Case No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JULIE L. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET. AL.
Petitioner,
v.
ARTHUR THOMPSON
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court resolve the conflict among the circuits and decide the question expressly left open in Magwood v. Patterson, 561 U.S. 320 (2010), of whether a subsequent habeas petition challenging the undisturbed conviction would be second or successive after the State imposes only a new sentence following a remand for a resentencing?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Julie L. Jones, Secretary of the Florida Department of Corrections, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the circuit court vacating the dismissal of Respondent's petition for writ of habeas corpus is an unpublished opinion but is available at Thompson v. Fla. Dep't of Corr., 606 Fed.Appx. 495 (11th Cir. 2015), and is included as Appendix A. (A-3). The order of the circuit court denying rehearing is unpublished and is included as Appendix B (A-28). The order of the district court dismissing the petition for writ of habeas corpus is unpublished and is included as Appendix C. (A-29). The order of the district court denying the motion for relief from judgment or order is unpublished and is included as Appendix D. (A-36) The report and recommendation by the magistrate judge is also unpublished and is included as Appendix E. (A-40)

STATEMENT OF JURISDICTION

The opinion in which the Eleventh Circuit granted Respondent Arthur Thompson's appeal and vacated the dismissal of Thompson's habeas corpus petition was issued on March 30, 2015. A motion for rehearing and rehearing en banc was filed April 20, 2015, and the Eleventh Circuit denied rehearing and rehearing en banc on August 21, 2015. The instant petition for writ of certiorari is being filed on or before November 19, 2015. The petition is timely. See Sup. Ct. R. 13.3 (... if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains

an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.); 28 U.S.C. § 2101(c).

Jurisdiction exists pursuant to 28 U.S.C. § 1254(1). See also Wright & Moore, Federal Practice & Procedure § 4034, 4036 (noting the "appellate jurisdiction of the Supreme Court extends to virtually every case that comes into a federal court" and observing that "once a case has come to be in a court of appeals, the Supreme Court may grant certiorari to review interlocutory decisions or procedural rulings, and may even grant review before the court of appeals has taken any action at all."); Pure Oil Co. v. Suarez, 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474 (1966)(certiorari granted to determine whether decision below was inconsistent with a decision of this Court and to resolve a conflict among the circuit courts); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 514, 82 S.Ct.519, 7 L.Ed.2d 483 (1962)(one of traditional functions of this Court is to resolve and accommodate diversities and conflicts occurring among courts of the eleven federal circuits).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The bar against successive petitions for writ of habeas corpus enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), is set forth in 28 U.S.C. § 2244(b), which provides in pertinent part:

> (1) A claim presented in a second 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 whole, would be sufficient to establish by clear and convincing

> evidence that, but for constitutional error, no reasonable fact finder 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.

***

(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.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent, Arthur Thompson, was convicted in 1991 of the first degree murder of Solange Boulianne on March 22, 1989, as well as an associated burglary with an assault and a robbery. The facts of this case are recounted in the Eleventh Circuit's opinion on appeal. Thompson v. Fla. Dep't of Corr., 606 Fed.Appx. 495 (11th Cir. 2015). Respondent was sentenced as an habitual offender for all three crimes. For the murder, Respondent was sentenced to life in prison, with a mandatory minimum sentence of 25 years; for the burglary, Respondent was sentenced to life in prison; and for the robbery, Respondent was sentenced to thirty years, all sentences to run consecutive.

Respondent's convictions and sentences were affirmed on direct appeal on March 17, 1993. Thompson v. State, 615 So. 2d 170 (Fla. 4th DCA 1993). After various postconviction proceedings, he filed his first federal habeas corpus petition in the Southern District of Florida in case number 00-6868-CV, containing eight challenges to his convictions. This petition was denied on the merits on May 31, 2001, and no appeal was taken.

On or about September 11, 2006, Respondent filed a state court motion to correct sentence asserting that the trial court erred in sentencing him to habitual offender sentences pursuant to Hale v. State, 630 So. 2d 521 (Fla. 1993), which proscribes consecutive habitual offender sentences. In response, the trial court deleted the habitual

offender classification on all three counts, and reduced the thirty year sentence for the robbery to the statutory maximum of fifteen years, but left the consecutive sentencing scheme in place. Respondent appealed and on June 25, 2008, the Fourth District Court of Appeal remanded for further proceedings, indicating that the trial court had to give reasons to justify what was now a departure sentence of life on the burglary charge. Thompson v. State, 987 So. 2d 727 (Fla. 4th DCA 2008).

On October 6, 2011, the trial judge, after pronouncing reasons for the upward departure, sentenced Respondent once more to life in prison for the murder and burglary and to fifteen years for the robbery; the life sentences were to run consecutive but the fifteen year sentence was to run concurrent to the life sentence for burglary. Respondent appealed, alleging the sentences violated Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). On May 1, 2013, the Fourth District Court of Appeal affirmed. Thompson v. State, 113 So. 3d 17 (Fla. 4th DCA 2013).

In the interim, Respondent filed another collateral attack in state court, on or about February 2, 2012, alleging newly discovered evidence that police officers perjured themselves in depositions and at trial. That motion was denied by the trial court, and the Fourth District Court of Appeal affirmed on March 28, 2013. Thompson v. State, 110 So. 3d 467 (Fla. 4th DCA 2013).

Respondent filed his second federal habeas petition in the district court on November 1, 2013. In this petition, Petitioner alleged five grounds for relief: that police officers lied in his case, that trial counsel was ineffective for not discovering the lies, that counsel was also ineffective for not arguing insufficiency of the evidence, that counsel was ineffective for failing to object to a "stealth" jury instruction, and that his sentence violated Apprendi. The district court judge denied relief on December 9, 2013.

The district court found that the petition was not successive.

> In Magwood v. Patterson, 130 S. Ct. 2788, 2802 (2010), the United States Supreme Court found that a collateral attack, after a resentencing, was not barred as a successive petition, but Magwood was not challenging his underlying conviction. Here, Thompson is challenging his underlying convictions, not the resentencing that occurred in 2011. See, Suggs v. U.S., 705 F.3d 279 (7th Cir.) cert. denied, 133 S. Ct. 2339 (2013). However, in an analogous case, the Eleventh Circuit has found that a defendant is entitled to one bite of the apple per judgment. Campbell v. Sec'y, D.O.C., 447 Fed. Appx. 25 (11th Cir. 2011). Although this court is more persuaded by the reasoning in Suggs, it will follow the non-binding ruling of

> the Eleventh Circuit's unpublished opinion in Campbell and find that this collateral attack is not barred as successive and that this court has jurisdiction to consider this collateral attack. That aspect of Judge White's report is not approved.

(Appendix D A-33-34)

The district court found the issues pertaining to the conviction were time barred and meritless, however.

> … this collateral attack is time-barred. The Eleventh Circuit now follows a claim by claim approach in determining timeliness. Zack v. Turner, 704 F.3d 917 (11th Cir. 2013). Under AEDPA, Thompson's conviction became final on the issues raised in this federal petition on April 23, 1993[] when he had not filed a habeas petition. Certainly, more than one year of un-tolled time elapsed before this petition was filed. Arguably, the resentencing in 2011 re-started the one year statute of limitations, but only as to that sentencing issue. No basis for equitable tolling has been advanced. Under 28 U.S.C. § 2244(d)(1)(D), the perceived, newly discovered evidence was not discovered through the exercise of due diligence, as Thompson cites to

> newspaper articles from 2002. Moreover, the newly discovered evidence was merely of an impeaching nature, was not material, and would not have affected the outcome of the case. Additionally, no Brady violation has been shown. U.S. v. Lee Vang Lor, 706 F. 3d 1252, 1259 (10th Cir. 2013) pet. filed (2013). Finally, no prejudice has been shown. U.S. v. Olsen, 704 F. 3d 1172, 1187 (9th Cir. 2013).

(Appendix D at A-34)(footnote omitted). Accordingly, the district court dismissed the petition.

Respondent appealed to the Eleventh Circuit. Following briefing by the parties, the Eleventh Circuit issued an unpublished opinion on March 30, 2015: Thompson v. Fla. Dep't of Corr., 606 Fed.Appx. 495 (11th Cir. 2015). The Eleventh Circuit ruled that the petition was not a second or successive petition:

> The Supreme Court in [Magwood v. Patterson, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010)] held that, "where ... there is a new judgment intervening between two habeas petitions, an application challenging the resulting new judgment is not second or successive" for purposes of the restrictions on second or successive habeas petitions in 28 U.S.C. § 2244(b). 561 U.S. at

> 341–42, 130 S.Ct. at 2802 (citation and quotation omitted). In Magwood, the state prisoner's second habeas petition challenged only his new sentence, and the Supreme Court expressly left open the question of whether a subsequent petition challenging the undisturbed conviction would be second or successive after the State imposes only a new sentence. Id. at 342, 130 S.Ct. at 2802–03.
>
> This Court decided that question in [Insignares v. Sec'y, Fla. Dep't of Corr., 755 F.3d 1273 (11th Cir. 2014)], holding that, "when a habeas petition is the first to challenge a new judgment, it is not 'second or successive,' regardless of whether its claims challenge the sentence or the underlying conviction." 755 F.3d at 1281 (emphasis added). This Court noted, however, that "[w]hile such a petition is not subject to AEDPA's restrictions on 'second or successive' petitions, AEDPA's other limitations still apply," including for instance procedural-default rules and, as to previously decided claims, the law-of-the-case doctrine. See id. at 1281 n. 9.

(Appendix B at A-23)

The Eleventh Circuit also rejected the district court's application of the claim by claim approach

to timeliness, stating that the district court had wrongly applied Zack. The circuit court ruled that, by virtue of Respondent's re-sentencing, his "judgment" became final less than one year before he filed his second petition for habeas corpus in the Southern District of Florida, and therefore, the petition was timely. The appellate court accordingly vacated the district court's dismissal of the petition and remanded for further proceedings consistent with the opinion.

Petitioner moved for rehearing and rehearing en banc on April 20, 2015. The Eleventh Circuit denied rehearing and rehearing en banc without comment on August 21, 2015. Petitioners now seek this Court's review of the Eleventh Circuit's order reinstating Respondent's petition.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AND DECIDE THE QUESTION EXPRESSLY LEFT OPEN IN MAGWOOD V. PATTERSON, 561 U.S. 320 (2010), OF WHETHER A SUBSEQUENT HABEAS PETITION CHALLENGING THE UNDISTURBED CONVICTION WOULD BE SECOND OR SUCCESSIVE AFTER THE STATE IMPOSES ONLY A NEW SENTENCE FOLLOWING A REMAND FOR A RESENTENCING.

The Eleventh Circuit abused its discretion by rejecting the contention that the petition was an improper second or successive petition and, thereby, permitting the respondent to attack his convictions, as well as his sentences, merely because the respondent had been re-sentenced. While Petitioner has no objection to the respondent being permitted to seek review of a new sentence imposed during a resentencing proceeding, Petitioner does object to the respondent being permitted, for a second time, to attack convictions which were never vacated and are now more than twenty years old. There is a significant conflict between the Eleventh Circuit's decision and the decisions of the Seventh Circuit on this issue regarding whether a petitioner's attempts to attack his convictions following a resentencing proceeding are second or successive. This Court should grant review to resolve this conflict among circuits. See

Sup.Ct.R. 10 (explaining that a conflict among the circuits or with a state court of last resort may be a basis for granting certiorari review).

Importance of the issue

This Court has left open the question of whether a defendant's second habeas petition, filed after a defendant has been resentenced, can be successive where the defendant challenges **the conviction in addition to, or instead of, the new sentence**. The closest this Court has come to discussing the issue is in Magwood v. Patterson, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010), where this Court concluded that the defendant's petition challenging his resentence was not a second or successive petition because Magwood's resentencing resulted in a new judgment and the petition in question was the "first" application/petition challenging the new judgment. But this Court did not, in Magwood, address the question of whether an application filed after a new sentence which challenges the conviction in addition to, or instead of, the new sentence is improperly successive **as regards the challenges to the conviction**.

The instant case presents a situation, aspects of which are recurring repeatedly throughout the United States and which thereby merit this Court's attention. See, e.g., Kramer v. U.S., 797 F.3d 493 (7th Cir. 2015)(§ 2255 petition was second or successive where it challenged conviction and sentence on one count after conviction and sentence on a separate count was vacated); In re Brown, 594 Fed.Appx. 726 (3d Cir. 2014)(second § 2254 petition

filed after one conviction was vacated and defendant was re-sentenced on remaining convictions was not unauthorized second or successive petition despite fact that it challenged convictions rather than new sentences); In re Parker, 575 Fed.Appx. 415 (5th Cir. 2014)(fact that judgment was amended as result of initial § 2255 petition was not sufficient to render it a new intervening judgment where, after correction of sentences, overall sentence remained the same; petition was successive); Insignares v. Sec'y, Fla. Dep't of Corr., 755 F.3d 1273, 1281 (11th Cir. 2014)(§ 2254 petition was not second or successive even though petitioner challenged conviction itself after being re-sentenced); Suggs v. U.S., 705 F.3d 279 (7th Cir.), cert. denied, 133 S. Ct. 2339 (2013) (§ 2255 petition was second or successive where it challenged a conviction after a sentence was vacated), Wentzell v. Neven, 674 F.3d 1124 (9th Cir. 2012)(§ 2254 petition was not second or successive because it was first petition challenging amended judgment of conviction, despite fact that judgment was amended only as regards one of the convictions and sentences and second petition challenged only the convictions and sentences which remained intact); In re Lampton, 667 F.3d 585, 589–90 (5th Cir.2012)(§ 2255 petition was second and successive despite assertion that it was the first petition following the initial § 2255 petition proceeding in which the district court vacated one of his convictions and sentences while leaving the others intact); In re Martin, 398 Fed. Appx. 326 (10th Cir. 2010)(ruling § 2254 petition

successive and Magwood inapplicable where amendment of judgment was merely to correct clerical error and no "resentencing" was held); Johnson v. U.S., 623 F.3d 41 (2d Cir. 2010)(§ 2255 petition was not second or successive where it attacked remaining convictions and sentences after one of petitioner's convictions and sentences was vacated). These courts have interpreted Magwood in a variety of different ways in order to reaching decisions on the issue of successiveness. The conflict inherent in the different approaches of circuits is most clearly expressed in the difference between Suggs and Insignares.

The issue raised herein is of critical importance to the States because it impacts the finality of state criminal convictions. It undermines comity for Congress to enact a statute of limitations for habeas review of state convictions and to specify limits on second or successive petitions and then have the federal courts undo these procedural bars. The Eleventh Circuit's position on this issue, and on the claim by claim approach to the timeliness of a petition, essentially means that a state court conviction can never truly be considered final so long as the possibility exists that the defendant may be resentenced.

As this Court has acknowledged, the stated purpose of the one year statute of limitations "quite plainly serves the well-recognized interest in the finality of state court judgements." Duncan v. Walker, 533 U.S. 167, 179, 121 S.Ct. 2120, 2128, 150 L.Ed.2d 251 (2001); see also Jones v. United States, 304 F.3d 1035, 1039 (11th Cir. 2002)(signal

purpose of AEDPA time limit is finality of state court convictions). The AEDPA's limitation on the successiveness of petitions serves much the same purpose.

As can be seen from the significant split between the Seventh Circuit and the Eleventh Circuit and other circuits and the difference in rationale between the circuits, this issue has percolated enough. This Court will certainly have the benefit of several points of view and approaches to this issue.

Additionally, the conflict is not resolving itself. Judge Fay of the Eleventh Circuit has even invited this Court to address this issue. See Insignares v. Sec'y, Fla. Dep't of Corr., 755 F.3d 1273 (11th Cir. 2014). As the Eleventh Circuit has explained, it feels bound to follow its own precedent. Therefore, the conflict will remain until resolved by this Court. This Court should grant review of this important issue.

Conflict with another circuit on the issue of successiveness

The Eleventh Circuit's opinion is also in conflict with the opinion of another district on the issue of successiveness.

In the district court below, the magistrate judge recommended Respondent's petition be dismissed as an unauthorized and improperly filed "second application," pursuant to the Antiterrorism and Effective Death Penalty Act, which became effective on April 24, 1996. The district court reluctantly rejected the magistrate judge's

conclusion that the petition was successive. The judge stated that he was more persuaded by the reasoning in Suggs v. U.S., 705 F.3d 279 (7th Cir.), cert. denied, 133 S. Ct. 2339 (2013), but felt that he had to follow the Eleventh Circuit's ruling in the unpublished case of Campbell v. Sec'y, D.O.C., 447 Fed. Appx. 25 (11th Cir. 2011). As the district court recognized, Suggs is indeed in conflict with the decision of the Eleventh Circuit in the unpublished Campbell case and in Insignares v. Sec'y, Fla. Dep't of Corr., 755 F.3d 1273 (11th Cir. 2014), a subsequent case published by the Eleventh Circuit on the same issue.

Under the Act, 28 U.S.C. § 2244(b) provides in part:

> (1) A claim presented in a second 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 whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder 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.

***

(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.

Thus, before a habeas petitioner may file a second or successive petition in a district court, he must apply to the appropriate court of appeals for an order authorizing the district court to consider the application. See Burton, 549 U.S. at 152-53 (citing 28 U.S.C. § 2244(b)(3)(A)). This provision "creates a 'gatekeeping' mechanism for the consideration of second or successive applications in district court." See Felker v. Turpin, 518 U.S. 651, 657, (1996).

Due to the fact that Respondent previously filed a petition in the district court which addressed the same underlying state conviction and which was addressed and denied on the merits, all of the claims relating to the conviction (as opposed to the sentence) would clearly constitute a "second application." As such, the State submits that, prior to filing the petition, Respondent should have filed a motion in the Eleventh Circuit requesting authorization for the district court to consider the application. However, Respondent never filed any such motion.

As a result, the district court was without jurisdiction to consider the petition and the habeas petition should have been dismissed for failing to comply with 28 U.S.C. § 2244(b)(3)(A), as to those claims which attack his conviction. See Hubbard v. Campbell, 379 F.3d 1245 (11th Cir. 2004); Felker, 101 F.3d at 660-661.

> Additionally, ... dismissal of a first habeas petition for untimeliness

> presents a "permanent and incurable" bar to federal review of the underlying claims. See, e.g., Murray v. Greiner, 394 F.3d 78, 81 (2d Cir.2005). We therefore hold that dismissal of a section 2254 habeas petition for failure to comply with the statute of limitations renders subsequent petitions second or successive for purposes of the AEDPA, 28 U.S.C. § 2244(b).

McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009).

It is true that in Magwood v. Patterson, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010), this Court concluded that Magwood's petition challenging his resentence was not a second or successive petition because Magwood's resentencing resulted in a new judgment and the petition in question was the "first" application/petition challenging the new judgment. This Court reversed based on its analysis of the term "second or successive" as contained in § 2244(b)(1). However, the facts of the instant case differed significantly from Magwood. That is, in Magwood, this Court specifically addressed the question of whether a first application challenging a new sentence in an intervening judgment is second or successive. But this Court did not address the question of whether an application filed after a new sentence which challenges the conviction in addition to, or instead of, the new sentence is improperly successive as regards the challenges to

the conviction.

Although Respondent here, like the petitioner in Magwood, filed his new petition after being re-sentenced, the claims raised in Magwood's new petition addressed only the sentence, which was "new," and the new petition was thus considered a first application. But, in the instant case, as distinct from Magwood, all but one ground of the second petition challenged the same state court conviction that was the basis of his previous petition, **and the challenges to the conviction could all have been raised previously.** Only one ground of the respondent's new petition at bar challenged the respondent's corrected sentence or its validity.

At one point in the Magwood opinion, this Court explained:

> This is Magwood's *first* application challenging that intervening judgment. The errors he alleges are *new*. It is obvious to us—and the State does not dispute—that his claim of ineffective assistance at resentencing turns upon new errors. But, according to the State, his fair-warning claim does not, because the state court made the same mistake before. We disagree. **An error made a second time is still a new error.** That is especially clear here, where the state court conducted a full resentencing and reviewed the aggravating evidence afresh. See Sentencing Tr., R. Tab 1, at R–25

("The Court in f[or]mulating the present judgment has considered the original record of the trial and sentence .... The present judgment and sentence has been the result of a complete and new assessment of all of the evidence, arguments of counsel, and law" (emphasis added)).13

13. Cf. Walker v. Roth, 133 F.3d 454, 455 (C.A.7 1997) ("None of these new claims were raised in his first petition, **nor could they have been; [the petitioner] is attempting to challenge the constitutionality of a proceeding which obviously occurred after he filed, and obtained relief, in his first habeas petition**").

Magwood, 130 S. Ct. at 2801 and n13 (emphasis added). Clearly, in Magwood, the state court made a **new mistake at resentencing** albeit the fact that it was the same mistake made previously and, therefore, the second petition addressing the **second** time this mistake was made was not a successive petition.

In the instant case, the state court did not repeat any alleged error pertaining to the petitioner's conviction because the original conviction remained intact during the second round of state court proceedings. Because the trial court did not repeat any error pertaining to the petitioner's conviction, and because the alleged errors pertaining to the

conviction which the respondent raised in his second § 2254 petition were errors that could have been raised in the original § 2254 petition, these errors pertaining to the conviction were not **new** errors, as required by Magwood. They were therefore successive.

Footnote 16 of the opinion in Magwood recognized that:

> Several Courts of Appeals have held that a petitioner who succeeds on a first habeas application and is resentenced may challenge only the "portion of a judgment that arose as a result of a previous successful action." Lang v. United States, 474 F.3d 348, 351 (C.A.6 2007) (citing decisions); see also Walker v. Roth, 133 F.3d 454, 455 (C.A.7 1997); Esposito v. United States, 135 F.3d 111, 113-114 (C.A.2 1997).

Magwood, 130 S. Ct. 2083 n.16.

However, the Magwood Court did not explicitly resolve "whether this interpretation of Section 2244(b) would allow a petitioner who obtains a conditional writ as to his sentence to file a subsequent application challenging not only his resulting, new sentence, but also his original, undisturbed conviction." Magwood, 130 S.Ct. at 2083 n.16. Yet, this Court in footnote 16 did acknowledge that there could indeed be limitations on what could be challenged in a new petition imposed after resentencing and this Court,

significantly, did not reject or overrule these cases.

As the district court judge recognized in the case at bar, the circuit court had considered in Campbell v. Sec'y, D.O.C., 447 Fed. Appx. 25 (11th Cir. 2011), whether Magwood permits a petitioner who receives an intervening judgment to attack the unaltered prior conviction in addition to the new sentence. In that case, Campbell filed a habeas petition attacking a judgment shortly after he received a reduced sentence. This new petition was denied as second or successive because Campbell had filed a habeas petition prior to the sentence reduction. The case reached the Eleventh Circuit on the petitioner's Rule 60(b)(4) motion for relief from the dismissal order. The Eleventh Circuit first noted it had previously ruled that "'[t]he writ and AEDPA' are 'focused on the judgment which holds the petitioner in confinement,'" and that "'the judgment to which AEDPA refers is the underlying conviction and most recent sentence that authorizes the petitioner's current detention.'" Id. at 27 (quoting Ferreira v. Dep't of Corr., 494 F.3d 1286, 1292-93 (11th Cir. 2007)). The circuit court noted that this view had found support in the only two sister circuits to have addressed this issue at that time. Id. at 28, referring to Johnson v. United States, 623 E.3d 41, 45-46 (2d Cir. 2010) (holding that, between Magwood and another Supreme Court ruling that judgments included both the adjudication of guilt and the sentence, '[i]t follows that, where a first habeas petition results in an amended judgment, a subsequent petition is not successive regardless of whether it challenges the

conviction, the sentence, or both"); and Martin v. Bartow, 628 F.3d 871, 877-78 (7th Cir. 2010) (observing that Magwood permitted challenges that could have been raised previously and was not limited to resentencing). The circuit court accordingly held that Magwood applied to the facts of Campbell's case and remanded for reconsideration of the merits of the motion in light of Magwood.

Following the issuance of Magwood, the Seventh Circuit issued Suggs v. U.S., 705 F.3d 279 (7th Cir.), cert. denied, 133 S. Ct. 2339 (2013), which was in conflict with Campbell. In Suggs, the Seventh Circuit noted that the Supreme Court in Magwood "left open the question of whether a motion following a resentencing is 'second or successive' where it challenges the underlying conviction, not the resentencing." Suggs, 705 F.3d at 284. The Seventh Circuit accordingly followed its own precedent and held that where a petitioner did not claim any errors, new or repeated, occurred in resentencing, and only claimed errors pertaining to the underlying conviction, the petition was a second or successive petition. Suggs, 705 F.3d at 284-285.

Subsequent to the issuance of Suggs, the Eleventh Circuit published the Insignares opinion. In Insignares, the Eleventh Circuit indicated that it felt compelled to follow its prior precedent in Ferreira. Accordingly, the Eleventh Circuit held, based on Ferreira, that "there is only one judgment, and it is comprised of both the sentence and the conviction." Insignares, 755 F.3d at 1273. Re-sentencing results in a new judgment and "when a

habeas petition is the first to challenge a new judgment, it is not 'second or successive,' regardless of whether its claims challenge the sentence or the underlying conviction." Id.

But, Judge Fay wrote a concurring opinion, noting that he wanted to write:

> …separately to express some doubt and concern about how we should interpret the opinion of the Supreme Court in Magwood v. Patterson, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010). It is clear that Magwood does not alter our opinion and holding in Ferreira v. Secretary, Department of Corrections, 494 F.3d 1286 (11th Cir.2007). **However, there is language in Magwood that indicates to me that the Supreme Court may well take a different tack should it deal with a case like this one.** In response to the dissenters, Justice Thomas goes to some lengths to emphasize: "This is Magwood's first application challenging that intervening judgment. The errors he alleges are new. It is obvious to us—and the State does not dispute—that his claim of ineffective assistance at resentencing turns upon new errors." Magwood, 561 U.S. at 339, 130 S.Ct. at 2801. That is not the situation with Insignares. There is nothing new in his petition attacking his new judgment. Instead,

> he raises exactly the same issues he raised in his earlier application. **Consequently, except for the intervening "new judgment," we are dealing in this case with an otherwise clear abuse of the writ.**
>
> When the Supreme Court has a case exactly like this one, we will know the answer. Until then, we are bound by our precedent in Ferreira.

Insignares, 755 F.3d at 1273.(emphasis added).

The Eleventh Circuit relied on Insignares to find that the petition filed by Respondent in the instant case was not a second or successive petition. Thompson, 606 Fed.Appx. at 505. But Respondent submits that, it is indeed a second or successive petition, and that the Eleventh Circuit's conclusion to the contrary runs afoul of the prohibitions against piecemeal litigation contained in the AEDPA. Cf. Burton, 549 U.S. at 154 (purpose of exhaustion requirement and AEDPA is to reduce piecemeal litigation and streamline federal habeas proceedings).

Subsequent to the issuance of the Insignares opinion, and the issuance of the opinion in the instant case, the Seventh Circuit issued Kramer v. U.S., 797 F.3d 493 (7th Cir. 2015), in which the Seventh Circuit followed Suggs and found that a § 2255 petition was second or successive where it challenged the conviction and sentence on one count after the conviction and sentence on a separate count was vacated. Clearly, the conflict

between the Seventh and Eleventh Circuits is continuing.

Although the conflict between the Seventh and Eleventh Circuits is the most distinct and pronounced, several other circuits have issued opinions which also seem to conflict with the Eleventh Circuit's approach in Insignares and in the instant case. For example, in In re Lampton, 667 F.3d 585, 589–90 (5th Cir.2012), the petitioner filed a second § 2255 petition following the initial § 2255 petition proceeding in which the district court entered a judgment which vacated one of his convictions and sentences while leaving the other convictions and sentences intact. The Fifth Circuit ruled that, where no amended judgment of conviction was entered and no new sentence was imposed, "an application challenging the resulting new judgment is not 'second or successive'" within the meaning of the statute." Lampton, 667 F.3d at 588. Therefore, Lampton's second petition was successive.

Similarly, in In re Parker, 575 Fed.Appx. 415 (5th Cir. 2014), the petitioner's judgment was amended as result of the petitioner's initial § 2255 petition. The petitioner then filed a second petition. The Fifth Circuit held that the fact that the judgment was amended as a result of the first petition was not sufficient to render the amended judgment a new intervening judgment where, after correction of the petitioner's sentences, the overall sentence remained the same. The Fifth Circuit therefore held that the petition was successive.

Further, in In re Martin, 398 Fed. Appx. 326 (10th Cir. 2010), the Tenth Circuit ruled that the petitioner's § 2254 petition was successive and Magwood was inapplicable where amendment of judgment was merely to correct a clerical/typographical error in the judgment of conviction and no "resentencing" was held.

As is evident, the federal courts are taking different approaches, under different rationales, and reaching different results. In this most critical area for the States in addressing federal habeas litigation, it is time for resolution of the confusion. This Court should accept Judge Fay's invitation, issued in Insignares, to take up this important issue which impacts a multitude of cases nationwide.

Abuse of discretion with regard to both issues

The Eleventh Circuit abused its discretion in the instant case. This Court has held that circuit courts abuse their discretion when they act in a manner that is inconsistent with the policies embodied in the AEDPA. Gonzalez v. Crosby, 545 U.S. 524, 533 (2005)(discussing the prior holding of Calderon v. Thompson, 523 U.S. 538 (1998) where this Court found a circuit court abused its discretion by *sua sponte* recalling the mandate in a capital federal habeas case because such actions were inconsistent with the policies embodied in AEDPA.); Bell v. Thompson, 545 U.S. 794 (2005)(finding a circuit court abused its discretion by delaying the issuance of its mandate in a capital federal habeas case). Here, the Eleventh Circuit abused its discretion in

finding that the habeas petition filed in the Southern District was not successive. This impinges on a key provision of the AEDPA – the bar against improperly filed successive petitions. If this Court does not grant review, this Court will be placing its imprimatur on the Eleventh Circuit's disregard of the prohibition against piecemeal litigation.

This Court should grant review of this important issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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