No. 15-689

IN THE

Supreme Court of the United States

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

ARTHUR THOMPSON,
Respondent.

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

BRIEF IN OPPOSITION

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JANUARY 22, 2016

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QUESTION PRESENTED

Under 28 U.S.C. § 2244(b), a federal court must dismiss any claim presented in a "second or successive habeas corpus application" unless the habeas petitioner obtains leave to file from the appropriate court of appeals. In *Magwood v. Patterson*, 561 U.S. 320 (2010), this Court determined that where a second-in-time habeas corpus application is filed after resentencing, and the application asserts both claims that arose upon resentencing and challenges to the sentence that could have been raised previously, § 2244(b)'s jurisdictional bar does not apply. This Court held that "AEDPA's text commands a * * * straightforward rule: where * * * there is a new judgment intervening between the two habeas petitions, an application challenging the resulting new judgment is not 'second or successive' at all." *Id.* at 341-42 (internal quotation marks and citation omitted).

The question presented is:

Whether a second-in-time habeas petition filed after resentencing and the entry of a new judgment, and asserting both claims that arose upon resentencing and challenges to the prisoner's original conviction, is "second or successive" under § 2244(b).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Respondent Arthur Thompson obtained *de novo* resentencing after filing a successful collateral challenge to his sentence in state court. It is undisputed that a new judgment resulted. He then filed a second-in-time habeas corpus application in federal district court. In it, he asserts constitutional claims challenging both his new sentence and his original conviction.

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") requires that "second or successive" habeas applications be dismissed unless specified conditions are met. 28 U.S.C. § 2244(b). This Court held in *Magwood v. Patterson* that, for the purpose of determining whether this jurisdictional bar applies, "the existence of a new judgment is dispositive." 561 U.S. 320, 338 (2010). This Court specifically rejected Alabama's argument that only claims related to a resentencing should be excepted from the requirements of § 2244(b); such a claim-by-claim rule, the Court explained, would "rewrite the statute." *Id.* at 334-35.

Since *Magwood*, *no* court of appeals has held that a habeas petition like Respondent's is subject to AEDPA's jurisdictional bar. Petitioner nevertheless asks this Court to grant certiorari on this splitless question and to adopt the claim-based analysis that *Magwood* rejected. The petition for certiorari should be denied.

STATEMENT

1. Under § 2244(b), a federal court must dismiss any claim presented in a "second or successive habeas corpus application" unless the habeas petitioner

obtains leave to file from the appropriate court of appeals. 28 U.S.C. § 2244(b)(1)-(3). As this Court has explained, the term "second or successive" does not apply to every habeas application filed after an initial application has been decided, but rather is a "term of art." *Magwood*, 561 U.S. at 332 (citing *Slack v. McDaniel*, 529 U.S. 473, 486 (2000)).

Specifically, in *Magwood*, this Court considered whether a second-in-time petition filed by a state prisoner after he had been resentenced was "second or successive" within the meaning of § 2244. The petitioner, Billy Joe Magwood, asserted two claims pertaining to his death sentence: one that arose for the first time upon his resentencing, and one that he could have raised—but did not—before his resentencing. *See* 561 U.S. at 329. Alabama argued that the petition should be evaluated claim by claim, so that "the phrase 'second or successive' would apply to any claim that the petitioner had a full and fair opportunity to raise in a prior application," but "would *not* apply to a claim that the petitioner did *not* have a full and fair opportunity to raise previously." *Id.* at 335. This Court disagreed.

Rejecting the State's claim-based approach, this Court held that "AEDPA's text commands a * * * straightforward rule: where * * * there is a new *judgment* intervening between the two habeas petitions, an application challenging the resulting new judgment is not 'second or successive' at all." *Id.* at 341-42 (internal quotation marks and citation omitted; emphasis added). It therefore did not matter that Magwood could have raised one of his sentencing challenges in his prior petition. "[T]he existence of a new judgment is dispositive." *Id.* at 338.

This Court reserved decision on a different scenario raised by the State: whether a second-in-time habeas petition is "second or successive" if it is filed after resentencing and challenges both the prisoner's new sentence and his original, undisturbed *conviction*. *Id.* at 342. This Court noted, however, "We base our conclusion on the text, and that text is not altered by consequences the State speculates will follow in another case." *Id.*

2. In 1991, Respondent Arthur Thompson was convicted by a Florida court of one count of first-degree murder, one count of burglary with assault or battery, and one count of robbery. Pet. App. 4. The trial court found him to be a habitual felony offender under state law, a designation that allowed the imposition of an above-guidelines sentence. *See Thompson v. State*, 987 So. 2d 727, 728 (Fla. Dist. Ct. App. 2008) (per curiam). The court sentenced him to consecutive life sentences for the murder and burglary convictions and an additional consecutive 30-year sentence for the robbery conviction. Pet. App. 4. The life sentence for his burglary conviction was above-guidelines. Pet. App. 5.

In June 2000, after exhausting state remedies, Respondent filed his initial habeas petition under 28 U.S.C. § 2254. That petition was denied in May 2001. Pet. App. 5-7.

In September 2006, Respondent filed a motion in state court to correct his sentence under Fla. R. Crim. P. 3.800(a). He argued that under applicable state law, his habitual felony offender designation was improper, and his sentences for burglary and robbery therefore could not run consecutively. Pet. App. 7.

The state trial court agreed in part, deleted his habitual felony offender designation from the judgment, and reduced his robbery sentence to 15 years, but it did not hold a resentencing hearing. Pet. App. 8. The Florida appellate court reversed and remanded, holding that once the habitual felony offender designation was deleted, there was no basis for Respondent's above-guidelines burglary sentence. *Thompson*, 987 So. 2d 727. The appellate court ordered a *de novo* resentencing hearing in which the trial court was required to give reasons justifying any above-guidelines sentence. *Id.* at 728.

In October 2011, on remand, the trial court vacated Respondent's 1991 sentence. Pet. App. 9. It then entered three orders imposing new sentences for each of Respondent's counts of conviction: life imprisonment for the murder conviction, life imprisonment for the burglary conviction, and 15 years' imprisonment for the robbery conviction. The sentences for burglary and robbery were to run concurrently to one another, but consecutively to the life sentence for murder. Pet. App. 9. The trial court also prepared a new sentencing guidelines scoresheet, which stated that the basis for the above-guidelines sentence for burglary was Respondent's simultaneous conviction for a capital murder offense. Pet. App. 9.

Respondent appealed his new sentence and, while that appeal was pending, also filed a new state collateral challenge to his conviction based on newly discovered evidence. The trial court denied his motion for collateral relief, and on March 28, 2013, this holding was summarily affirmed on appeal. *Thompson v. State*, 110 So. 3d 467 (Fla. Dist. Ct. App.

2013) (per curiam). On May 1, 2013, the state court of appeals summarily affirmed his new sentence. *Thompson v. State*, 113 So. 3d 17 (Fla. Dist. Ct. App. 2013) (per curiam).

3. On November 1, 2013, Respondent filed the § 2254 petition at issue in this case. His petition asserts one claim that arose at his 2011 resentencing: that the court violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by basing its upward departure for his burglary sentence on facts not found by the jury. It also asserts three claims of constitutional error at trial: two claims of ineffective assistance of counsel, and one claim, based on newly discovered evidence, that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), by failing to disclose information showing that the two lead investigators in Respondent's case had falsified their employment histories and engaged in misconduct.

The State argued that the petition was both time-barred and subject to dismissal under § 2244(b) as "second or successive." Applying *Magwood* as well as the Eleventh Circuit's unpublished decision in *Campbell v. Secretary, Florida Department of Corrections*, 447 F. App'x 25 (11th Cir. 2011) (per curiam) (then the only Eleventh Circuit case addressing the extension of *Magwood*'s rule), the district court held that because Respondent had been resentenced since his initial habeas petition, his second-in-time petition was not "second or successive." Pet. App. 33-34. The district court found, however, that Respondent's claims challenging his underlying conviction were untimely because more than one year had passed since his original conviction

became final. Pet. App. 34. It therefore dismissed his petition as time-barred. Pet. App. 35.

Respondent moved in the Eleventh Circuit for a certificate of appealability, and the court granted his motion "only" on the issue "[w]hether the district court erred in dismissing Thompson's instant 28 U.S.C. § 2254 petition as untimely filed." Order, *Thompson v. Florida Dep't Corr.*, No. 14-10532 (11th Cir. May 23, 2014).

Contrary to Petitioner's Statement, the Eleventh Circuit did not "rule[] that the petition was not a second or successive petition," Pet. 10. That issue was not within the scope of the certificate of appealability. *See* Pet. App. 26 n.10 ("We do not consider the State's arguments that * * * [Thompson's] § 2254 petition should be dismissed in part as second or successive with regard to his convictions claims, as [this issue is] not within the scope of the COA."). The Eleventh Circuit confined its holding to the timeliness issue that was actually under review.

With regard to the timeliness issue, the Eleventh Circuit held that the district court had erroneously construed circuit precedent when it found Respondent's petition untimely because some of the claims pertained to his underlying conviction. The court explained that in calculating AEDPA's statute of limitations period under 28 U.S.C. § 2244(d)(1)(A), which refers to "the date on which the judgment became final," the Eleventh Circuit looks to the date of the judgment challenged. Pet. App. 18, 26 (citing *Ferreira v. Sec'y, Dep't Corr.*, 494 F.3d 1286, 1292-93 (11th Cir. 2007)). Entry of a new judgment resets the limitations clock, regardless of whether the habeas

petitioner asserts claims pertaining to his original conviction or the new judgment. Pet. App. 26. The district court had erred, the Eleventh Circuit ruled, in relying on a case addressing a "multiple trigger date" scenario—in other words, where there is no new judgment resetting the clock, and the habeas petitioner attempts to "piggyback" old claims on a claim that, under AEDPA, may be asserted more than one year after judgment. Pet. App. 20-22 (discussing 28 U.S.C. § 2244(d)(1)(B)-(D); *Zack v. Tucker*, 704 F.3d 917 (11th Cir. 2013) (en banc)). Such a "claim by claim" approach was inappropriate in Respondent's case, where "[t]he new 2011 judgment triggered a new statute of limitations period." Pet. App. 24.

To be sure, the Eleventh Circuit did discuss *Magwood*, as well as *Insignares v. Secretary, Florida Department of Corrections*, 755 F.3d 1273 (11th Cir. 2014) (per curiam), the circuit's first published decision applying *Magwood*'s rule to allow a challenge to a prisoner's original conviction. *See* Pet. App. 23 ("Two other recent decisions bear note before we analyze Thompson's § 2254 petition."). But *Magwood* and *Insignares* were relevant only insofar as they confirm that the court's judgment-based approach to AEDPA's statute of limitations is consistent with its judgment-based approach to AEDPA's bar of "second or successive" petitions.

Holding that the district court had erred in finding Respondent's petition untimely, the Eleventh Circuit reversed the district court's order and remanded the case for further proceedings. The State now petitions for review by this Court.

REASONS FOR DENYING THE PETITION

The petition should be denied for three reasons.

First, this case is a flawed vehicle to resolve the question raised by the Petition because the Eleventh Circuit *declined to decide* whether Respondent's habeas petition is jurisdictionally barred as "second or successive" in its unpublished decision below.

Second, and in any event, contrary to Petitioner's account, *see* Pet. 14-17, there is no clear, well-developed conflict among the courts of appeals regarding the application of *Magwood*. As an initial matter, there is *no* disagreement among the courts of appeals on the result that *Magwood* dictates in the circumstances presented here: when a habeas petition filed after resentencing and entry of a new judgment challenges *both* the prisoner's new sentence *and* his original conviction, it is not barred by § 2244(b). Much of the apparent variation among court-of-appeals decisions applying *Magwood* reflects a question not implicated here: what constitutes a "new judgment" in a criminal case if the defendant has *not* been resentenced? And there is, at best, a 1-1 split concerning whether a second-in-time habeas petition filed after resentencing is "second or successive" when the petitioner challenges *only* his underlying conviction. But that question, on which there is only a shallow 1-1 split, is not presented here, and this Court's intervention to resolve it would be premature in any case.

Third, the judgment below is plainly correct and does not call for this Court's intervention. Section 2244(b), as explicated in *Magwood*, compels the conclusion that a second-in-time habeas petition

filed after resentencing is not "second or successive" regardless of the nature of the claims asserted. Indeed, *Magwood* already rejected the argument, resurrected by Petitioner, that the application of § 2244(b)'s jurisdictional bar should be analyzed claim-by-claim, because the statute forecloses it.

I. THIS CASE IS A FLAWED VEHICLE TO RESOLVE THE QUESTION PRESENTED

This case is a flawed vehicle to resolve the question presented because the unpublished decision below did not address the issue.

The district court correctly concluded, on the basis of Eleventh Circuit law, that Respondent's petition was not barred as "second or successive" because he had been resentenced since his initial § 2254 petition was resolved, and a new judgment had been entered. Pet. App. 33-34. The State did not appeal that determination. The district court also concluded that Respondent's petition was time-barred under § 2244(d). Pet. App. 34-35. Respondent appealed, and the Eleventh Circuit vacated and remanded because the district court had incorrectly applied Eleventh Circuit law concerning AEDPA's statute of limitations. Pet. App. 24-27. Contrary to Petitioner's characterization of the Eleventh Circuit's decision, Pet. 10, that court did "not consider the State's arguments that * * * [Respondent's] § 2254 petition should be dismissed in part as second or successive with regard to his convictions claims, as [this issue was] not within the scope of the COA." Pet. App. 26 n.10.

To be sure, because § 2244(b)'s bar on "second or successive" petitions is jurisdictional, this Court

could consider the question even though the Eleventh Circuit did not. *See infra* Part IV. However, this Court generally declines to consider issues not decided by the court of appeals below, and for good reason—this is "a [C]ourt of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). *See also, e.g.*, *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 697 (2010) ("[T]his Court is not the proper forum to air the issue in the first instance."). There is no basis for the Court to deviate from that practice here, particularly because, as explained below, Petitioner vastly overstates the extent of any circuit split over the question presented.

II. PETITIONER OVERSTATES THE CIRCUIT CONFLICT OVER THE APPLICATION OF *MAGWOOD*, AND THE CIRCUITS ARE ALIGNED ABOUT THE ISSUE PRESENTED BY THIS CASE.

In any event, the circuit conflict described by Petitioner is largely illusory.

First, no court of appeals after *Magwood* has held that the habeas application of a prisoner in Respondent's position—asserting, after resentencing, challenges to both his new sentence and his underlying conviction—is "second or successive" under § 2244(b). There is therefore no circuit split regarding the issue presented in this case.

Second, much of the apparent disagreement among the courts of appeals following *Magwood* turns on what constitutes a "new judgment" in cases where the prisoner has *not* been resentenced. There is only one scenario in which the courts of appeals have disagreed about whether a "new judgment" exists.

And that issue is entirely beside the point here, where Respondent obtained *de novo* resentencing in state court before filing his second-in-time federal habeas petition.

Third, with regard to prisoners who have actually been resentenced, it is true that there is a 1-1 split on the question whether a second-in-time habeas petition challenging *only* the underlying conviction is "second or successive" under § 2244(b). *Compare Suggs v. United States*, 705 F.3d 279 (7th Cir. 2013), *with Insignares* 755 F.3d 1273. But *that* issue is not presented here, because Respondent's second -in-time habeas petition challenges *both* his new sentence *and* his underlying conviction.

1. There is *no* dispute among the courts of appeals about the scenario presented by this case, where a prisoner who been resentenced after his prior habeas petition files a second-in-time habeas petition challenging both his new sentence and his underlying conviction. The Sixth Circuit is the only other court of appeals to consider such a case, and it held that the petition was not barred as "second or successive." *King v. Morgan*, 807 F.3d 154, 156-57 (6th Cir. 2015). Review by this Court to consider an issue as to which there is no division in the courts of appeals is unwarranted.

2. Much of the seeming variation among the courts of appeals' application of *Magwood* in fact results from the myriad factual scenarios that raise the question of when there is a "new judgment" in a criminal case.

Magwood 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' at all." 561 U.S. at 341-42 (citing *Burton v. Stewart*, 549 U.S. 147 (2007)). The defendant in *Magwood* had received a new sentencing proceeding after a federal court conditionally granted the writ of habeas corpus and vacated his original death sentence. *Id.* at 326. It was therefore uncontested that his second-in-time habeas petition challenged a "new" state-court judgment. *See Magwood*, 561 U.S. at 336 ("[T]he question before the Court today [is] whether abuse-of-the-writ rules, as modified by AEDPA under § 2244(b)(2), apply at all to an application challenging a new judgment.").

Where a prisoner has not been resentenced between habeas petitions, however, it is not always clear whether there is an intervening "new judgment." The courts of appeals have confronted a variety of different factual scenarios raising this question. For example, is there a "new judgment" where a judgment is amended to correct a clerical error? *See In re Martin*, 398 F. App'x 326, 327 (10th Cir. 2010) (no "new judgment"). Where a district court corrects the term of supervised release entered with respect to one count of conviction, but the overall term of supervised release remains unchanged because of concurrent terms imposed for other counts? *See In re Parker*, 575 F. App'x 415, 418 (5th. Cir. 2014) (no "new judgment"). *See also*, *e.g.*, *Marmolejos v. United States*, 789 F.3d 66, 67 (2d Cir. 2015) (no "new judgment" where judgment was amended to correct a clerical error); *Martin v. Bartow*, 628 F.3d 871, 874 (7th Cir. 2010) ("new judgment" exists where a state court annually renews a civil commitment order that is predicated on a prior

conviction for a sexually violent crime); *United States v. Garza*, No. 14-40828, 2015 WL 5138133 at *3 (5th Cir. Sept. 2, 2015) (per curiam), *petition for cert. filed*, No. 15-7552 (U.S. Nov. 24, 2015) (no "new judgment" where a federal district court vacates and immediately reenters judgment in order to allow an out-of-time appeal). Although courts of appeals have come to different conclusions on different facts, in none of the cases above have they disagreed over how to treat the same scenario.

To be sure, one question about what constitutes a "new judgment" in the absence of resentencing has occasioned disagreement among the courts of appeals: whether there is a "new judgment" under *Magwood* where a court vacates one count of conviction and its sentence, but leaves other counts and their accompanying sentences intact. The Second Circuit and the Ninth Circuit have ruled that this produces a new judgment, *see Johnson v. United States*, 623 F.3d 41 (2d Cir. 2010); *Wentzell v. Neven*, 674 F.3d 1124 (9th Cir. 2012), while the Fifth Circuit and the Seventh Circuit have held otherwise, *see In re Lampton*, 667 F.3d 585, 587 (5th Cir. 2012); *Kramer v. United States*, 797 F.3d 493 (7th Cir. 2015), *petition for cert. filed*, No. 15-787 (U.S. Dec. 15, 2015).[1]

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[1] Although the *Kramer* court relied in part on *Suggs v. United States*, 705 F.3d 279 (7th Cir. 2013), which did involve a resentencing, *see infra*, it also noted that Kramer's lack of a resentencing distinguished his case from *Suggs*. *See* 797 F.3d 493, 501 (7th Cir. 2015) ("Indeed, Suggs had an arguably stronger claim than Kramer that, under *Magwood*, his motion should be considered non-successive. The conviction that Suggs

There is therefore some division among the courts of appeals on the narrow question whether there is a "new judgment" under *Magwood* after one count of conviction and its accompanying sentence are vacated but others remain intact. But that split is irrelevant here, where a state court conducted a *de novo* resentencing of Respondent.

3. Petitioner makes much of a disagreement between the Seventh and Eleventh Circuits regarding yet another separate issue: whether a second-in-time habeas petition filed by a prisoner who has been resentenced is "second or successive" when the prisoner asserts *only* claims relating to the underlying conviction that he could have raised before. *See* Pet. 13, 17. But again, this 1-1 division of authority is not at issue here, because Respondent asserts an indisputably "new" claim pertaining to his resentencing; moreover, this split is, in any event, too shallow to warrant this Court's review.

In *Suggs*, 705 F.3d 279, the Seventh Circuit considered whether *Magwood* had altered that court's previous rule that a habeas petition challenging an underlying conviction after resentencing is "second or successive." Two members of the panel concluded that because *Magwood* had reserved this question, *see* 561 U.S. at 342, Seventh Circuit precedent holding that such a petition is barred as "second or successive" remained good law. *See* 705 F.3d at 284. The panel majority recognized, however, that

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sought to challenge was the very one that *resulted in* both the vacated and new sentences. In Kramer's case, he is seeking to challenge an *entirely separate* conviction.").

Magwood's reasoning "could be understood to extend to a situation like [Suggs's] case." *Id.* Judge Sykes, dissenting, would have held that under *Magwood* "a habeas petition is deemed initial or successive by reference to the *judgment* it attacks—not which *component* of the judgment it attacks or the nature or genesis of the *claims* it raises." *Id.* at 287-88.

The Eleventh Circuit has since disagreed with *Suggs* and held that a second-in-time habeas petition filed after resentencing but attacking only the prisoner's underlying conviction is not "second or successive." *Insignares*, 755 F.3d at 1280. This result, the Eleventh Circuit held, is compelled by *Magwood*'s holding that "the existence of a new judgment is dispositive," *Id.* (quoting *Magwood*, 561 U.S. at 338), as well as by this Court's clear rejection of a claim-based approach, *see id.* at 1279 ("The Supreme Court [in *Magwood*] also clarified that the phrase 'second or successive' applies to habeas *petitions*, not to the *claims* they raise.").

Intervention by this Court to resolve this 1-1 split would be premature. *See* Eugene Gressman et al., *Supreme Court Practice* § 4.I.4(B), at 247 (10th ed. 2013) (certiorari review is not favored until more than two courts of appeals have addressed a question). And, in any event, *this* case does not directly implicate that split, because unlike the prisoners in *Suggs* and *Insignares*, Respondent asserts claims pertaining to *both* his new sentence *and* his underlying convictions in the habeas petition filed after his resentencing.

III. RESPONDENT'S HABEAS PETITION IS NOT "SECOND OR SUCCESSIVE"

This Court's intervention is also unwarranted because the judgment below is correct.

1. As this Court explained in *Magwood*, the statute makes clear that the applicability of AEDPA's "second or successive" bar turns on whether the habeas petitioner challenges a new judgment. And because resentencing invariably results in a new judgment, a second-in-time habeas petition filed after resentencing, like Respondent's, is not "second or successive" under § 2244.

Section 2244(b) establishes a jurisdictional bar to a "second or successive habeas corpus application under section 2254." 28 U.S.C. § 2244(b). Unless the petitioner satisfies the criteria set forth in Section 2244(b)(2), his claims "shall be dismissed." 28 U.S.C. § 2244(b). The phrase "second or successive" is a "term of art" that must be interpreted within its "statutory context." *Magwood*, 561 U.S. at 332. *See also Panetti v. Quarterman*, 551 U.S. 930, 944 (2007) ("The Court has declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time.").

Whether a habeas corpus application is "second or successive" under section 2244(b) depends on whether it challenges the same state-court *judgment* the prisoner challenged in a prior application. The statute specifies that its bar applies to "[a] claim presented *in a second or successive habeas corpus application* under section 2254." 28 U.S.C. § 2244(b) (emphasis added). The phrase "second or successive" plainly modifies "habeas corpus application under

section 2254." And § 2254, in turn, makes clear that "an application for a writ of habeas corpus" is filed "in behalf of a person in custody *pursuant to the judgment of a State court*." 28 U.S.C. § 2254(a) (emphasis added). As this Court explained in *Magwood*, "[a] § 2254 petitioner is applying for something: His petition 'seeks *invalidation* (in whole or in part) *of the judgment* authorizing the prisoner's confinement." 561 U.S. at 332 (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005)).

Where a prisoner has been resentenced, there is necessarily a *new* judgment "authorizing [his] confinement." As this Court has repeatedly held, a prisoner's sentence is inextricable from his judgment of conviction. "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212 (1937). *See also Deal v. United States*, 508 U.S. 129, 132 (1993) ("A judgment of conviction includes both the adjudication of guilt and the sentence."); *Insignares*, 755 F.3d at 1281 ("[T]here is only one judgment, and it is comprised of both the sentence and the conviction.").

And because there is a "new judgment," a second-in-time habeas application filed by a prisoner seeking relief from that judgment is not "second or successive" under § 2244(b). As *Magwood* held, the "existence of a new judgment is dispositive." 561 U.S. at 338. It makes no difference whether the prisoner raises challenges to his new sentence or to his underlying conviction. Section 2244(b) turns on the status of the "application" as a whole, not on the nature of the claims presented. *See supra.* Thus, as the Eleventh Circuit correctly held in *Insignares*, a

second-in-time petition filed after resentencing and challenging the prisoner's underlying conviction is not barred as "second or successive." The logic of *Magwood* compels that conclusion.

2. The position advocated by Petitioner on the facts of this case is particularly untenable. Petitioner recognizes that, unlike the prisoners in *Insignares* and *Suggs*, Respondent's application challenges his resentencing as well as his underlying conviction. Petitioner avers that the State "has no objection" to allowing Respondent to challenge his new sentence, but it "does object" to his attacking his original conviction. Pet. 13. Petitioner therefore asks this Court to adopt a claim-by-claim approach that the Court specifically held in *Magwood* is foreclosed by the statute.

Section 2244 expressly does *not* tie the "second or successive" inquiry to the claim being asserted. Rather, it provides that "[a] claim presented *in a second or successive habeas corpus application* * * * shall be dismissed" unless the specified conditions are met. 28 U.S.C. § 2244(b)(1) (emphasis added). In *Magwood*, this Court explicitly rejected the State's request that it "rewrite the statue to make the phrase 'second or successive' modify claims." 561 U.S. at 334-35.

Indeed, the rule that this Court *rejected* in *Magwood* required the court to "'separate the new claims challenging the resentencing from the old claims that were or should have been presented in the prior application.'" *Magwood*, 561 U.S at 329 (quoting *Magwood v. Culliver*, 555 F.3d 968, 975 (11th Cir. 2009)). Petitioner's argument that this

Court should do an about-face and revert to the rule it rejected in *Magwood* is unfounded.

3. A judgment-based approach, rather than a claim-based approach, also furthers Congress's objective in enacting AEDPA. This Court has held that one of the "basic purposes" of AEDPA is "to eliminate delays" in the habeas review process. *Holland v. Florida*, 560 U.S. 631, 648 (2010). A claim-based approach would be difficult to implement and would unnecessarily complicate litigation of habeas corpus petitions, contrary to "AEDPA's purpose of preventing piecemeal litigation," *Magwood*, 561 U.S. at 334.

As an initial matter, determining whether a claim asserted in a habeas petition challenges a new sentence or an underlying conviction will often not be straightforward. Some oft-asserted claims can challenge both. For example, where a prisoner asserts a challenge to the adequacy or integrity of the jury—such as a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), or a claim that voir dire was insufficient—and the jury found facts applicable to both the conviction and the sentence, *see Apprendi*, 530 U.S. 466, his challenge would be directed at *both* the new sentence and the original conviction. The same would be true if the prisoner alleged that the judge was conflicted or biased, and the same judge had handled trial and sentencing. Under Petitioner's approach, would the district court be required to slice up the claim and transfer half of it to the court of appeals for a determination whether it satisfied the requirements of § 2244(b)(2) for filing a "second or successive" application? This manner of proceeding would be illogical, time-consuming, and unwieldy.

Even where a habeas petition asserts separate claims challenging the prisoner's new sentence and his original conviction, requiring the district court to transfer some, but not all, claims to the court of appeals for pre-authorization under § 2244(b)(2) will complicate and lengthen the litigation process unnecessarily.

In contrast, a judgment-based approach will not unduly burden federal courts, which can readily dispose of many abusive claims under existing rules. As *Magwood* recognized, the doctrine of procedural default prevents prisoners from pursuing challenges to their original convictions that they did not raise properly in state court. *See* 561 U.S. at 340 (citing *Coleman v. Thompson*, 501 U.S. 722, 729-30) (1991), and *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)). Moreover, if a prisoner reasserts a challenge that was heard and dismissed on the merits in a prior habeas petition, "[i]t will not take a court long to dispose of [the] claims where [it] has already analyzed the legal issues." *Id.* at 340 n.15. As this Court stated in *Magwood*, the "concern that our rule will allow petitioners to bring abusive claims so long as they have won any victory pursuant to a prior federal habeas petition is greatly exaggerated." *Id.* at 340 (internal quotation marks and citation omitted).

IV. IF THIS COURT IS INCLINED TO ADDRESS *MAGWOOD*'S FURTHER APPLICATION, HOWEVER, IT SHOULD GRANT THIS PETITION INSTEAD OF OR IN ADDITION TO ANY OTHER PENDING PETITION.

Denial of certiorari in this case is appropriate for the reasons stated above. *See supra*. If this Court is inclined, however, to consider the questions that have arisen in the wake of *Magwood*, it should grant this petition either instead of or in addition to any other pending petition.[2]

Magwood specifically reserved one question: whether "a petitioner who obtains a conditional writ as to his sentence [may] file a subsequent application challenging not only his resulting, *new* sentence, but also his original, *undisturbed* conviction." 561 U.S. at 342. That question—implicated by the facts here—is distinct from the question addressed by the Seventh

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[2] The habeas petitioners in *Kramer*, 797 F.3d 493, and *Garza*, 2015 WL 5138133, have filed petitions for certiorari. Petition for Writ of Certiorari, *Kramer v. United States*, No. 15-787 (U.S. Dec. 15, 2015); Petition for Writ of Certiorari, *Garza v. United States*, No. 15-7552 (U.S. Nov. 24, 2015) (response requested Jan. 21, 2016). Neither *Kramer* nor *Garza* involved resentencings. *See supra* Part II (noting that in *Kramer*, the district court vacated one count of conviction and the accompanying sentence while leaving the other conviction and sentence intact; and in *Garza*, the district court vacated and immediately reentered judgment in order to allow an out-of-time appeal). Thus, both involve a threshold issue—whether there was any "new judgment" at all—that is a predicate to deciding whether, after a new judgment, a habeas petition that challenges only the original conviction is "second or successive." Moreover, for the reasons explained, *see infra*, even if the Court reached the latter question in *Kramer* or *Garza*, that might still leave unresolved the related post-*Magwood* question raised by the facts of this case, *i.e.*, whether a petition that follows a new judgment is "second or successive" if it challenges both the new sentence that led to the new judgment and the original conviction.

Circuit in *Suggs* and the Eleventh Circuit in *Insignares*: whether a second-in-time habeas application challenging *only* the habeas petitioner's original conviction, and *not* his new sentence, is barred as "second or successive."

If this Court wishes to proceed incrementally and consider the narrowest question left open by *Magwood*, this case is the only one that presents it. Alternatively, if this Court chooses to intervene to clarify other disagreements over *Magwood*'s application, granting this case in addition to any other pending petition would enable the fullest presentation of the relevant issues and ensure the efficient use of this Court's resources.

That is because the question reserved by *Magwood* and the question addressed by *Suggs* and *Insignares* do not necessarily have the same answer. This Court might determine, for example, that habeas applications may not be split up into separate claims, *see Magwood*, 561 U.S. at 331-32 (rejecting "claim-focused" interpretation of § 2244(b)), so that an application such as Respondent's (which raises claims arising from a resentencing and claims related to the original conviction) is not barred as "second or successive"; at the same time, the Court might also conclude that § 2244(b) *does* bar an application challenging *only* the prisoner's underlying, unaltered conviction because it does not allege any "new errors," *see id.* at 339 (emphasizing that "[t]he errors [Magwood] alleges are *new*"). Conversely, if this Court agreed with the Seventh Circuit that a second-in-time petition challenging only the prisoner's original conviction is barred as "second or successive," that would not compel the conclusion

that a petition (such as Respondent's) challenging *both* the prisoner's new sentence *and* his original, underlying conviction is similarly barred. Thus, disposing of one of these questions does not necessarily dispose of the other.

Moreover, if this Court chooses to consider *Magwood*'s further application, Respondent has an interest in making (and this Court has an interest in considering) unique arguments. Like a prisoner whose habeas application challenges *only* his underlying conviction, Respondent will argue that the existence of a "new judgment" is dispositive of § 2244(b)'s applicability. Respondent, however, has challenged *both* his new sentence *and* his original conviction. He will therefore press the *additional* argument that it is improper to divide up a habeas application and apply § 2244(b)'s jurisdictional bar on a claim-by-claim basis. Put simply, Respondent's position will not be fully represented by any other habeas petitioner whose case might be considered by this Court at this time.

Finally, the fact that this issue was not addressed below by the Eleventh Circuit, *see supra* Part II, does not bar review by this Court. Section 2244(b) establishes a limitation on the subject matter jurisdiction of the federal courts. *See Stewart*, 549 U.S. at 149 (holding that habeas petitioner's "fail[ure] to comply with the gatekeeping requirements of 28 U.S.C. § 2244(b) * * * deprived the District Court of jurisdiction to hear his claims"). Accordingly, this Court could consider the question whether or not it was raised or decided below. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[C]ourts, including this Court, have an independent obligation

to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."); *United States v. Woods*, 134 S. Ct. 557, 562 (2013) (Court granted certiorari and resolved circuit split on jurisdictional question not addressed by court of appeals below). For the same reason, the State did not forfeit or waive the issue of whether AEDPA's jurisdictional bar on "second or successive" petitions applies here. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."). Moreover, the Eleventh Circuit has set forth its understanding of *Magwood v. Patterson*'s application in its reasoned, published decision in *Insignares*, so the rule supporting the judgment below is settled in that circuit.

For the reasons set forth above, *see supra* Parts II-III, the issues that have arisen in the lower courts regarding *Magwood*'s application do not warrant this Court's review. But if this Court chooses to review those questions, the Court should grant the petition in this case instead of or in addition to any other petition.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 22, 2016

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