No. 09-158

IN THE

Supreme Court of the United States

BILLY JOE MAGWOOD,

Petitioner,

v.

GRANTT CULLIVER,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

For nearly three decades, the State has been seeking to execute petitioner for an act that the district court held, and the Eleventh Circuit did not dispute, was not a capital offense under state law when he committed it. Having persuaded the Alabama courts to allow such punishment, the State now characterizes the Eleventh Circuit's denial of habeas relief as a factbound decision raising no certworthy issues. Notwithstanding these boilerplate protestations and the State's attempts to justify the Eleventh Circuit's decision on alternative grounds, the Eleventh Circuit's decision rests on pure, outcome-determinative legal holdings that cry out for review by this Court.

The Eleventh Circuit's successive petition holding contravenes basic *res judicata* principles as well as this Court's precedent; creates a circuit split; and threatens to dramatically alter how courts must administer 28 U.S.C. § 2244(b) following retrials and resentencings. The Eleventh Circuit's ineffective assistance holding ignores the distinction between state and federal law – that is, between the Alabama Supreme Court's dispensing with Alabama's aggravating circumstance requirement for death-eligibility, and counsel's failure to argue that the Due Process Clause prohibited applying that decision retroactively. (Indeed, the Eleventh Circuit's analysis on this deficient-performance point is so demonstrably incorrect that, if this were the only issue in the case, summary reversal would be appropriate.) Certiorari should be granted.

I. This Court Should Review The Eleventh Circuit's Successive Petition Holding.

1. Drawing on basic *res judicata* principles, the petition explained what should be self-evident: a habeas petition challenging a new judgment cannot be deemed a successive petition. It does not matter whether a retrial or a resentencing results in a judgment that is substantively identical to a previous one. When a judgment is vacated and a new judgment is entered in its place, a petition challenging that new judgment is necessarily a first petition – and any claim in such a petition should be treated as one in a first petition. Pet. 11.[1]

Instead of engaging the logic of this argument, the State simply disputes that *Richmond v. Lewis*, 506 U.S. 40 (1992), and *Burton v. Stewart*, 549 U.S. 147 (2007) (per curiam), support it. The State misreads these decisions.

As the State implicitly acknowledges, this Court in *Richmond* ruled for a state prisoner on the merits of a claim in exactly the same procedural posture as this one. It is true, as the State points out, that "[t]here was no discussion by this Court" of whether the prisoner's claim was successive. BIO 14. But the issue had been litigated below and this Court had the authority *sua sponte* to dismiss the claim if it was

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[1] This reasoning does not imply, as the State suggests, that prisoners who are resentenced may "raise the same claims over and over again after resentencing." BIO 18. Ordinary collateral estoppel and *stare decisis* principles preclude prisoners from relitigating arguments already decided adversely against them simply because new judgments have been entered.

successive. *See* Pet. 14. Under these circumstances, this Court's decision to grant review and to reach the merits indicates that it regarded the claim as part of a first petition. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962) ("While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, . . . neither should we disregard the implications of an exercise of judicial authority assumed to be proper.") (citations removed).

This Court in *Burton* likewise signaled, for reasons the State does not contest, that a first habeas petition challenging a new sentence can never be successive. *See* Pet. 13. To be sure, *Burton* also emphasized the importance of "reduc[ing] piecemeal litigation." BIO 13. But, as *Burton* indicates, that goal has purchase only when a subsequent petition challenges the "same" judgment. 549 U.S. at 156. When a retrial or resentencing results in a new judgment, the prisoner unquestionably may initiate a new round of habeas review. (Indeed, the State does not challenge petitioner's ability to pursue his ineffective assistance claim here.) Having an additional claim in such a new petition does not create piecemeal litigation.

Nor does the ability to challenge a new sentence, if and when one is entered, encourage prisoners to "sleep on their claims" (BIO 18) when challenging death sentences. Prisoners cannot challenge *resentencings* unless they first succeed in obtaining habeas relief from their existing sentences. They thus have every reason to raise every possible claim against initial sentences.

2. The Eleventh Circuit's successive petition reasoning is so at odds with hornbook law, *see* Pet. 11, that few wardens have asked federal courts to adopt it. (Indeed, even the State did not advance the argument in the district court in this case. *See* Pet. App. 63a.) But when wardens floated this notion in the Ninth and Second Circuits, those courts easily rejected it.[2] Although the State tries to minimize the tension between the Eleventh Circuit's holding and the law of those circuits, its efforts are unpersuasive.

The State does not dispute that the Ninth Circuit in *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985), and *Richmond v. Lewis*, 948 F.2d 1473 (9th Cir. 1992), held that a claim in exactly the same posture as petitioner's was not successive. Instead, the State contends that these holdings do not conflict with the Eleventh Circuit's because they predate AEDPA. But as petitioner has pointed out, and as the State does not dispute, nothing in AEDPA altered what constitutes a "successive" petition; AEDPA simply codified the pre-existing concept. Pet. 15 n.6; *see also Watson v. Carey*, 2008 WL 3980340 (E.D. Ca. 2008), *adopting magistrate's recommendation* at 2006 WL 3313834, at *2 (E.D. Ca. 2006) (applying *Richmond* in post-AEDPA case). Consequently, the law of the two circuits is squarely divided.

The State also acknowledges that the Second Circuit has held that a petition challenging a "new

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[2] For another rejection of this argument, see *Moore v. Kinney*, 119 F. Supp. 2d 1022, 1040 (D. Neb. 2000), *aff'd*, 320 F.3d 767 (8th Cir. 2003) (en banc). The state apparently abandoned the argument on appeal.

sentence on grounds opened by the resentencing" is always a first petition. BIO 16 (quoting *Esposito v. United States*, 135 F.3d 111, 113-14 (2d Cir. 1997)). The State asserts, however, that the due process claim petitioner advances "was not a ground opened by [his] resentencing." BIO 16. The State misapprehends the Second Circuit's rule. If a prisoner's sentence is vacated and he receives an entirely "new sentence in [a] new judgment" (as opposed to merely an amended judgment), any claim concerning the legality of the new sentence is "opened by the resentencing." *Esposito*, 135 F.3d at 113-14; Pet. 15-16. Petitioner challenges the legality of his new sentence, so the Second Circuit would have reached the merits of his claim.

3. This issue is important. It is not uncommon for federal courts to grant habeas relief that triggers retrials or resentencings. The Eleventh Circuit's holding indicates, however, that the simple, straightforward rule previously thought to govern habeas petitions challenging such new judgments – namely, that such petitions always constitute first petitions – no longer controls.

The State downplays the threat that this decision poses for the general administration of habeas corpus, asserting that the Eleventh Circuit's holding "is limited to those situations where the claim was available at the original trial or sentencing but was not raised at that time." BIO 17. As the petition points out, however, and as the State does not dispute, 28 U.S.C. § 2244 does not provide any way to so limit the holding. Pet. 17-20. The text of that statute requires courts to decide whether "application[s]" – not claims – are successive. Taking

Eleventh Circuit's approach seriously, therefore, would require courts to treat *all* claims against subsequent judgments as successive, contravening numerous practices that courts, habeas practitioners, and prisoners (most of which must proceed pro se) currently take for granted. *See* Pet. 18-20.[3]

When the only way to mitigate the damage of a holding will be to flout the plain language of the governing statute, this Court should immediately intervene. This is especially so when, as here, the field at issue is already fraught with high-stakes procedural complexity, thus demanding as much clear notice and legal coherence as possible.

4. Finally, the State urges this Court to condone the Eleventh Circuit's successive petition holding based on two arguments that the district court rejected and that the Eleventh Circuit did not address. Neither provides an impediment to review.

a. The district court correctly held that petitioner did not procedurally default his fair warning claim. A habeas petitioner avoids procedural default whenever he properly "present[s] the substance of his

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[3] Contrary to the State's assertion, for instance, the Eleventh Circuit's decision *would* "prevent prisoners from being able to seek relief against their new judgments based on intervening decisions from this Court." BIO 17. Courts "routinely treat[]" applications as second or successive when they raise "claims alleged to be 'new' due to the Supreme Court's changing the law." *Sustache-Rivera v. United States*, 221 F.3d 8, 14 (1st Cir. 2000). The only reason, therefore, that prisoners in petitioner's position are currently able to seek habeas relief based on intervening decisions is that they have received new judgments.

claim to the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986). The State does not contest that the Rule 20 litigation following petitioner's resentencing was a proper time for him to raise his fair warning claim. Petitioner argued in his Rule 20 filing, *see* Pet. App. 69a, and on appeal that "the absence of any statutory aggravating circumstance and the lack of notice given by the 1975 Act for the retroactive application of the decision in *Kyzer* rendered [his] sentence unconstitutional under the . . . 14th Amendment[]." BIO 20; Pet. App. 69a (quoting petitioner's appellate brief). These easily understandable contentions, punctuated with specific references to the federal constitutional provision involved, more than adequately presented the substance of the claim. *See Duncan v. Henry,* 513 U.S. 364, 365 (1995) (per curiam); 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.3c, at 1077-87 (5th ed. 2005).

Even if, as the State suggests, the Alabama Court of Criminal Appeals' denial of relief in *Magwood v. State*, 689 So.2d 959, 965-66 (Ala. Crim. App. 1996), "did not reach the merits" of petitioner's fair warning argument, BIO 20, it would not matter. This Court has termed it "too obvious to merit extended discussion" that a prisoner's ability to renew a federal claim in federal habeas proceedings "cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam); *accord Dye v. Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam). In other words,

when, as here, a prisoner properly presents a federal constitutional claim in state courts, the claim is preserved for federal habeas review, even if the courts choose to ignore it. *Id.*

At any rate, the State's procedural default argument is purely academic. Federal courts may not penalize a prisoner for failing to raise an argument in state court when the argument demonstrates that the prisoner is "innocent of [a] capital crime itself" because "there was no aggravating circumstance." *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992). Therefore, as the district court made clear and as the State does not dispute, "Magwood's innocence of the death penalty would . . . excuse, under [*Sawyer*'s] miscarriage-of-justice exception, any procedural default that would otherwise bar his claim." Pet. App. 57a n.7.

b. The district court correctly decided the merits of petitioner's fair warning claim. Pet. App. 44a-60a. When petitioner committed his crime, Ala. Code § 13-11-4 provided that a trial court could not sentence a defendant to death without finding "[o]ne or more of the aggravating circumstances enumerated in section 13-11-6." Pet. App. 97a (reproducing Alabama law at that time). No Alabama court had ever suggested that this statute did not mean exactly what it said; to the contrary, Alabama courts had confirmed that "§ 13-11-6 list[ed] the *only* aggravating circumstances that could be considered by the sentencing judge." Pet. App. 51a (surveying state court decisions). Accordingly, the Alabama Supreme Court's holding in *Ex parte Kyzer*, 399 So.2d 330 (Ala. 1981), that Alabama law did not require the presence of an aggravating fact listed in Section 13-11-6 in order to

impose the death penalty "was 'unexpected and indefensible by reference to the law which had been expressed prior to' [petitioner's] offense conduct." Pet App. 55a (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

The State disputes this conclusion on three grounds. First, the State suggests that petitioner had fair warning that he could receive the death penalty because *Kyzer* was decided before petitioner's resentencing. BIO 21. But the relevant time frame, for purposes of due process retroactivity analysis, is not when any court proceeding occurred, but when the "the conduct at issue" was committed. *Bouie*, 378 U.S. at 354; *accord id.* at 350. *Kyzer* did not exist when petitioner committed his crime; it was decided two years later. Pet. App. 67a. It thus could not be applied to petitioner without implicating the Due Process Clause.

Second, the State argues that it was "clear from the face of § 13-11-2 that the murder of a police officer was a capital offense for which the death penalty could be imposed." BIO 21. Not so. The text of that statute required the State to prove "aggravation" in addition to the offense charged. And Section 13-11-4 – which the State ignores throughout its brief – provided that a sentencing court needed to find "[o]ne or more of the aggravating circumstances enumerated in section 13-11-6" in order to impose the death penalty. No Alabama court has ever found that any of the aggravating factors listed in Section 13-11-6 pertained to petitioner's crime.

Third, the State contends that *Kyzer* was not "unexpected and indefensible" because it merely cured the supposed "anomaly" that Section 13-11-6

did not include an aggravating circumstance that corresponded to the crime, listed in Section 13-11-2, of killing a police officer. BIO 26. But killing a police officer could have accompanied several of the aggravators listed in Section 13-11-6, Pet. App. 97a-98a; the fact was simply that none was present in this case. Furthermore, as the district court explained, there was nothing illogical about listing killing a police officer in Section 13-11-2 as a form of aggravated murder but not listing an aggravating circumstance in Section 13-11-6 that *always* corresponded to that crime. That was the only way under Alabama law at that time to dictate a sentence of mandatory life imprisonment without parole for the generic offense. Pet. App. 71a.

In any event, even a truly "anomalous situation" does not license a state court to rewrite a "narrow and precise" criminal statute retroactively. *Bouie*, 378 U.S. at 352. And that, at the very least, is what happened here. As the Alabama Supreme Court itself has since conceded, in the course of expressly disavowing its reasoning in *Kyzer*, the "plain language" of Alabama law at the time of petitioner's crime expressly provided that the death penalty could not be imposed unless an aggravating circumstance listed in Section 13-11-6 was present. *Ex parte Stephens*, 982 So.2d 1148, 1153 & n.6 (Ala. 2006). No state court decision suggested – nor could one have – that the law did not mean exactly what it said. *Id.* The Due Process Clause, therefore, forbade the Alabama courts here from declining to apply that statutory scheme "as it was written," *Bouie*, 378 U.S. at 355, not to mention as later construed in *Stephens*. *See Fiore v. White*, 531 U.S. 225 (2001) (per curiam).

II. This Court Should Review The Eleventh Circuit's Ineffective Assistance Holding.

The State's defense of the Eleventh Circuit's ineffective assistance holding replicates the Eleventh Circuit's confusion between state and federal law, thereby confirming that certiorari is necessary to foreclose such errors in future cases.

The State argues that petitioner's counsel's performance at resentencing satisfied the Sixth Amendment because he could fairly have assumed "that federal courts would respect the state court's decision on a purely state law question" – namely, whether an aggravating circumstance listed in Section 13-11-6 was necessary to impose the death penalty. BIO 32-33. But counsel's assumption that petitioner's eligibility for the death penalty was a "purely state law question" was exactly what rendered his performance ineffective. More than twenty years before petitioner's resentencing, *Bouie* had explained that the Due Process Clause forbids a state court from retroactively applying a state-law decision that unforeseeably expanded the coverage of a criminal statute. It thus was unreasonable and inept for petitioner's counsel to fail to raise this due process objection to the resentencing court's clear error in applying *Kyzer* to petitioner.

The State also asserts that counsel's deficient performance did not prejudice petitioner because applying *Kyzer* to petitioner did not violate due process. BIO 33. The Eleventh Circuit resolved petitioner's ineffective assistance claim strictly on performance grounds, so this Court need not necessarily address this prejudice-prong argument. In any event, petitioner's fair warning claim is

meritorious. *See supra* at 8-10. The claim would have made plain that petitioner was constitutionally ineligible for the death penalty. Counsel's failure to raise the argument at resentencing thus prejudiced petitioner in the worst possible way: it caused him to be slated for execution for an act that was not punishable by death.[4] This Court should not allow such a miscarriage of justice to go unremedied.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] To the extent the State suggests (BIO 33) that the prejudice inquiry should turn on how the state resentencing court actually might have resolved a *Bouie* objection, instead of what federal law, properly construed, would have required it do, this Court has rejected that notion. *See Lockhart v. Fretwell*, 506 U.S. 364, 370-72 (1993).

Respectfully submitted,

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