. Dugger*, 465 U.S. 200 (1984); *Woodard v. Hutchins*, 464 U.S. 377 (1984); *Delo v. Stokes*, 495 U.S. 320 (1991); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Burton v. Stewart*, 549 U.S. 147 (2007).

3. The Court can affirm by applying either (a) §2244(b)(2)'s plain language or (b) the prevailing circuit rule. Both methods dictate affirmance because each focuses on whether Magwood had an opportunity to raise his fair-warning claim in his 1983 Petition, and Magwood acknowledges that he did in the question presented.

ARGUMENT

SECTION 2244(b)(2) BARS REVIEW OF MAGWOOD'S FAIR-WARNING CLAIM.

Magwood knew the consequences of his failure to raise all available claims in his 1983 Petition. In September 1983, Respondents requested an "order compelling [Magwood] to present all conceivable claims and issues" in his 1983 Petition, "under penalty of having them barred from future proceedings if he fails to present them now." App. 6a. The district court granted our request, *see* App. 12a, and the federal courts adjudicated every claim that Magwood presented in his 1983 Petition. *See Magwood v. Smith*, 791 F.2d 1438 (1986). Those proceedings concluded with one limited command: Reweigh the same aggravating circumstance against four mitigating circumstances, not two. *Id.* at 1450.

At that point, 24 years ago, Respondents were "entitled to the assurance of finality" on every other issue that ripened during Magwood's 1981 trial, issues such as the validity of Magwood's conviction and his eligibility for the death penalty. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Having once borne the "significant costs of federal habeas review," both Respondents and Sheriff Grantham's family possessed a "compelling" interest not to spend 13 additional years (1997-2010) traveling from federal district court, to circuit court, to this Court, litigating issues that achieved closure in 1986. *Id.* Federalism and comity demanded that, if Respondents were required to return to federal court, the only issues for

debate would be novel to the 1986 resentencing. *See McCleskey v. Zant*, 499 U.S. 467, 492 (1991) ("[I]f reexamination of a conviction in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition.").

Magwood's attempt to revive a claim that ripened in 1981, then soured in 1986, not only tramples our vested interest in finality, it defies 86 years of habeas doctrine. Since their inception, the "abuse of the writ" and "successive petition" doctrines have embodied one overarching principle: A petitioner gets one, but only one, opportunity to litigate a habeas claim. AEDPA strengthened this principle by making its application mandatory and swift. *See* 28 U.S.C. §2244(b); *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

Whether through §2244(b) or the abuse of the writ doctrine, this Court has applied the "one opportunity" principle on six occasions to hold that a claim raised in a numerically second or successive habeas petition was barred when the claim could have been, but was not, raised in a previously adjudicated petition. *See Wong Doo v. United States*, 265 U.S. 239 (1924); *Antone v. Dugger*, 465 U.S. 200 (1984); *Woodard v. Hutchins*, 464 U.S. 377 (1984) (per curiam); *Delo v. Stokes*, 495 U.S. 320 (1991); *McCleskey*, *supra*; *Burton v. Stewart*, 549 U.S. 147 (2007). Magwood belongs on this list because he abused the writ in the same manner: He failed to raise a fair-warning claim in his 1983 Petition; that

petition was adjudicated in 1986; and, he now raises a fair-warning claim in his subsequent 1997 Petition.

Simply put, the door closed on Magwood's fair-warning claim when his first petition was adjudicated in 1986, just as the door closed on similar claims for the petitioners in *Wong Doo*, *Antone*, *Woodard*, *Delo*, *McCleskey*, and *Burton* when their first petitions were adjudicated. AEDPA serves as the door's lock, not its key.

A. SECTION 2244(b) FOCUSES ON THE PRIOR OPPORTUNITY TO RAISE CLAIMS.

The Court can apply §2244(b)(2) to Magwood's 1997 Petition in one of two ways: (1) by its plain language or (2) by treating the term "second or successive" as a "term of art given substance in [the Court's] prior habeas corpus cases." *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). Both methods dictate preclusion of Magwood's fair-warning claim because both inquiries hinge on Magwood's opportunity to raise the claim in his 1983 Petition. Respondents separate the two methods, however, because applying §2244(b)'s plain language to *all* claims in a post-resentencing petition leads to a dubious result.

1. Absent its exception for newly discovered facts or law, which do not apply here, §2244(b) provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed[.]

28 U.S.C. §2244(b)(1), (2) (exceptions omitted). Read plainly, §2244(b)(2) divests federal courts of jurisdiction over Magwood's fair-warning claim because (1) Magwood did not present the claim in his "prior application" (*i.e.* the 1983 Petition); (2) Magwood "presented" the claim in his numerically "second or successive habeas corpus application" (*i.e.* the 1997 Petition); and (3) neither of §2244(b)(2)'s exceptions for new facts or new law applies. Thus, §2244(b)(2) mandates that Magwood's fair-warning claim "shall be dismissed." *Id.* At this point, Respondents would normally argue that AEDPA's plain language ends the matter because federal courts derive their "power to award the writ" of habeas corpus solely from "written law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807).

But we acknowledge a problem. Reading §2244(b) plainly against numerically second petitions that arise after resentencing would bar claims that first ripen at resentencing (unless the claim met one of §2244(b)(2)'s exceptions), and the Court has held that "the statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought

in an application filed when the claim is first ripe." *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). Accordingly, while AEDPA's plain language mandates affirmance here, Respondents follow the Court's lead in *Slack*, *Martinez-Villareal*, and *Panetti* by addressing the phrase "second or successive" as a term of art describing the historic successive petition and abuse of the writ doctrines.[8]

2. If the Court looks beyond §2244(b)'s plain language, the debate centers on how the Court applies the term "second or successive": by counting paper "applications" or judging the prior opportunity to raise "claims." Magwood argues that, even though the Court is not applying §2244(b)'s plain text, it must maintain strict allegiance to the phrase "second or successive habeas corpus application" and count the number of paper applications against "the same judgment." Blue Br. 13. In other words, Magwood argues that §2244(b)(2) should be judicially appended to read:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application [*against the same judgment*] shall be dismissed unless –

[8]To be clear, this case does not involve a *Panetti/Martinez-Villareal* "first ripe" issue. The lower courts adjudicated the merits of Magwood's claims that originated at resentencing, Pet. App. 16a-22a, and the question presented acknowledges that Magwood could have raised his fair-warning claim in his 1983 Petition. Pet. i. Therefore, affirmance on §2244(b)(2)'s plain language is consistent with the Court's precedent.

Under Magwood's theory, if a numerically second petition does not attack "the same judgment," the fact that a pleaded claim was, or could have been, adjudicated in the previous petition is irrelevant under §2244(b). Blue Br. 18.

Respondents believe that the Court should instead focus on the claims pleaded in a numerically second petition; specifically, the opportunity to raise the claims in a previous petition. A claim-focused approach is correct for two reasons.

First, §2244(b) is a claim-focused statute. Claims, not applications, are barred by §2244(b). *See Artuz v. Bennett*, 531 U.S. 4, 9 (2000) (citing §2244(b) to support the statement that "[o]nly individual *claims*, and not the application containing those claims, can be procedurally defaulted"). As the Court noted in *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005), "the 'requirements' of the subsection [§2244(b)] are not applicable to the application as a whole; instead, they require inquiry into specific 'claim[s]'." Furthermore, focusing on claims when applying the successive petition bar comports with similar claim-focused applications of AEDPA. For example, courts judge exhaustion by focusing on the exhaustion of individual claims in the state courts, despite §2254(b)'s text referring to preclusion of the paper "application for a writ of habeas corpus." Claim-focused review also guides the procedural default rule, a defense similar in structure and purpose to the successive petition bar. *See McCleskey*, *supra*, at 493.

Second, the Court applies the claim-focused approach. In *Panetti*, the Court's most recent §2244(b) case, the Court was faced with the same question: how to apply the phrase "second or successive" to a numerically second petition that raised a newly-ripened claim. The Court dove into Panetti's numerical second petition to judge the nature of his claim, concluding that "[t]he statutory bar on 'second or successive' applications does not apply to a *Ford claim* brought in an application when the *claim* is first ripe." *Panetti*, *supra*, at 947 (emphasis added). Panetti's prior opportunity to litigate his individual claim drove the Court's extra-textual inquiry. The same should be true here.

In determining that Panetti's newly ripened claim was not barred as "second or successive," the Court considered several guidelines: (1) the Court's abuse of the writ precedent, (2) AEDPA's goals of "comity, finality, and federalism," and (3) the avoidance of "troublesome results" and "procedural anomalies." 551 U.S. at 944-46. In Part B, we demonstrate how a claim-focused approach comports with each of these factors. In Part C, we show that Magwood's theory conflicts with them all.

B. THE PREVAILING "ONE OPPORTUNITY" RULE PROPERLY APPLIES §2244(b) TO POST-RESENTENCING PETITIONS.

Respondents dub the claim-focused reading of §2244(b) the "one opportunity" rule after Judge Easterbrook's encapsulation of AEDPA's underlying principle: "[T]he idea behind the rules in §2244(b)

and §2255[h] is that a prisoner is entitled to one, but only one, full and fair opportunity to wage a collateral attack." *Beyer v. Litscher*, 306 F.3d 504, 508 (7th Cir. 2002) (brackets omitted).

As its name indicates, the "one opportunity" rule focuses on a petitioner's prior opportunity to litigate his claim(s) in a prior habeas petition. If resentencing occurs between successive habeas petitions, §2244(b) applies accordingly: Any claim in a numerically second or successive petition that could have been, or was, adjudicated in a previous habeas petition is barred, unless it meets one of §2244(b)(2)'s exceptions. Any claim in a numerically second or successive petition that is novel to the resentencing, and therefore could not have been raised in a previous petition, is not barred. If the numerically second petition is "mixed" because it contains at least one successive or abusive claim, then the petition is transferred to the circuit court for authorization under §2244(b)(3). *See* Vol. 28 *Moore's Federal Practice*, §671.10[2][b] (Matthew Bender 3d ed.) (outlining the various transfer rules for petitions that contain "both claims that are successive" and "other claims that could be filed directly in the district court").

By focusing on the prior opportunity to raise a claim, the "one opportunity" rule balances competing interests. The preclusion of claims that either were, or could have been, adjudicated in a previous petition vindicates the States' and victims' interests in finality. Allowing claims novel to resentencing to proceed upholds a petitioner's "one opportunity" to

litigate freshly ripened claims, as mandated by *Martinez-Villareal* and *Panetti*.

1. The Circuits Have Applied The "One Opportunity" Rule To Post-Resentencing Habeas Petitions For More Than A Decade.

Before running *Panetti's* interpretive gauntlet, Respondents dispel Magwood's assertion that the Eleventh Circuit's application of the "one opportunity" rule is somehow "unprecedented, so there is no body of law that illustrates its implications." Blue Br. 28. In addition to the Eleventh Circuit, Respondents have identified six circuit courts that have applied the "one opportunity" rule to post-resentencing §2254 petitions and §2255 motions since AEDPA took effect in 1996: [9]

- *First Circuit*: After vacating the petitioner's original judgment, which resulted in resentencing, the circuit court held that the petitioner's post-resentencing §2255 motion was barred as a "second petition as AEDPA uses that term" because it raised an ineffective assistance of counsel claim that could have been raised in the first petition. *See Pratt v. United States*, 129 F.3d 54, 63 (1st Cir. 1997).

[9]The "second or successive" inquiry applies equally to §2255 motions filed by federal prisoners. *See* 28 U.S.C. §2255(h) (requiring authorization of a "second or successive motion" under §2244(b)).

- *Second Circuit*: After the petitioner's first §2255 motion resulted in a reduction of his sentence, the circuit court held that the petitioner's post-resentencing §2255 motion was barred because it raised previously available challenges to "the conviction or the unamended components of his sentence." *Galtieri v. United States*, 128 F.3d 33, 38 (2d Cir. 1997). Later that year, the circuit court allowed a similar post-resentencing §2255 motion that "[sought] to vacate [the petitioner's] new sentence on grounds opened by the resentencing." *Esposito v. United States*, 135 F.3d 111, 113-14 (2d Cir. 1997).[10]

- *Fourth Circuit*: After a petitioner was resentenced because one of his underlying convictions was vacated, the circuit court held that his post-resentencing §2255 motion was not "second or successive" because the motion "[sought] to raise only those issues that originated at the time of resentencing" and it was the petitioner's "first opportunity to assert new issues which arose during his resentencing hearings." *In re Taylor*, 171 F.3d 185, 187-88 (4th Cir. 1999).

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[10]Magwood relies on *Esposito* as the post-AEDPA case creating a circuit split, *see* Pet. 14-15; Pet. Reply Br. 4-5, Blue Br. 28, n.11, despite *Esposito's* express acknowledgment that "[n]ot every habeas petition that attacks a new and amended judgment is saved from AEDPA's bar on 'second or successive' petitions." *Esposito*, *supra*, at 113. Magwood claims the Second Circuit's decisions turned on an "amended" versus "new" sentence distinction. Blue Br. 28, n.11. This alleged distinction is refuted by the numerous cases cited *infra* at 27-30 that applied the prevailing "one opportunity" rule after the original sentence was vacated and a new judgment entered.

- *Fifth Circuit*: After the petitioner's first §2255 motion resulted in his judgment being re-entered to perfect an out-of-time appeal, the petitioner filed a second habeas petition attacking the effectiveness of trial counsel and new appellate counsel. *See United States v. Orozco-Ramirez*, 211 F.3d 862, 863-64 (5th Cir. 2000). The circuit court held that the IAC claims against trial counsel were "second or successive" because they could have been raised in the first petition. *Id.* at 869. The court held that the IAC claims against appellate counsel were not "second or successive" because they could not have been raised in the first petition. *Id.*

- *Sixth Circuit*: After a §2255 petitioner was resentenced because one of his underlying convictions was vacated, the petitioner filed a second §2255 motion raising only issues that originated at resentencing. *Lang v. United States*, 474 F.3d 348, 350 (6th Cir. 2007). The circuit court held that the claims were not "second or successive," agreeing with its "sister circuits that, where a claim originates at resentencing and could not have been challenged at the original sentencing proceeding, the first §2255 motion challenging that claim is not a 'second or successive' motion." *Id.* at 353.

- *Seventh Circuit*: In *Walker v. Roth*, 133 F.3d 454 (7th Cir. 1997), a §2254 petitioner was resentenced after the district court held that his original sentencing violated due process. The circuit court permitted his second §2254 petition because it solely "challenge[d] aspects of his resentencing." *Id.* at 455. Later, in *Dahler v. United States*, 259 F.3d

763 (7th Cir. 2001) (Easterbrook, J.), the petitioner was resentenced after his first §2255 motion resulted in his original sentence being vacated. Much like Magwood, Dahler argued in his next petition that he was not eligible for recidivist sentencing because the jury had not made that determination. The court held that Dahler's post-resentencing *Apprendi* claim was barred because "the contention he now advances . . . is not something that was introduced by his resentencing in 1998." *Id.* at 764. "The choice between judge and jury . . . was one made in 1995, and nothing changed between the sentencing in 1995 and the resentencing in 1998." *Id.*

Like the Eleventh Circuit here, every circuit court dealing with a numerically second petition that arose after resentencing opened the petition to judge the nature of the claims inside.[11] If a claim could have been, or was, raised in the first petition, it was barred as "second or successive." If a claim originated at resentencing, it was not. *See Dahler*, *supra*, at 765 (noting that, by 2001, the "distinction between challenges to events that are novel to resentencing," and "events that predated the sentencing," had "been adopted by every other circuit that [had] considered the subject"); *see also* 7 W. LaFave, *Criminal Procedure*, §28.9(b), p.294 (3d ed. 2007) ("The bar on successive petitions does not

[11]In an unpublished opinion, the Tenth Circuit has also applied the "one opportunity" rule to bar "three issues [that] could have been raised in [the petitioner's] first §2255 motion," which led to resentencing. *See United States v. Verners*, 49 Fed. Appx. 803, 804-05 (10th Cir. 2002).

apply to a prisoner who is resentenced after filing his first application for relief, and raises only claims that originated at resentencing in his second application"); *Moore's Federal Practice*, *supra*, at §671.10[2][b] ("a second petition following a successful first petition should be treated as a first petition, at least with respect to issues that could not have been raised previously").

Of course, Respondents do not contend that the "one opportunity" rule is correct because the circuits agree. As outlined below, the rule is correct because it meets each of the interpretive factors used by the Court in *Panetti*.

2. The "One Opportunity" Rule Flows From The Historic Abuse Of The Writ And Successive Petition Doctrines.

Like the prevailing "one opportunity" rule, the abuse of the writ and successive petition doctrines and their progeny, the phrase "second or successive," historically focused on a petitioner's prior opportunity to adjudicate claims. *See Panetti*, *supra*, at 943-44 ("The phrase 'second or successive' is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of [AEDPA].")

Congress did not create the phrase "second or successive" from whole cloth in 1996. The phrase appeared in the 1948 version of §2255: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on

behalf of the same prisoner." 28 U.S.C. §2255 (1964 ed.). The Court first used the phrase "second or successive application" in 1963 to describe petitions that fell under its historic abuse of the writ and successive petition doctrines, *see Sanders v. United States*, 373 U.S. 1, 8 (1963), and the term "second or successive petition" still governed the abuse of the writ doctrine when Congress passed AEDPA in 1996. *See* 28 U.S.C. §2254(b) Rule 9(b) (1994 ed.). Accordingly, a proper understanding of the phrase "second or successive" is grounded in the Court's abuse of the writ and successive petition precedent. *See Slack*, *supra*, at 486-87 (stating that "second or successive" is a "term of art given substance in our prior habeas corpus cases").

1. Magwood bases his historical argument on the assertion that the "abuse of the writ doctrine [was] designed to curb repetitive challenges to the *same* judgment." Blue Br. 13. But the Court certainly did not create the abuse of the writ doctrine to curb repetitive attacks on *state* judgments of conviction and sentence. The abuse of the writ doctrine was born in 1924, *see Salinger v. Loisel*, 265 U.S. 224 (1924); *Wong Doo* (1924), *supra*, nearly two decades before the Court first "allow[ed] a final judgment of conviction in a state court to be collaterally attacked on habeas." *Felker*, *supra*, 663 (citing *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942) (per curiam)).

In fact, the successive petition and abuse of the writ doctrines grew out of cases involving prisoners who were *not* attacking judgments of conviction and

sentence. The Court crafted the abuse of the writ doctrine in *Salinger*, which involved a habeas petitioner who was skipping states to avoid extradition, not attacking a judgment of conviction and sentence. *See Salinger*, *supra*, at 225-27 One month after releasing *Salinger*, the Court applied its newly minted rule against a petitioner seeking to avoid deportation, not attacking a judgment of conviction or sentence. *See Wong Doo*, *supra*, at 239.

In *Sanders*, *supra*, the Court set the ground rules for its successive petition and abuse of the writ doctrines. In the process, the Court first used the phrase "second or successive application," along with the terms "first," "second," and "subsequent" applications, to describe the petitions in *Salinger* and *Wong Doo*—again, petitions that attacked custody, but not judgments of conviction and sentence. *Sanders*, *supra*, at 8-10. Accordingly, Magwood's contention that the "abuse of the writ doctrine" and "second or successive concept" were "designed to curb repetitive challenges to the *same* judgment" is a historical fallacy. Blue Br. 13.

2. Instead, the abuse of the writ doctrine, and its progeny, "second or successive application," targeted numerically second (or later) petitions containing claims that could have been raised in earlier petitions. By 1996, the Court had found an abuse of the writ on five occasions. The Court held that Wong Doo's petition abused the writ because he raised a claim in his numerically second petition, even though he had "full opportunity to offer proof" of the same claim in his first habeas proceeding.

Wong Doo, *supra*, at 241. In *Woodard v. Hutchins*, 464 U.S. 377 (1984), the Court found that a second petition was abusive because it raised three claims that "could and should have been raised in [Hutchins'] first petition." *Id.* at 379. In *Antone v. Dugger*, 465 U.S. 200 (1984), the Court found an abuse of the writ when a second petition raised three claims not contained in the first petition. *Id*. at 964-65. In *Delo v. Stokes*, 495 U.S. 320 (1991), the Court found that a claim raised in a petitioner's fourth petition was abusive because the claim "could have been raised in his first petition for federal habeas corpus." *Id.* at 321-22. Finally, in *McCleskey v. Zant*, 499 U.S. 467 (1991), the Court determined that the petitioner abused the writ by raising a claim in his second petition that he could have raised in his first. *Id.* at 497-503. In short, every finding of an abuse of the writ leading up to AEDPA's passage turned on the petitioner's prior opportunity to raise the claims pleaded in his numerically second or later petition, not on the petitioner's judgment status.

Five years before AEDPA's passage, the Court confirmed that "a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice." *McCleskey*, *supra*, at 489. The Court's claim-focused, opportunity-driven definition of an abuse of the writ would have shaped Congress' understanding of the term "second or successive" in 1996. *See Slack*, *supra*, at 486 (stating that "we do not suggest the definition of second or successive

would be different under AEDPA" than under pre-AEDPA law).

The prevailing "one opportunity" rule aligns with the Court's pre-AEDPA definition of an abuse of the writ and the Court's pre-AEDPA application of the doctrine. Magwood's judgment-based reading of §2244(b), which resurrects previously available claims, does not. In fact, if Magwood is correct that current §2244(b) grants petitioners a second opportunity to raise the same claim, then AEDPA seemingly *relaxed* the contemporary abuse of the writ rule. *But see Felker*, *supra*, at 664 (noting that AEDPA added "new restrictions on successive petitions" and "further restricts the availability of relief to habeas petitioners").

3. The "One Opportunity" Rule Aligns With The Court's Post-AEDPA Precedent.

The Court's post-AEDPA precedent interpreting the phrase "second or successive" similarly turns on a petitioner's opportunity to litigate his claims in a previous habeas petition. The Court has applied §2244(b)'s "second or successive" language to numerically second habeas petitions four times since 1996.[12] We start with the cases in which the Court determined that §2244(b) did not bar habeas review.

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[12]Although both cases implicated §2244(b), Respondents do not address the post-AEDPA cases in which a motion did not count as a §2254 petition or §2255 motion. *See Gonzalez v. Crosby*, 545 U.S. 524 (2005) (holding that a Rule 60(b) motion was not the equivalent of a §2254 petition); *Castro v. United*

1. In *Slack v. McDaniel*, 529 U.S. 473 (2000), Antonio Slack dismissed his first "mixed petition" without prejudice pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982), so that he could exhaust his remaining claims in state court.[13] The Court held that Slack's numerically second petition, which was filed after full exhaustion in the state courts, was not "second or successive." *Id.* at 486-87. Central to the Court's decision was that Slack's original mixed petition "[had] been dismissed . . . before the district court adjudicated any claims." *Id.* at 487.

In *Stewart v. Martinez-Villareal*, *supra*, Ramon Martinez-Villareal claimed in his 1993 Petition that he was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). The *Ford* claim was denied as premature, and the remainder of the 1993 Petition was denied. *Id.* at 640-41. After the State secured an execution date, Martinez-Villareal re-raised the claim in his 1997 Petition. *Id.* The Court held that the 1997 Petition was not "second or successive," as "[t]here was only one application for habeas relief [*i.e.* the 1993 Petition];" the district court was required to adjudicate Martinez-Villareal's *Ford* claim "at the time it became ripe;" and, "it [had] not been ripe for resolution until now." *Id.* at 643.

States, 540 U.S. 375 (2003) (rejecting the recharacterization of a Rule 33 motion for new trial as a §2255 motion).

[13]*Slack* arose before AEDPA; accordingly, the Court applied Rule 9(b) and its decision in *McCleskey*. *Slack*, *supra*, at 485-86. Because Rule 9(b) also used the term "second or successive," the pre-AEDPA distinction is not relevant here.

The ripeness of a *Ford* claim similarly drove *Panetti,* 551 U.S. 930. Unlike Martinez-Villareal, Louis Panetti did not raise his *Ford* claim in his first petition, which was adjudicated on the merits. *Id.* at 937-38. After his execution date was set, Panetti filed another §2254 petition, this time raising a *Ford* claim. *Id.* at 938-39. As we have previously noted, the Court's conclusion speaks volumes for the present debate: "[t]he statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application when the claim is first ripe." *Id.* at 947. The Court held that "[t]he statutory bar on 'second or successive' *applications* [did] not apply" to a numerically second petition, but only after the Court looked squarely at the prior opportunity to litigate the *claim* pleaded within. *Id.* (emphasis added).

In short, each time the Court has allowed litigation of a claim pleaded in a numerically second (or later) habeas petition since 1996, the Court's decision focused on the petitioner's opportunity to fully and fairly litigate the claim(s) in his previous petition. The focus on the prior opportunity to litigate claims also explains the Court's decision to bar claims in *Burton v. Stewart, supra*, the post-AEDPA case upon which Magwood primarily relies. *See* Blue Br. 25-27.

2. *Burton* was a natural extension of *Slack*. Unlike Slack, Lonnie Burton chose to forgo his opportunity to dismiss his "mixed petition" under *Rose v. Lundy*, opting instead to press the conviction-related claims in his 1998 Petition while exhausting

his sentencing claims in state court. *Id.* at 151-52. After his 1998 Petition was denied, Burton filed another petition in 2002, which raised the previously unexhausted sentencing claims. *Id.* The Court held that Burton's 2002 Petition was "second or successive," distinguishing *Slack* by noting that Burton's first petition "was adjudicated on the merits." *Id.* at 155. In other words, Burton had the opportunity to litigate both his conviction and sentencing claims in a numerically first petition via dismissal and exhaustion under *Rose v. Lundy*, but he failed to take it.

Magwood places great stock in the Court's discussion of which judgment Burton attacked in his 1998 and 2002 petitions. Blue Br. 26-27. Burton was convicted in 1994 and resentenced twice. Thus, Burton had three distinct judgments: the 1994 judgment (1994 conviction plus 1994 sentence), the 1996 judgment (1994 conviction plus 1996 resentence), and the 1998 judgment (1994 conviction plus 1998 resentence). Burton argued that "petitions challenging new judgments are not second or successive when the claims could not have been brought any sooner," Reply Br. 2, *Burton*, *supra* (No. 05-9222), and that his second (2002) petition was his first opportunity to challenge his 1998 resentence because it was "indisputably his first and only challenge to the 1998 judgment." *Id.* The Court rebuffed Burton's factual assertion, finding that both of Burton's petitions attacked his "1998 Judgment," which consisted of Burton's 1994 conviction and 1998 resentence. *Burton, supra,* at 155-56. Thus, had Burton used *Rose v. Lundy* to dismiss his 1998

Petition without prejudice, his next petition would have presented his one full and fair opportunity to challenge both the 1994 conviction and 1998 resentence.

Contrary to Magwood's suggestion, *Burton* did not answer the question presented here *sub silentio*. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions."). The Court merely responded to Burton's factually and legally incorrect argument by noting that Burton's 2002 petition was the numerically second petition filed after Burton's 1998 resentencing. This is the first case to squarely present the question of whether the first §2254 petition filed after a writ-induced resentencing may contain claims subject to preclusion under §2244(b). And, in line with 86 years of precedent, the Court's answer should turn on Magwood's opportunity to raise his fair-warning claim in his prior petition, which was adjudicated on the merits.

4. The Prevailing "One Opportunity" Rule Vindicates AEDPA's Goals Of Comity, Finality, And Federalism.

One round of federal review of state court judgments "strikes at finality" and federalism. *McCleskey*, *supra*, at 491-92. When that round ends, "having in all likelihood borne for years the

significant costs of federal habeas review, the State is entitled to the assurance of finality." *Calderon*, *supra*, at 556. AEDPA provides that assurance. In essence, §2244(b) serves as a contract that federal courts will not second guess the state courts for a second time on issues that could have been (§2244(b)(2)), or were (§2244(b)(1)), litigated the first time around. The prevailing "one opportunity" rule honors that contract. Magwood's reading of §2244(b), which resurrects claims that achieved closure after round one, evokes a "[p]erpetual disrespect for the finality of convictions [that] disparages the entire criminal justice system." *McCleskey*, *supra*, at 492.

This case provides a prime example of finality's significance. Had Magwood timely raised his fair-warning claim in 1983, we would not be here. If Magwood's claim had been denied in 1986, this second round of habeas litigation would be over. If Magwood's claim had merit, his death sentence would have been declared void, and the State and federal courts would have avoided the "significant costs" of the past 13 years of federal habeas litigation. *Id.* at 490-91. Either way, the parties would have closure.

The desire for closure is not novel to parties. Sheriff Grantham's family shares our finality interest: "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an

interest shared by the State and the victims of crime alike." *Calderon*, *supra*, at 556 (citations omitted). Magwood began filing habeas petitions nine days before his execution date in 1983. Nearly 27 years later, Sheriff Grantham's family has been unable to "move forward knowing the moral judgment will be carried out." *Id.* Worse yet, the sheriff's family has spent the past 13 years waiting on the resolution of a claim that demanded closure in 1986.

Congress intended §2244(b) to promote finality by limiting habeas petitioners to "one bite at the apple." *See, e.g.,* 141 Cong. Rec. S7803, S7832 (1995) (statement of Sen. Biden) ("[We] want to . . . limit the number of petitions that can be filed. So essentially you get one bite out of the apple."); 141 Cong. Rec. S7803, S7877 (1995) (statement of Sen. Dole) ("[B]y limiting condemned killers convicted in State or Federal court to one Federal habeas petition—one bite of the apple—these landmark reforms will go a long, long way to streamline the lengthy appeals process[.] . . . It is dead wrong that we must wait 8, or 9, or even 10 years before a capital sentence is actually carried out. And, of course, it is terribly unjust to the innocent victims.") The prevailing "one opportunity" rule vindicates AEDPA's purpose. Magwood's rule ignores it.

5. Magwood's Hypothetical Scenarios Are Unavailing.

Respondents briefly address Magwood's hypotheticals. First, both Magwood and his *amici* express concerns that, should a federal court grant sentencing relief on one claim in a first petition, but

leave the remaining claims unadjudicated, the petitioner would lose his ability to re-raise the unadjudicated claims in a post-resentencing petition. Blue Br. 31; NACDL Amicus Br. 10-11, 15-16. Respondents assume, however, that because the claims were not fully adjudicated in the first petition, both the "one opportunity" rule and the Court's decisions in *Slack* and *Martinez-Villareal* would prevent the previously raised, but unadjudicated, claims from being considered "second or successive" in a post-resentencing petition. *See Slack*, *supra*, at 486-87 (holding that the dismissal of claims without prejudice does not count against petitioner); *Martinez-Villareal*, *supra*, at 643-45 (holding that a court must consider a *Ford* claim raised in a second petition that was dismissed on ripeness grounds in the first petition).

Second, Magwood fears that the prevailing "one opportunity" rule allows the state court to make the same mistake twice; that is, the state court may violate the instructions contained in the conditional writ without ramifications under §2244(b). Blue Br. 31-32. Respondents assume that state judges will follow instructions imposed by federal courts in a conditional writ. But if they do not, we also assume 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 to have accrued after that mandate was issued, thereby allowing the new claim to be raised in a numerically second petition as freshly ripened under the "one opportunity" rule and *Panetti*. *See Panetti*, *supra*, at 947 (holding that a claim in a numerically second

petition is not barred by §2244(b) when it is "first ripe").

Third, Magwood raises the following scenario: (1) A habeas petitioner fails to raise a claim that the admission of an affidavit violates the Confrontation Clause but receives habeas relief on another guilt-phase claim; (2) before the resulting retrial, this Court releases *Crawford v. Washington*, 541 U.S. 36 (2004); (3) the State ignores *Crawford* and again admits the affidavit at retrial; and (4) the petitioner files a numerically second §2254 petition raising a Confrontation Clause claim for the first time. Blue Br. 30-31. Initially, Respondents note that a full-blown retrial is a different animal than the weighing of two additional mitigating circumstances, which is the question presented. Retrials result in new juries, new questions, and new closing arguments; thus ripening new and distinct claims. So, while the "one opportunity" rule would apply to new trials, its application would be sparse.

Frankly, it is not clear how this 'non-retroactive change in the law before retrial' scenario would play out. Respondents have discovered no cases on point, nor has Magwood cited any. Courts may treat the convergence of new law and new facts stemming from a new trial as creating a "new claim;" thereby giving the petitioner his one opportunity to litigate the claim.

But if this Court (or any court) held that the claim was previously available and is therefore barred by §2244(b)(2), two facts must be

remembered. First, Congress can limit the scope of the writ, *see Bollman*, *supra*, at 94, and Congress intended to preclude previously available habeas claims that are based on a non-retroactive change in the law. *See* 28 U.S.C. §2244(b)(2)(A). Second, AEDPA does not eliminate review of the hypothetical claim, just a second round of *federal habeas* review of the claim. If a state trial court ignores *Crawford* during a retrial, the defendant still has recourse on direct appeal in the state appellate courts, and then in this federal Court, which sits in judgment free from the constraints of AEDPA. So, even if §2244(b) applies to Magwood's hypothetical, it does not "immunize blatant constitutional transgressions at resentencing (or retrials) from federal scrutiny." Blue Br. 14. It merely prevents the hypothetical petitioner from embarking on a second, years-long trek through the federal court system to raise a claim that he could have raised in his first §2254 petition. That was precisely Congress' intent.

Again, it is telling that Magwood relies on hypotheticals, not actual examples, despite application of the prevailing "one opportunity" rule for more than a decade. The sky has not fallen, and should unforeseen issues arise under §2244(b), the federal courts will handle them on a case-by-case basis as they have done since AEDPA's passage. The legitimate fear in this case is the ramification of Magwood's reading of §2244(b): resurrection of every claim that was, or could have been, adjudicated in a first habeas petition. *See infra* at 46-52.

C. MAGWOOD'S READING OF §2244(b) IS NOT COMPELLED BY AEDPA'S TEXT, AND IT DEFIES AEDPA'S PURPOSE.

To hide the abusive nature of his fair-warning claim, Magwood argues that §2244(b) is only triggered by attacks on "the same judgment," Blue Br. 13, a term foreign to §2244(b)'s text. In other words, Magwood claims that §2244(b) should read

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application [*against the same judgment*] shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application [*against the same judgment*] shall be dismissed unless –

28 U.S.C. §2244(b)(1), (2) (exceptions omitted). Under Magwood's amended statute, "[w]hen a new judgment is entered, the counting of petitions begins afresh." Blue Br. 13. Accordingly, if a numerically second petition attacks a new judgment, "a court has no statutory authority to dismiss any particular 'claim' on the ground that it is somehow 'second or successive.'" Blue Br. 18.

Magwood, however, repudiates his own theory. Magwood's argument hinges on the notion that "a habeas application challenging a new judgment for

the first time cannot be second or successive in any respect." Blue Br. 16. Yet, Magwood acquiesces that any post-resentencing claim "that challenged his *conviction* would be successive." Blue Br. 21, n.8. This concession erodes Magwood's argument in two ways. First, as *Burton* made clear, a petitioner's underlying conviction constitutes part of the new judgment. *Burton*, *supra*, at 155-57. Therefore, Magwood is conceding that a significant portion of a new judgment is subject to §2244(b)'s reach. Second, to weed out conviction-based claims, a court must open a petition attacking a new judgment to review the nature of its claims. This claim-by-claim review contradicts Magwood's theory that reviewing the claims inside a post-resentencing petition is barred by §2244(b). Blue Br. 18. Magwood likely washes his hands of the conviction-portion of his "new judgment" theory because he recognizes the theory's pernicious result: the resurrection of previously-available habeas claims. *See Panetti*, *supra*, at 946 (warning against "an interpretation of [§2244(b)] that would 'produce troublesome results'").

1. Magwood's Theory Resurrects Claims That Could Have Been, Or Even Were, Adjudicated In A Previous Petition.

Under Magwood's theory, resentencing emasculates both §2244(b)(1) and §2244(b)(2) because both provisions use the term "second or successive habeas corpus application." With §2244(b)(1) neutralized, a petitioner can resurrect every claim that was denied in his first habeas petition. Absent §2244(b)(2), the petitioner can add

countless more claims that could have been, but were not, raised in his first petition.

This result may seem genteel presently because only one of Magwood's abusive claims made it to this Court.[14] But that is *this* case. Future cases will, no doubt, be different. For example, adopting Magwood's "new judgment" theory would allow petitioners to supplement two claims that originated at resentencing with 50 successive and abusive claims. Worse yet, a resentenced petitioner could choose to complete a second loop through the federal courts without raising a single claim that originated at resentencing. In fact, under Magwood's theory, a post-resentencing petitioner could simply staple a new cover page with the words, "§2254 Petition Attacking New Judgment," to his previously adjudicated petition and §2244(b) would have no application. While the odds are that the State would ultimately prevail against this tactic, the State would spend years litigating the successive and abusive claims at each federal court level, where the court of appeals would have conclusively rejected the claims in 30 days under §2244(b)(3).

Rebooting any habeas proceeding after resentencing is a "troublesome result." *Panetti*, *supra*, at 946. But it is devastating in capital cases, AEDPA's primary target. *See Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA

[14]To be clear, the resurrection of even one abusive or successive claim violates §2244(b) and is an affront to AEDPA's goals of "comity, finality, and federalism." *Panetti*, *supra*, at 945.

to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases."). Capital habeas proceedings are the most burdensome and time-consuming cases in federal court. It is not even close. When the Federal Judicial Center reassigned case weights in 2004, it determined that an average capital habeas proceeding requires 5,685 "judge minutes" to pass through the district court alone. Federal Judicial Center, *2003-2004 District Court Case Weighing Study*, App. X, Table 1. Not only did this number top the list, it exceeded the amount of time that judges required to dispose of the second (Environmental Matters) and third (Civil RICO) most burdensome cases combined—by 35%. *Id.* Where an average federal proceeding weighs 1.0, a capital habeas proceeding weighs 12.89. *Id.* This gross disparity is easily explained. A 2007 study revealed that the average capital petitioner raises 28 claims; 5% of petitioners raise more than 88 claims; and multiple petitioners have raised over 200 claims in a single habeas petition. Nancy J. King, *et. al*, *Final Technical Report: Habeas Litigation in U.S. District Courts*, (2007), available at http://www.ncjrs.gov/pdf files1/nij/grants/219559.pdf. In cases involving resentencing, Magwood essentially asks the Court to multiple these numbers by two.

Magwood attempts to mitigate this pernicious result in two footnotes. Neither provides relief.

1. As previously mentioned, *supra* at 45-46, Magwood retreats from his theory that any attack on a new judgment is immune from §2244(b) by asserting that claims within a post-resentencing

petition "that challenged [a petitioner's] *conviction* would be successive." Blue Br. 21, n.8. But Magwood's "new judgment" theory is not so easily jilted. Magwood's proposed distinction between conviction and sentence is both legally wrong and practically unworkable in death penalty cases.

In *Burton*, the Court rebuffed the contention that the new judgment stemming from resentencing includes the new sentence but not the original conviction. *Burton*, *supra*, at 155-57; *see*, *e.g.*, *Ferreira v. Sec'y, Dep't. of Corr.*, 494 F.3d 1286, 1292 (11th Cir. 2007) (applying *Burton* to restart AEDPA's one-year statute of limitation for all claims upon resentencing because "the judgment to which AEDPA refers is the underlying conviction and most recent sentence"). In fact, Magwood's *amici* acknowledge the rule: "[T]his Court has held in a number of different contexts that a criminal judgment includes both a conviction and associated sentence." NACDL Amicus Br. 7. In the light of *Burton*, if the first petition attacking a new judgment is immune from §2244(b), as Magwood claims, then resentencing resurrects successive or abusive claims against both the conviction and the sentence.

Furthermore, the wall Magwood erects between claims attacking a capital conviction and its corresponding death sentence is quite permeable. Take this case for example. The two mitigating circumstances added to Magwood's 1986 resentence were based on the guilt-phase testimony of four mental health experts, so every guilt-phase claim concerning those witnesses relates to Magwood's

1986 resentence to the same extent his fair-warning claim does. And, as is often the case, Magwood's underlying conviction also serves as his aggravating circumstance; therefore, *every* claim attacking Magwood's 1981 conviction challenges his 1986 resentence to the same extent his fair-warning claim does.[15] Simply put, federal courts cannot easily divorce many claims attacking a capital conviction from claims attacking its corresponding death sentence. Often, they are inextricably intertwined.

Magwood knows this. He argued it below. The circuit court refused to authorize Magwood's *Brady* claim regarding the guilt-phase mental health experts under §2244(b)(3). *In re Magwood*, *supra*, at 1548-49. Undaunted, Magwood argued to the district court that the same *Brady* claim was nonetheless available to attack his 1986 resentence because the claim affected his penalty-phase defense. That argument spawned five supplemental briefs and took more than three years to resolve. (1997-R: Docs. 69, 71, 72, 75, 76, 78, 79, 112.)

2. To salvage §2244(b)(1)'s bar against previously adjudicated claims, Magwood claims that "ordinary *stare decisis* and collateral estoppel . . .

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[15]"[T]wo-thirds of the death sentences imposed in Alabama involve cases of robbery/murder." *Brown v. State*, 11 So. 3d 866, 933 (Ala. Crim. App. 2007). Murder during a robbery is also an aggravating circumstance. *See* Ala. Code §13A-5-49(4) (2006). Accordingly, even if Magwood's 'conviction versus sentence' dichotomy was legally correct, an overwhelming majority of Alabama's capital petitioners could resurrect their guilt-phase claims by arguing (like Magwood) that it affects the reapplication of their aggravating circumstance.

apply with full force in habeas proceedings." Blue Br. 24-25, n.10. Magwood is mistaken; §2244(b)(1) exists precisely because such doctrines do not prevent the re-litigation of habeas claims.

Res judicata in its broadest sense (*i.e.* claim preclusion and issue preclusion) never has applied to habeas proceedings. *See Salinger*, *supra*, at 230. In fact, the abuse of the writ doctrine was born when the Court held in *Salinger* that *res judicata* did not prevent a habeas petitioner from raising "the same grounds" rejected in his first petition. *Id.* As for *stare decisis*, it is not an "inexorable command," *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), nor does it apply horizontally one-way, vertically either way, or at all in the majority of habeas cases that end with an unpublished opinion. *See*, *e.g.*, Eleventh Circuit Rule 36-2 ("unpublished opinions are not considered binding precedent"). At best, *stare decisis* functions as a screen door, where §2244(b) stands as a steel barricade.

Magwood also misses AEDPA's bigger picture. Even if either doctrine ultimately prevented habeas relief on a successive claim, the State would have spent years litigating the doctrine's applicability, its exceptions, and likely the merits of the underlying claim. Congress' intent for AEDPA was to eradicate successive claims in 30 days to avoid such protracted litigation. *See* 28 U.S.C. §2244(b)(3).

In sum, Magwood's reading of §2244(b) lacks a limiting principle that prevents the resurrection of a petitioner's prior habeas case. This result poses a

serious threat to the States and to the federal courts because, while Magwood concedes his guilt-phase and previously adjudicated claims to this Court, future petitioners (especially capital petitioners) will not share his benevolence.

2. Magwood's Theory Wrongly Adds Language To Congress' Chosen Text.

Again, AEDPA's primary purposes were "to further the principles of comity, finality, and federalism" and "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford*, *supra*, at 206. Congress did not contradict itself by compelling the resurrection of stale claims with §2244(b)'s text.

Magwood bases his application-focused, "new judgment" reading of §2244(b) on two textual points. First, §2254 petitions are filed by state prisoners who are "in custody pursuant to the judgment of a state court." 28 U.S.C. §2254(a). Second, "the words 'application' and 'claim' in AEDPA mean different things" and the term "second or successive" modifies "application," not "claim." Blue. Br. 17-18.

It is true that §2254 petitioners are in custody pursuant to a judgment. But it does not follow that Congress therefore modified §2244(b)'s phrase "second or successive habeas corpus application" with "challenging the same judgment," any more than Congress intended §2244(b)'s benchmark for counting petitions to be "challenging the same custody" or "seeking similar relief" or "by the same person" or "in the same case," each of which would

cut against Magwood in this case.[16] Congress chose to follow the phrase "second or successive" with "habeas corpus application under Section 2254" and nothing more.

Like Magwood, Respondents can cherry-pick language from outside §2244(b)(2) to support a foreign benchmark. Take "challenging the same custody" for example. Section 2244(a) states that an "application for a writ of habeas corpus" need not be entertained "if it appears that *the legality of such detention* has been determined . . . on a prior application for a writ of habeas corpus." 28 U.S.C. §2244(a) (emphasis added). Similarly, the Court concluded *Burton* by stating that "Burton neither sought nor received authorization from the Court of Appeals before filing his 2002 petition, a 'second or successive' petition *challenging his custody*, and so the District Court was without jurisdiction to entertain it." *Burton*, *supra*, at 157 (emphasis added). In fact, if §2254(a) provided the benchmark for counting petitions in §2244(b), "custody," not "judgment," would be the stronger candidate. Section 2254 petitions may be considered "only on the ground that [the petitioner] *is in custody* in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(a) (emphasis added). Being held "pursuant to the judgment of a State court" is merely §2254's "status requirement," not its "substance requirement." James S. Liebman

[16]Unlike his judgment, Magwood's custody did not change as a result of the 1986 resentencing. Respondents have maintained "the same custody" of Magwood since his conviction in 1981.

& Randy Hertz, *Federal Habeas Corpus Practice and Procedure*, §8.1 at p.391 (5th ed. 2005). That is why §2254 petitions not only attack a petitioner's judgment of conviction and sentence, but sometimes "the duration of sentence . . . and the conditions under which that sentence is being served," including administrative rules such as "the basis of parole" and "good time" credits.[17] *Id.* at §9.1, p.475-81.

Respondents' point, of course, is not to advocate adding "the same custody," or any other phrase, to §2244(b)'s text. Congress chose the phrase "second or successive habeas corpus application under Section 2254," and this Court has warned against reading words "into AEDPA's provisions governing second or successive petition and motions (28 U.S.C. §§2244(b) and 2255[h]) [when] Congress did not put those words there." *Mayle v. Felix*, 545 U.S. 644, 661 n.6 (2005). We simply note that, by utilizing Magwood's textual approach, a case can be made for benchmarks other than "the same judgment."

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[17]Courts faced with applying §2244(b)'s "second or successive" language to numerically second §2254 petitions challenging the administration of the petitioner's sentence have applied the prevailing "one opportunity" rule. *See*, *e.g.*, *Benchoff v. Colleran*, 404 F.3d 812 (3d Cir. 2005) (holding that petitioner's "parole claim" was barred under §2244(b) because it "had ripened" by the time he filed his first §2254 petition); *James v. Walsh*, 308 F.3d 162 (2d Cir. 2002) (holding that §2254 claim challenging the recalculation of the petitioner's sentence was not barred under §2244(b) because it "did not exist" when the first petition was filed).

As for Magwood's contention that the term "second or successive" modifies the word "application," thereby forcing the Court to focus solely on Magwood's paper application, Blue Br. 17-18, Magwood cannot have it both ways. If the Court must confine itself solely to the text of §2244(b), then the Court must limit the term "second or successive" to numerically second petitions, just as §2244(b)'s text dictates. Only when the Court steps outside of AEDPA's plain text does "second or successive" become a "term of art" for interpreting §2244(b)'s preclusive effect. *Slack*, *supra*, at 486. At that point, the Court clearly demonstrated in *Panetti* that it is the nature of the *claims*—specifically, the prior opportunity to raise the claims—that counts. *See also Pace*, *supra*, at 416 ("the 'requirements' of the subsection [§2244(b)] are not applicable to the application as a whole; instead, they require inquiry into specific 'claim(s)'").

3. Magwood's Reliance On *Richmond v. Lewis* Is Unavailing.

Magwood grounds his "new judgment" theory in two of this Court's cases. Blue Br. 25-27. Respondents addressed Magwood's reliance on the post-AEDPA case, *Burton v. Stewart*, *supra* at 37-39. We now address Magwood's pre-AEDPA precedent, *Richmond v. Lewis*, 506 U.S. 40 (1992).

The simple response to *Richmond* is that the Court's decision is inapposite here. *Richmond* held that an aggravating factor was unconstitutionally vague and nothing more. The question of whether Richmond's claim was barred by former §2244(b) was

not before the Court because (1) before AEDPA, §2244(b) was non-jurisdictional and had to be pleaded by the State, *see McCleskey*, *supra*, at 494 and (2) §2244(b) was not raised during briefing. Magwood's contention that the Court's "decision to grant review" indicates that Richmond's claim did not violate §2244(b) is contradicted by this Court's decision to grant review in *Burton*, *supra*, only to vacate on §2244(b) grounds after the State argued §2244(b) during merits briefing. *See id.* at 157.

Willie Richmond's case is not devoid of value, however. Like Magwood, Richmond was resentenced to death after gaining habeas relief. *See Richmond v. Ricketts*, 774 F.2d 957, 959 (9th Cir. 1985). Like Magwood, Richmond raised "new and different grounds" in his post-resentencing habeas petition, which the district court dismissed as abusive because the new claims were "known to Richmond and should have been alleged in the first petition." *Id.* at 961. Richmond's claims were reinstated only because the Ninth Circuit interpreted this Court's 1963 *Sanders* decision to require "a conscious decision deliberately to withhold [the claims]." *Id.* (citing *Sanders*, *supra* at 18). One year after the Ninth Circuit's 1990 ruling, however, this Court held that "[a]buse of the writ is not confined to instances of deliberate abandonment." *McCleskey*, *supra*, at 489. "[A] petitioner may abuse the writ by failing to raise the claim through inexcusable neglect." *Id.*

As a result, if *Richmond* sheds any light on this case, it serves as evidence that district courts were applying the "one opportunity" rule to post-

resentencing capital habeas petitions *before* AEDPA. And the *Richmond* district court's application of today's prevailing rule was reversed only because the circuit court misread this Court's abuse of the writ precedent.

* * *

In summary, Magwood seeks to replace the prevailing application of §2244(b) with a theory that is not compelled by AEDPA's plain language and fails the interpretive factors this Court espoused in *Panetti*. Magwood's assertion that the abuse of the writ doctrine "was designed to curb repetitive challenges to the *same* judgment" is historically inaccurate. Blue Br. 13. Magwood's reading of §2244(b) turns AEDPA's goal of promoting "comity" and "federalism" on its head by spawning a second round of federal courts second guessing the state courts on the same issue. *Panetti*, *supra*, at 945. And Magwood's rule flaunts "finality" by creating the "troublesome result" of lengthy habeas proceedings on claims that could have been, or even were, adjudicated years earlier. *Id.* at 945-46.

D. Magwood's Fair-warning Claim Is Barred Under The Prevailing "One Opportunity" Rule.

Should the Court apply the prevailing "one opportunity" rule, Magwood's framing of the question presented resolves the pertinent issue. Magwood acknowledges in the question presented that he "could have challenged his previously imposed (but

now vacated) sentence on the same constitutional grounds" in his 1983 Petition. Pet. i.

Magwood's fair-warning claim ripened at his 1981 trial, when the State chose to rely on the murder of a sheriff as its aggravating circumstance pursuant to the 1975 Alabama Code. Thus, as he admits, Magwood could have raised a fair-warning claim at his 1981 trial and in his 1983 Petition. Because Magwood had a full and fair opportunity to adjudicate his fair-warning claim in his 1983 Petition—and, in fact, was ordered to do so (App. 12a)—the court of appeals properly dismissed Magwood's fair-warning claim under §2244(b)(2). Pet. App. 15a-16a.

* * *

In July, Magwood will commence his thirtieth year on Alabama's death row. He will have spent more than 13 years of that time (~45%) in a second stint in federal court, primarily litigating a claim that should have been adjudicated in 1986. Adoption of the prevailing "one opportunity" rule cannot guarantee the prevention of similar delays in all resentencing cases. But one thing is certain: If the Court adopts Magwood's resurrection rule, future capital petitioners will re-litigate their habeas case after resentencing to clog the federal courts. In those cases, Magwood's delay will shift from being the exception to the norm. AEDPA does not dictate that result.

CONCLUSION

The Court should affirm the decision of the court of appeals.

Respectfully submitted,

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February 3, 2010

APPENDIX

[18]*See* 1983-R: Doc. 57 at 1-2

[19]*See* 1983-R: Doc. 74 at 3

28 U.S.C. §2244(a)

(a) 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 a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

28 U.S.C. §2244(b)

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

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

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

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

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

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. §2255(h)

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BILLY JOE MAGWOOD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 83-H-760-N
	)	
FRED SMITH, Commissioner, Alabama Department of Corrections, and WILLIE JOHNSON, Warden, Holman Unit,	)	
	)	
Respondents.	)	

MOTION TO COMPEL PETITIONER
TO PRESENT ALL CONCEIVABLE
CLAIMS OR HAVE THEM BARRED

Respondents move this Honorable Court to enter an order requiring petitioner to present through amendment to his petition by a date certain any and all conceivable grounds for habeas corpus relief he wishes to present, with notice that failure to raise a ground by that date will be deemed a waiver of his right to raise it. In support of this motion, respondents show the following:

1. The interests of all parties concerned with this case dictate that the validity of petitioner's conviction and sentence be fully litigated in as expeditious a manner as possible and that piecemeal litigation of claims and issues be avoided. The best way to ensure this result is through an order compelling petitioner to present all conceivable claims and issues under penalty of having them barred from future proceedings if he fails to present them now.

2. Such an order was entered by Judge Hand of the Southern District in the habeas corpus proceeding involving John Louis Evans, III. In his speech to the Eleventh Circuit Conference in May of this year, Justice Powell praised Judge Hand's order as a "constructive step" and as "commendable." 69 A.B.A.J. 1000 (August, 1983) [Ex. A, hereto].

3. Since that time Judge Hand has also entered such an order in *Ritter v. Smith*, No. 83-0457-H-S (S.D. Ala. May 11, 1983) (unpublished order) [Ex. B, hereto], and Judge Pointer entered such an order in *Raines v. Smith*, No. 83-P-1080-S (N.D. Ala. May 18, 1983) (unpublished order) [Ex. C, hereto].

WHEREFORE, for these reasons, respondents respectfully request this Honorable Court to enter the requested order.

Respectfully submitted,

s/ Charles Graddick [by] EdC
CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

s/ Ed Carnes
ED CARNES
ALABAMA ASSISTANT
ATTORNEY GENERAL

s/ P. David Bjurberg
P. DAVID BJURBERG
ALABAMA ASSISTANT
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ADDRESS OF COUNSEL:

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205/834-5150

CERTIFICATE OF SERVICE

I certify that I have served a copy of this motion on petitioner by mailing a copy of it to his attorney, postage prepaid and properly addressed to him as follows:

Hon. J. L. Chestnut, Jr.
Chestnut, Sanders, Sanders & Turner
P.O. Box 1305
Selma, Alabama 36701

Done this the 28th day of September, 1983.

s/ Ed Carnes
ED CARNES
ALABAMA ASSISTANT
ATTORNEY GENERAL

[Exhibits to motion omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BILLY JOE MAGWOOD,	)	[Clerk's file
	)	stamp
Petitioner,	)	omitted]
	)	
vs.	)	No. 83-H-760-N
	)	
FRED SMITH,	)	
Commissioner, Alabama	)	
Department of	)	
Corrections, and WILLIE	)	
E. JOHNSON, Warden,	)	
Holman Unit,	)	
	)	
Respondents.	)	

ORDER

This case, which involves a prisoner on death row who is seeking a writ of habeas corpus, comes before the Court on respondents' motion to waive the requirement that petitioner exhaust his state remedies. Petitioner currently is appealing the Coffee County Circuit Court's denial of his petition for a writ of error coram nobis. Respondents wish to proceed with petitioner's federal court action simultaneously with petitioner's state court appeals. For the reasons stated below, this Court will not accept respondents' waiver at this time.

The Eleventh Circuit recently made clear that this Court has discretion to accept or reject respondents' waiver of the exhaustion requirement of 28 U.S.C. § 2254. *Thompson v. Wainwright*, No. 82-6052 (11th Cir. Sept. 6, 1983). Respondents clearly have the power to waive exhaustion, *id.*; Ala. Code § 36-15-21, and this Court need not accept that waiver. *Thompson v. Wainwright*, *supra*, at 5023. Although the Eleventh Circuit did not establish any set standards to guide this Court in the exercise of its discretion, several considerations emerge from the *Thompson* opinion. The development of a factual record in the state courts will aid the federal court in its review. Initial resort to state procedures also may obviate the need for federal review because petitioner may succeed in state court. The federal court also may consider whether extensive fact finding is involved, how long a delay exhaustion will entail, and whether unresolved issues of state law exist. *Id.*

The Court does not agree with respondents' argument that it may reject their waiver only while petitioner pursues trial level, as opposed to appellate level, state court review. Initially the Court notes that the Eleventh Circuit does not seem to have made the distinction that respondents urge. *Id.* at 5017. More importantly, although the Alabama appellate courts are unlikely to aid this Court by making further fact findings, the other federalism concerns cited by the *Thompson* court remain operative at the state appellate level.

Those other concerns persuade the Court that it should not accept respondents' waiver at this time. Respondents argue that petitioner's appeal has no chance of success. Petitioner has appealed the state circuit court's refusal to suspend his death sentence due to his present insanity. Respondents argue, with some justification, that Ala. Code § 15-16-23 permits no appeal from such a decision. Petitioner, however, states that he will challenge the constitutionality of the "no appeal" provision. The Court notes that the Alabama courts have as yet had no opportunity to examine § 15-16-23, and believes that they should have such an opportunity before this Court proceeds with its determination. Petitioner also is appealing the circuit court's denial of his claim of ineffective assistance of counsel. In particular, petitioner points to the failure to inquire into prospective jurors' racial views on voir dire in a case presenting the potential for racial bias. The Court is not prepared to characterize this claim as futile.

The Court is mindful, of course, of the state's interest in curtailing the long and costly process of appeals in capital cases. The parties have estimated that the state courts will take roughly one year to reach a final ruling on petitioner's error coram nobis petition. After that, the lengthy federal process awaits. If and when the Court of Criminal Appeals rules against petitioner, the Court will consider any arguments respondents wish to present in support of their waiver.

It is hereby ORDERED that respondents' motion to waive exhaustion is denied at this time.

It is further ORDERED that respondents' motion to compel petitioner to present all conceivable claims is granted. Petitioner is hereby ORDERED to present all possible grounds for habeas corpus relief within thirty days of the date of this order. Petitioner will be deemed as of that date to have waived the right to present any ground not yet presented.

DONE this 27th day of October, 1983.

s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE