Case No. 15-689
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

REPLY BRIEF OF PETITIONER IN RESPONSE TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

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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.

ARGUMENT

As stated in the Petition for Writ of Certiorari, there is a significant conflict between the Eleventh Circuit's decisions in several cases, including this one, and the decisions of the Seventh Circuit on the issue of whether a petitioner's attempts to attack his convictions following a resentencing proceeding are second or successive. Respondent attempts to avoid resolution of this conflict by asserting that the instant case is not the appropriate case in which to resolve the conflict, that there is no actual conflict, and that Respondent's § 2254 petition for writ of habeas corpus filed in the district court below was not actually a second or successive petition. Respondent's position on all these points is not well taken.

I. Magwood does not resolve the issue raised in the instant case.

Contrary to Respondent's assertion otherwise, this Court has not yet determined whether a defendant's second habeas petition filed subsequent to resentencing should be considered successive if that petition contains challenges to the original and still valid conviction.

In Magwood v. Patterson, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010), this Court explained that a successive federal habeas petition is permissible if the challenge therein is related to a new sentence **imposed pursuant to a resentencing**

proceeding that occurred subsequent to the previously filed federal petition. In that circumstance, this Court characterized Magwood's resentencing as a new judgment and the petition in question was now the "first" application/petition challenging the new judgment. Importantly, this Court expressly limited the scope of Magwood to only that circumstance and intentionally left unresolved the question of whether that same "successive" federal habeas petition would be permissible if it was premised in part or in full on a challenge to the original and still valid conviction or whether it is an improper successive petition **regarding any challenge to the conviction**. Magwood, 130 S.Ct. at 2802-2803. Specifically, this Court stated that it was declining to resolve at that time "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. Further, this **Court acknowledged 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 which cases imposed such limitations.** Id. Therefore, despite Respondent's attempts to argue that Magwood has resolved the issue and controls the outcome herein, this is patently not the case.

Notably, the petitioner in Magwood filed his new petition after being re-sentenced, but 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.**

In this vein, it is well worth noting that only one ground of the respondent's new petition at bar challenged the respondent's corrected sentence or its validity. But, notably, the one ground regarding the new sentence involved a meaningless, and frivolous, claim, made pursuant to Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000).[1] Therefore, Respondent's new petition was nothing more than a thinly disguised untimely second attack on his convictions. This Court should avoid elevating form over substance and reject Respondent's attempt to challenge decades old convictions that were left undisturbed following both the initial federal habeas and the subsequent

[1] Respondent asserted that "the trial court violated Apprendi when it imposed an upward departure [for the burglary with an assault] based on an 'unscored capital murder charge,' a fact not found by a jury." (Appendix A A-11) There are many reasons why this is a fallacious claim. For example, the capital murder charge was indeed "a fact found by a jury" since Respondent was found guilty of this capital murder charge during the same trial for the burglary and robbery. The Apprendi claim was further meaningless because it related only to the non-capital offenses and, even if it succeeded, which it clearly would not under the case law of this Court, it still would not affect Respondent's life sentence for the first degree murder.

resentencing.

By recognizing Respondent's petition for what it truly is, a challenge to the convictions alone, it becomes even more apparent that the instant opinion and Suggs v. U.S., 705 F.3d 279 (7th Cir.), cert denied, 133 S. Ct. 2339 (2013)(, are directly in conflict despite Respondent's attempts to suggest that they are distinguishable. Whether Suggs involves a "successive" petition that contains only a challenge to the convictions, or a challenge to the convictions as well as to one of the sentences, is immaterial to the real issue, and that issue is whether a petitioner may utilize a new sentence gained after an unsuccessful initial federal habeas challenge to challenge a conviction that remained valid throughout.

II. This case is indeed a suitable case in which to address the question presented.

Respondent incorrectly claims that the Eleventh Circuit did not directly address the issue of whether his petition should be considered successive. For that proposition Respondent relies on a footnote in the opinion recognizing that the COA did not encompass the separate issue regarding whether Respondent's second petition was successive. (Appendix A-26 at fn.10). However, despite the deficiency in the COA, the Eleventh did indeed consider this issue because resolution of whether the petition was successive was an integral part of the Court's analysis regarding whether Thompson's petition should be considered time barred. (Appendix A-15; A-23-A-24). Without

question, regardless of the Court's intent to address the question of successiveness, the explicit reasoning and pronouncements regarding the timeliness issue are so inextricably intertwined with the successiveness issue and the case law on same that it is impossible to address the issue of timeliness without first addressing the successiveness issue. Indeed, the Court discussed the impact of Magwood and Insignares v. Sec'y, Fla. Dep't of Corr., 755 F.3d 1273 (11th Cir. 2014), in its ultimate decision in the instant case; notably, Magwood and Insignares are two cases which address the issue of successiveness. (Appendix A-15; A-23-A-24).

Additionally, the holding of the opinion at bar is based in large part on this Court's opinion in Burton v. Stewart, 549 U.S. 147, 127 S.Ct. 793 (2007), and on the Eleventh Circuit's own case: Ferreira v. Secretary, Fla. Dep't of Corr., 494 F. 3d 1286 (11th Cir, 2007). (Appendix A-24-A-27). Ferreira involved a **time-bar** issue, but the Eleventh Circuit Court based its reasoning in Ferreira on Burton, which this Court decided based solely on **successiveness**. Therefore, as demonstrated in Burton and Ferreira, the issues of successiveness and timeliness truly are inextricably intertwined.

Moreover, pursuant to Magwood and Insignares, the question of whether Thompson required permission from the Eleventh Circuit as a condition precedent prior to the filing of his second petition, was, as Respondent concedes, a **jurisdictional question**. See Burton, 127 S.Ct. at 152 (where

petition was second or successive petition, and where defendant never sought authorization to file it from the circuit court, the district court never had jurisdiction to consider it in the first place). Also cf., Jones v. U.S., 2015 WL 7871345 (N.D. West Virginia December 4, 2015)(§ 2255 petition attacking conviction following resentencing was second or successive and, because defendant failed to seek permission from circuit court to file second or successive petition, district court lacked jurisdiction to consider petition). Consequently, resolution regarding whether a subsequent petition is successive/timely is inherent for jurisdictional purposes and must always be addressed at the outset.

In the instant case, due to the fact that Respondent had previously filed a petition in the district court which addressed the same underlying state conviction and which was addressed and denied on the merits, the State submits all of the claims relating to the conviction (as opposed to the sentence) would clearly constitute a "second application." As such, the State further submits that, prior to filing his § 2254 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), at least as to those claims which attacked his conviction. Notably, a decision on this

jurisdictional issue from this Court would completely vitiate the Eleventh Circuit's decision in Thompson because the lack of jurisdiction would render the issue of timeliness moot.

Therefore, the issue of successiveness was a necessary and integral component of the Eleventh Circuit's decision and provides this Court with the legitimate opportunity to squarely address the issue left open in Magwood.

III. Petitioner does not overstate the conflict between circuits

As detailed in the Petition, cases in which a defendant is attempting to belatedly challenge his conviction through what is essentially a second or successive petition are recurring repeatedly throughout the United States; indeed, several new cases have come to light since Petitioner filed the Petition for Writ of Certiorari, including a new opinion issued by the Eleventh Circuit. Petitioner has listed the significant ones issued by the circuit courts for the convenience of this Court, including the new cases: Patterson v. Secretary, Fla. Dep't of Corr., 2016 WL 370660 (11th Cir. Jan. 29, 2016), King v. Morgan, 807 F. 3d 154 (6th Cir. 2015)(court held that, following a resentencing, prisoner could challenge undisturbed conviction without triggering the bar against second or successive petitions); U.S. v. Garza, 2015 WL 5138133 (5th Cir. Sep. 2, 2015)(§2255 motion was properly barred as successive; district court's re-entry of judgment did not alter or amend convictions or sentences;

further, claims could have been raised in first §2255 motion)(cert. pending in this court in case number 15-7552); 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)(cert. pending in this court in case no. 15-787); 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).

Fatal to Respondent's attempts to distinguish the cases cited above, is the fact that the identical issue pervades and therefore directly affects the outcome of every single case, i.e., what overriding principle/s govern whether a defendant is permitted a **second** opportunity pursuant to § 2254 to again challenge a valid conviction that remains unaffected by a resentencing proceeding. A review of the cases listed above demonstrates the existence of the confusion and, ultimately, the conflict among the circuits regarding this issue. This conflict is most clearly expressed by comparing the Seventh Circuit's opinion in Suggs and the Eleventh Circuit's opinion in Insignares. Despite Respondent's assertion, the conflict exists, as recognized by other courts. Jones, 2015 WL 7871345 at *2, is merely the latest example to

recognize this conflict. See also In re Lampton, 667 F.3d at 588–90 (finding second petition successive following the reversal of one of his convictions and sentences while leaving the other convictions and sentences intact as there was no new amended judgment of conviction); In re Parker, 575 Fed. Appx. at 415 (finding second petition irrespective of fact that petitioner successfully had judgment was amended because overall sentence remained the same); In re Martin, 398 Fed. Appx. at 326 (finding petitioner's § 2254 petition was successive and Magwood was inapplicable where the amendment of the judgment was merely to correct a clerical/typographical error in the judgment of conviction and no "resentencing" was held). These different approaches, under different rationales, with different results, underscore the need for review. Quite recently, the Eleventh Circuit stated that the complaint that Insignares, and Patterson, allow "a state prisoner to raise, in a subsequent federal habeas petition, claims that he failed to assert in his first petition, … should be addressed to the Supreme Court." Patterson, 2016 WL 370660 at *8.

Although Respondent asserts that this Court rejected a "claim by claim" approach to successiveness in Magwood, Respondent ignores this Court's express recognition therein that "successiveness" as it relates to a conviction could be treated separately from "successiveness" as it relates to a sentence. Likewise, Respondent also ignores this Court's express decision in Magwood to "wait for another day" to address that important

difference. Magwood, 130 S.Ct. at 2083 n.16. See also Insignares, 755 F.3d at 1285 (concurrence by Judge Fay seeking review by this Court to resolve this important issue which impacts a multitude of cases nationwide).

Further, while Respondent makes the conclusory statement that an expansion of the right to successive federal habeas review would not cause an undue burden to federal courts, he does not explain how that is so. His argument defies simple logic. Indeed every new case that is filed in the federal courts constitutes a drain on the resources of the court, and on the resources of the State that has to respond. In certain instances, as is the circumstance here, a case which is several decades old may present additional obstacles to a State; the prosecution may be foreclosed from presenting a response to a defendant's claims because of the passage of time and the destruction of records, and evidence, the passing of witnesses and the fading of memories. In addition to the fact that long standing principles of federal comity and finality would be severely compromised with the unwarranted expansion of federal habeas review, Respondent has not identified a single overriding or important principle/goal that would be in jeopardy by the refusal to confer such an expansion.

IV. Respondent's § 2254 habeas petition was indeed a second or successive petition

Respondent contends that his § 2254 habeas petition was not a second or successive petition regardless of the fact that it contained additional

challenges to a twenty–four year old conviction that had been previously and unsuccessfully challenged in a prior federal habeas petition. Such an expansive interpretation of the federal habeas statute is not supported by law, by public policy, or by logic. Due to the confusion among the circuits as well as the direct conflict that has resulted from that confusion, this Court must resolve the dispute. See Jones, 2015 WL 7871345 at *2 (recognizing, "[c]ircuit courts are split on whether resentencing constitutes an intervening new judgment when the petitioner collaterally attacks his underlying conviction.").

CONCLUSION

For the foregoing reasons, as well as for those reasons set forth in Petitioner's petition for writ of certiorari, Petitioner respectfully submits the petition for a writ of certiorari should be granted.

Respectfully submitted,

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