IN THE SUPREME COURT OF THE UNITED STATES

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BILLY JOE MAGWOOD, :

Petitioner : No. 09-158

v. :

TONY PATTERSON, WARDEN, ET AL. :

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Washington, D.C.

Wednesday, March 24, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

JEFFREY L. FISHER, ESQ., Stanford, California; on behalf of Petitioner.

COREY L. MAZE, ESQ., Solicitor General, Montgomery, Alabama; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 09-158, Magwood v. Patterson.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

A habeas petition challenging a new State court judgment for the first time cannot be a second or successive petition. AEDPA, of course, is a highly complex statutory system that has many interdependent parts. The pivotal language of this case, section 2244, is reproduced at page 2 of the blue brief, of Petitioner's brief.

What that section does is it restricts claims that can be brought in, quote, "a second or successive habeas corpus application" under section 2254. So this text establishes a two-step framework. First, the court needs to decide whether it's dealing with a second or successive petition. And second, if it is and only if it is, then the Court applies the modified res judicata principles set forth in that section.

Now, this case involves only the first of those two steps. And a petition, as here, that challenges a new death sentence cannot be a second or successive petition for the very simple reason that it challenges a State court judgment that has no -- never been covered in a habeas petition before.

JUSTICE ALITO: 2244 doesn't make any reference to judgment, 2244(b). And now you bring in the concept of a judgment by looking at another provision. But if "second or successive application" means a second or successive application with respect to a particular judgment, then I don't see why the important and seemingly common sense point that you make in footnote 8 of your brief can be correct; namely, that when a prisoner such as Petitioner obtains habeas relief from his sentence but not his conviction, any habeas petition after his resentencing that challenged his conviction would be successive.

You suggest that there are two judgments; there is a judgment of sentence and there is a judgment of conviction. But for habeas purposes, the only thing that is relevant is the judgment pursuant to which the Petitioner is held in custody. And that is the judgment -- that is the sentence.

So I -- I -- if your argument is correct

that you look to whether there's a second or successive application as to a judgment, then the point you make in footnote 8 just cannot be true. So that if Petitioner gets sentencing relief, gets resentenced, in the second petition the Petitioner can challenge the conviction.

MR. FISHER: But, Justice Alito, let me make clear how we get to incorporating judgment and then answer your question. The way that you incorporate the word "judgment" is because, again, the language I just quoted says "an application under section 2244." And section 2244 defines -- and this is at the bottom of the page, of page 2 --

JUSTICE ALITO: I understand that.

MR. FISHER: -- defines it as "seeking relief from a State court judgment."

Now, you are right that -- that -- that if somebody receives relief only as to their sentence and gets a new death sentence, as in this case, that the judgment he is challenging is new only as to the sentence.

Now, there -- the word "judgment" appears in other places in the U.S. Code. There is two other places I am aware of where this Court had to construe the word "judgment." One of them is when this -- is with respect to this Court's jurisdiction over final

State court judgments. And in that realm -- this is in Brady v. Maryland in footnote 1 it's laid out. In that realm, this Court treats the judgment as having two parts that can be final --

JUSTICE ALITO: Well, if a -- if someone has a -- a judgment of conviction, but is no longer in custody, that -- that person cannot bring habeas petition, isn't that right?

MR. FISHER: That's right.

JUSTICE ALITO: So it -- it is the judgment pursuant to which the person then is held in custody to which the habeas petition goes.

MR. FISHER: That's right. And in Burton this Court made it very clear that the judgment that he's being held in custody as to is the new judgment that he is challenging.

Now, what I'm saying is in the Brady context this Court has treated judgment as having two parts that can be final as to one and not as to the other. In other contexts in Burton, for purposes of seeking an appeal or seeking habeas relief, it is treated as inseparable.

And the common thread between those two circumstances has been what minimizes Federal intrusion on State affairs? And so in this context that's a very

easy answer, because what this Court always assumed, and correctly so, I believe, is that if the only thing that is unconstitutional is somebody's sentence, that's the only thing a Federal court has the power to invalidate. And that's the only thing --

CHIEF JUSTICE ROBERTS: What if the sentence is -- he is convicted, sentenced to 10 years, and raises an argument, and only an argument, that cuts off 2 years of his sentence. He says under the statute the maximum is 8 years, and the court says, the judgment is vacated to the extent it goes beyond 8 years.

Can he then bring a new challenge to, say, the whole sentence, or cut it off at 4 years, or does that limit his challenge? In other words, I'm trying to get to the point that it's not just the conviction, but if it's a period of the sentence that is not subject to challenge the first time?

MR. FISHER: Well, I don't know, Mr. Chief Justice, that that question could actually arise in a section 2254 case, where the only thing a Federal court has power to do is to declare one way or the other whether the sentence is constitutional or not and then leave it to the State to decide in further proceedings how to -- how to go forward.

In the Federal context in section 2255, the

question you suggest might arise, and indeed it has in a few places. And the question that the Federal courts have asked themselves in the second habeas petition, the second in time habeas petition, is the -- is the Petitioner challenging something he lost on the first time? And if the answer to that is yes, then it's a successive petition.

JUSTICE ALITO: Well, I don't want to belabor --

MR. FISHER: If he's challenging --

JUSTICE ALITO: I don't want to belabor this point, but once you get beyond the formal argument that you just look to whether it's a new judgment -- if you -- if you take a step beyond that, and if you -- if you don't take a step beyond that, then footnote 8 is wrong.

If you take a step beyond that, then there -- then there isn't a textual basis for drawing this distinction between the sentence and the conviction. And what you need to ask is what is consistent with the scheme of that; isn't that right?

MR. FISHER: No, Justice Alito. I think there are two textual bases. The first is the word "judgment" and, as I've described, sometimes this Court treats the judgment as having two parts that can be divided, and sometimes it doesn't. I think in this

context it ought to treat them as able to be divided. The other place you look is the words "second" --

JUSTICE SCALIA: Excuse me. Before you get beyond that, what you are talking about here is the judgment under which he is being held in custody, right?

MR. FISHER: Correct.

JUSTICE SCALIA: And that -- even if you divide it, that judgment hasn't changed.

MR. FISHER: Well, certainly it has --

JUSTICE SCALIA: He is still -- even -- his sentence has been altered and it's sent back for resentencing, but he is still being held in custody under the same judgment.

MR. FISHER: He is being held in custody until he is executed, certainly, under his conviction. But his death sentence -- and in habeas -- in habeas it's always been understood you can challenge not just the fact of your custody, but the terms under which your custody --

JUSTICE SCALIA: That's true. But --

MR. FISHER: So I think the death sentence here is most easily thought of as the terms of the custody, which is a separate thing that he challenged and won on the first time and is challenging again now.

JUSTICE KENNEDY: Well, I -- I'm not sure.

And getting back to Justice Alito's point, if -- if we say that the conviction is separate from the sentence, he can't challenge the conviction without being -- meeting the successive bar, what about the finding of death eligibility? Why -- why can't that be separated from the sentence just like the earlier conviction?

MR. FISHER: Well, I think that because -- what we're we are really talking about here when we talk about death eligibility is the need to find an aggravating circumstance. And here that goes only to whether -- his penalty, what his penalty can be. It's only to whether he can receive the death sentence or not. So it goes solely to punishment, not to crime.

Now, Justice Alito, on --

JUSTICE KENNEDY: That followed from the first conviction.

MR. FISHER: The first conviction enabled him -- if we put aside for the moment our substantive fight over whether or not the crime itself constitutes an aggravating circumstance, but the conviction itself carries a life sentence unless an aggravating circumstance is found.

And so put -- put it this way, Justice Kennedy: After the Eleventh Circuit granted habeas relief the first time, Mr. Magwood at that

moment, in 1986, was subject to a conviction that carried a life sentence. And it was the State that elected to go forward at that point and to seek a new death sentence. And all our position is, is that when that brandnew full-blown sentencing hearing was held -- and the Alabama trial court at Pet App. 103a called this a "complete and new assessment of the evidence and the law" -- when this new hearing was held it had to comport with the Constitution.

I don't think even the State disputes that all the -- all parts of the Constitution applied in that context.

JUSTICE GINSBURG: Mr. Fisher --

MR. FISHER: And so --

JUSTICE GINSBURG: -- you -- you say -- you present this argument that it is a second petition and you say that's the only issue before us and there is no other way that the new proceeding would be cut off under AEDPA.

There was in this case, in the first -- when the -- the sentence was set -- set aside, an order by the district judge; and it said: Magwood, I want you now to bring out all conceivable -- all conceivable claims on pain of forfeiture.

Why doesn't that alone -- this is an order

by the court: I don't want you to engage in seriatim litigation; I want you to bring forward all conceivable claims. And that was an order and it was made on pain of forfeiture. Why isn't that dispositive of this case?

MR. FISHER: Because that order was entered in one case, and now we have an entirely different case, Justice Ginsburg. That order was entered in the case under which Mr. Magwood challenged his 1981 judgment.

JUSTICE GINSBURG: Yes, but what he's bringing up now was a conceivable claim that he could have brought up then.

MR. FISHER: Well, it's not -- it was not claim he could have brought, and this is an important point, Justice Ginsburg. Under res judicata law, he is not making, as the State would say, the same claim now as he could have made then. The fact that he is challenging a different judgment by definition makes it a new --

JUSTICE GINSBURG: But the issue is the same. The issue is that he didn't qualify for the death penalty because at the time he committed this offense, there had to be, in addition to the eligible offense, at least one aggravator.

MR. FISHER: That's right. The legal -- the legal issue that he is raising is one that he could have

raised then.

JUSTICE GINSBURG: So why doesn't preclusion result from the court's order that says: Bring up all conceivable claims?

MR. FISHER: Because you can't waive something by failing to raise it in a different case. This is an entirely different case, in the district court --

JUSTICE BREYER: Then -- then you get to -- you get to Justice Alito's question, because in fact what we have here is we have piece of paper issued in 1981, and on that piece of paper it says: You, Billy Joe Magwood, are guilty and sentenced to death by electrocution. Then we have another piece of paper which was issued in 1986, and that says: You are ordered and adjudged guilty of the offense of aggravated murder and sentenced to death by electrocution. So the words are identical. And one was issued in '81 and one was issued in '86.

So you are saying since '86 -- this piece of paper in '86 is a new judgment, you can start all over. So then the question comes up, well, if you can start all over in respect to anything, why can't you start all over in respect to everything? But you recognize that that would be a mess, because all the things that were

never challenged here, like those things related to guilt, they could all come up again, too, even though he has never done it.

So what is -- what is -- what is your answer? Clearly you are going to start saying some things if it wasn't at issue you can bring up, and others you can't; and once you are down that track, how do we know whether these are on one side or the other?

MR. FISHER: So let me answer that in practical terms and then get back to Justice Alito by giving a -- giving statutory hook for it.

In practical terms, even though the new judgment, which is at Pet. App. 106a, reimposes the conviction, it's not anything new as to that conviction. If it were a new judgment as to that conviction, the State of Alabama would have to have a whole new trial on guilt/innocence, and it didn't.

JUSTICE BREYER: It is something new in respect to the sentence.

MR. FISHER: Pardon me?

JUSTICE BREYER: It is something new in respect to the sentence.

MR. FISHER: It is new because of the brandnew sentence, Your Honor.

JUSTICE BREYER: Ah! But it is not new in

respect to the words. They are identical.

MR. FISHER: Well, it's --

JUSTICE BREYER: All that happened --

MR. FISHER: -- they imposed --

JUSTICE BREYER: -- is the sentence was reimposed. So why not those things?

Does your concession on the first part, which I agree is necessary, imply a concession on the second part, that it's not new in respect to what might have been brought up before?

MR. FISHER: No, it doesn't. Look at this Court's decision in Lawlor. This is discussed in our opening brief, I believe around page 23, and it's a res judicata case. And what the Court held in that case is if somebody does something to somebody, the exact same thing multiple times, you can bring a new case when they do it to you the second time or the third time, and you can make arguments that were never made the first time. There is no waiver, there is no forfeiture, and the reason you can do it is you are challenging a new injury.

So Mr. Magwood under -- even under res judicata law, which this Court has said is stricter than habeas law, even under res judicata law he would have the right to bring this claim as to the sentence because

it's challenging something new.

Now let me get back to the statute, because this is important. The other place that we get our -- our answer is the word --

JUSTICE SCALIA: Excuse me. The reason Lawlor doesn't work is what you have there is different acts. The later judgment is -- is not just a later judgment with respect to the same act. It's a later judgment with -- with respect to a different act. Here you are saying you want to apply the same rule with respect to a later judgment, redoing the judgment for the same prior act. And I don't think that the same rule has to apply.

MR. FISHER: With all due respect, I think Lawlor does apply. One example in that case is an abatable nuisance. Imagine that smoke goes over and pollutes somebody's property every -- every first day of January every year. Somebody brings a lawsuit about that saying it violates certain laws, and they lose. If the next year smoke goes over the property again, you can bring a lawsuit for the identical thing.

JUSTICE SCALIA: Not the identical thing. The last one was for the smoke that went last year. The next one is for the smoke that went this year.

MR. FISHER: Fair enough. Well, same --

same here. The first case Mr. Magwood brought was about the 1981 judgment sentencing him to death, and this case is about the 1986.

JUSTICE SCALIA: The same act of his. I'm talking about the act that is the basis of the lawsuit.

MR. FISHER: But remember, the act --

JUSTICE SCALIA: It's the very same act.

MR. FISHER: But all we are talking about here is not the same act. The same act as to the conviction carries over, but this was, as the trial court put it, a complete and new assessment of the evidence. This second --

JUSTICE KENNEDY: Well, I -- I -- I want you to get -- on the assessment of the evidence, I just want to ask -- I probably should know this, and you can get back to Justice Alito's question as well. Under Alabama procedure, at the sentencing hearing both in the first trial and the second, is there evidence about the aggravating and mitigating, or do you just look at the evidence that was proven in the guilt phase?

MR. FISHER: Well, the trial judge --

JUSTICE KENNEDY: Is there new witnesses, et cetera?

MR. FISHER: As it turns out, the parties did not put new witnesses on the stand. But the trial

judge was explicit -- and this is in the -- in the order that's in the back of the appendix -- it was explicit that the parties had the right to do that.

JUSTICE KENNEDY: But then it's --

MR. FISHER: They had every right --

JUSTICE KENNEDY: -- not clear to me why death eligibility wasn't a part of the first conviction.

MR. FISHER: Because death eligibility hinges on the finding of an aggravating circumstance. And so that was vacated when the -- when the -- when the State elected to go forward and tried to reimpose a death sentence and the -- reimpose a new death sentence and the trial judge found new -- it turned out to be the same aggravating circumstance, but it found an aggravating circumstance all over again.

Imagine, Justice Kennedy, the State if it had wanted to at the second death sentence hearing could have submitted evidence to try to prove a new aggravating circumstance. The defendants could have submitted evidence trying to prove new mitigating circumstances.

Now, Mr. -- Justice Alito, I think it's important to get back to your question for the second actual hook for my argument, and it's the words "second or successive." It has to -- in some way to make any

sense of the statute, you have to say it's second or successive as to something.

Now, if you look at McCleskey, which is this Court's most thorough consideration of that concept, it says again and again in that decision what makes it second or successive is that you are asking for the same thing you have been denied before. You are coming back, as -- as -- as it used to be the case, you are filing, in effect, an appeal, endless appeals from the denials that you have been getting.

We are giving meaning to "second or successive" by saying that it's second or successive if you are asking for relief that has been denied before. It is not second or successive if it's the first time you are challenging something new that the State's imposed.

JUSTICE GINSBURG: Mr. Fisher -- Mr. Fisher, to get -- I get your "second, it's a new judgment." But thinking in terms of what AEDPA was attempting to do, we have two claims, one after the other. The second claim is one that would take away the death penalty forever, that would be it, because he said the only sentence I can get is life without parole.

He brings instead, first, one that doesn't make him -- that still leaves him exposed to the death

penalty. So the court has been put upon twice. If he had brought the first claim and he is right about that, he's not death eligible. Instead, he brings a claim that still leaves him death eligible, and the court has been burdened twice, when easily he could have brought, as the district judge instructed him to do, everything the first time.

MR. FISHER: Justice Ginsburg, I'm going to tell you two things. First of all, with -- with respect to the two different claims, given the severity of Mr. Magwood's mental illness, I think there was every reason to expect that prevailing on that claim in the Eleventh Circuit would have put an end to the State's decision to seek the death penalty in this case.

As it turns out, it didn't and the State went forward.

But also understand that the State's argument here, to the extent you are ordering the claims in sort of a level of importance, would apply even if the opposite were true, even if Mr. Magwood had brought the -- had brought some other claim the first time and prevailed on it. Any claim, the State says, that you could have raised the first time is forever barred. And that gets to, well, I still don't think I have quite answered the question on second or successive, so let me

continue that.

We are giving meaning to that term "second or successive." It's important to understand that, whatever slight difficulty you have with the word "judgment" and making sense of the words "second or successive" in our case are dwarfed by the interpretive difficulties, in fact the impossibilities, with respect to the State's proposal.

The State's proposal -- and it's laid out at page 17 of its brief, at the top of the page, right after the number 1 -- the State's proposed rule -- and I think it's useful to put it next to the statute. The State's proposed rule is if a claim could have been or was raised in a prior petition, it is barred by Section 2244 (2) or (1).

Now, the first thing you will notice is that the words "second or successive" appear nowhere in the State's rule. The State gives no definition, no meaning whatsoever, to those concepts. What the State is trying to do is -- is ask this Court to create a brandnew waiver system, a brandnew waiver system for all second in time petitions.

And we know -- we know from Martinez-Villareal and Slack and other cases that second in time petitions are not necessarily successive and

certainly they ought not to be thought of as successive when they challenge a different judgment or a different conviction or the like.

But what the State is asking for is a brandnew waiver system that has never been imposed in any decision from this Court and there have been three decisions from this Court where it would have come up. One is Burton, another is Richmond, which is cited in our brief, and the third case is --

JUSTICE KENNEDY: Well, how -- how does the State's definition at page 17 of the red brief not comport with the whole idea of second or successive?

MR. FISHER: Because the only way to get the idea of second or successive into the State's definition is where it says prior habeas petition. So, the only way that a State can even be pretending to give meaning to that would be a second in time petition.

Now, we know that can't be enough because of Slack and Martinez-Villareal. But even more than that, we know that can't be enough because it would -- it would prohibit defendants from bringing second habeas petitions even as to things that are novel as to -- a second in time rule would apply section 2244's rules to even second in time petitions that are brandnew things that arose at the retrial or resentencing.

JUSTICE KENNEDY: No, but that's not -- that's not something that could have been or was raised.

MR. FISHER: That's right, Justice Kennedy. So the State creates additional statutory language that doesn't exist. It could have been or a previously available rule. Let me give you some --

CHIEF JUSTICE ROBERTS: But that's an issue that we look at all the time under AEDPA. That's not a new approach. AEDPA says, you know, if you show that a claim relies on a new rule of constitutional law made retroactive, that was previously unavailable. That seems to me to be the same inquiry, as to whether or not a claim could not have been raised in a prior habeas petition.

MR. FISHER: I disagree, Mr. Chief Justice. You do look at those questions once it has been determined that a petition is second or successive. You have never looked at those questions in order to determine somehow whether it gets in the door.

CHIEF JUSTICE ROBERTS: It's an -- I thought your point -- I thought your point was, oh, this is going to be hard to do, impossible, as you say.

MR. FISHER: Well, I can tell you lots of reasons why that would be the case. So, let me give you some examples.

JUSTICE SCALIA: Well, wait. First -- before you get off whether this is second or successive, although the -- the State didn't put it this way, I think what the State is clearly saying is that if it is the second petition that could have raised this issue, it is second or successive. What's wrong with that?

MR. FISHER: The word --

JUSTICE SCALIA: Why doesn't that fit -- fit the statutory language?

MR. FISHER: Because the word the statute used, Justice Scalia, is "claim," not issue. And this is not the same claim.

JUSTICE SCALIA: It doesn't use --

MR. FISHER: Lawlor tells you that, and res judicata.

JUSTICE SCALIA: -- it doesn't use "judgment," either, and -- and -- and you are -- you are dragging in judgment as the -- as the --

MR. FISHER: Well, it refers to section 2254, and section 2254 uses the word "judgment," so it's our belief it is by incorporation.

But to get back to your precise question, it's important because the statute does not use the words "issue" or "argument." It uses the word "claim," which is a defined term in legal parlance.

JUSTICE SCALIA: Okay. So if -- if this is the -- if this is the second time that this claim could have been presented, it's a second -- it's a second or successive claim.

MR. FISHER: But, Justice Scalia, this is not the second time this claim could have been presented. In 1983 or '84 when he filed his first habeas petition, he couldn't make this claim because this judgment didn't even exist. There would be no way to challenge this judgment. And I'm not being overly technical here. I just urge you to look at res judicata law.

Now let me give you some examples of the difficulties the State system would raise. First of all, with -- with respect to intervening authority. The State itself concedes in its brief that it's not clear how its system would apply in the case of somebody who gets habeas relief and then later wants to seek habeas relief based on an intervening decision of this Court.

Up until now that has been a perfectly easy situation because the new judgment allows a new claim to be brought, but under the State's rule it's unclear. To the extent that the State says, well, what we would have to do is look and see -- look and see whether if there was fair notice of that decision, the defendant would

have raised it. That gets into very difficult situations about how new is the decision.

CHIEF JUSTICE ROBERTS: It seems to me -- it seems to me those are the exact same problems that would arise, do arise, under AEDPA. You have got to show that it's a new rule of constitutional law made retroactive.

MR. FISHER: But that's not the State's rule, Mr. Chief Justice. It's very easy to say whether this Court has made a decision retroactive. It would be. It hasn't happened, but I imagine it would be very easy.

The State's rule is any new decision from this Court gives the defendant a new -- gives potential rise to a debate as to whether or not that claim was previously available.

Let me tick off a couple of other things before I sit down. What about a situation the first time where a claim is Teague-barred or procedurally precluded or maybe even the defendant doesn't raise it because under the facts that the first trial went forward, it would have been harmless error.

All of those situations would raise very difficult questions as to whether that claim, as the State would put it, was previously available. Even, again, go back to the idea of having a new trial based

on new -- based on new facts and new evidence. Trying to figure out whether it's the same claim, a different claim; imagine a claim based on a prosecutor's closing argument. Well, unless the prosecutor reads the exact same script a second time, there is going to be a huge fight over whether it's a new claim, an old claim, a different claim.

And finally, the State's other -- the other prong of the State's test is about claims that were raised before are now barred. Now, the State immediately recognizes that that's a huge problem because it would bar defendants from making -- from seeking habeas relief if the State made the same violation the second time around. So it invents a brand-new due process principle that has never been held to be -- to be in existence by this Court. And indeed, in the Penry case, where this Court dealt with the Texas situation, where the State court made the same error twice, it went straight to the constitutional claim.

JUSTICE KENNEDY: Well, if it's the second -- I see your light's on. If it's the second time around, then it's just barred by law of the case.

MR. FISHER: Well, it -- well, it shouldn't be barred. Because it's a new judgment, the defendant should be able to get relief the second time around. It

would be a very strange construction of the habeas statute, and it wouldn't be law of the case because it would be a new case, again, Justice Kennedy.

And finally, let me give you the situation of claims the defendant raises but then loses on but is unable to appeal. Imagine a case like this where the defendant has many other claims that he loses on in the district court or in the court of appeals. Now, the State has a pickle here.

It has to either say that those claims are forever barred from being raised again, even though the defendant was deprived of a full right to appeal because he won on something else and couldn't appeal the losses on the other issues, or the State has to say that those were -- that those were not previously available, those claims were not previously available, in which all of its rhetoric about resurrecting past claims drops away.

Again, a very difficult question that this Court's going to have to grapple with if it accepts the State's rule.

I would like to reserve what time I have left.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Fisher.

Mr. Maze.

ORAL ARGUMENT OF COREY L. MAZE

ON BEHALF OF THE RESPONDENT

MR. MAZE: Mr. Chief Justice, and may it please the Court:

Even though they rose together, the State has litigated Magwood's mitigating circumstances in Federal court from 1983 to 1986, and now we have been litigating these aggravating circumstances from 1997 through today. That's piecemeal litigation. That's precisely the reason that AEDPA was passed under 2244(b) and that's precisely what the abuse of the writ doctrine was designed to prevent.

And it's based on the principle that this Court unanimously affirmed again yesterday. You have equitable principles that say when you have two parties, a party has a full and fair opportunity to praise a claim or to litigate. But the other party also has a finality interest. And once you take away your full and fair opportunity by not using it, the other party's interest in finality outweighs. That's what Congress envisioned in AEDPA. That's what this Court envisioned with the abuse of the write doctrine. That's why we don't allow someone who had a claim previously available that didn't use it to bring it again.

And if I may, I want to go straight to

Justice Alito's question about conviction versus sentence, and then to Justice Kennedy's about whether or not under Alabama law this is aggravated with something new to the resentencing.

As far as judgment -- conviction versus sentence, I had two answers. Justice Breyer got to the first. On page 106, the new judgment, as Mr. Magwood would say, says, "I hereby judge you convicted of the underlying offense in the actual guilt phase and the sentence." So it contains both, if you consider that a new judgment.

But the second point is, if Magwood is correct that you can separate a judgment of sentence and conviction, then Burton is wrong. Burton has to be wrong. Because the argument in Burton was -- he cited In Re Taylor, which was the exact same case we put in our brief. He said: My first petition attacked the judgment of conviction; my second petition attacked the judgment of resentence, and because those are two separate judgments, this was my first chance to attack the judgment of sentence.

And this Court said: No, it's one judgment; it's conviction and sentence. And because your first petition attacked that judgment that contained both, your second petition attacks the same judgment that

contained both.

So if Mr. Magwood is right that you can separate the two, then Burton has to be wrong. Now --

JUSTICE BREYER: No, I think what you would have to do -- it's a dilemma here.

MR. FISHER: Right.

JUSTICE BREYER: What you would have to say to follow his approach, is you would say: Judge, here is what you would do. They're filing it from the second judgment. Okay? So it is not second or successive.

But wait. If there is a first judgment that says the same thing, then it is, in effect, the first judgment that counts.

Now, what happens when there is a change? Well, to note the scope of the change, you would go to the habeas court and you would say, to the extent that that habeas court changed -- reversed --

MR. MAZE: Right.

JUSTICE BREYER: -- or left open or told the lower court: Do this over; to that extent, it is a new judgment. And that -- that would get them where they want to go.

MR. MAZE: And you just answered Justice Kennedy's question. The question in this case is: What changed? If you'll look at the district

court's opinion, its order from the first case -- it's page 228 of the opinion -- it said: The Court finds that this case must be remanded to the State court for resentencing on the existence of mitigating circumstances, rather than two. Justice Kennedy's question was --

JUSTICE BREYER: Wait. Wait. Wait. Wait right there. I would have read that to say that what he said was: Vacate the sentencing part.

Now, you say: Well, vacate the sentencing part; fine. Now we look at the second judgment, and we say: It's a new judgment. Oh, but it isn't.

MR. MAZE: Right.

JUSTICE BREYER: Insofar as that habeas didn't tinker with it. But they did tinker with it, because they vacated the sentencing part.

Now, why doesn't that work? And his argument is, that works much easier for the judges, much easier for everybody, than to try to figure out whether a claim could have or couldn't have been raised, whether a sentence was changed from six years to five years, or who knows what we are going to get into; et cetera.

MR. MAZE: Because it's one of two things. Either you vacated the entire judgment and the conviction and sentence are put back together -- they

are -- it is a new judgment altogether. Or you look at specifically what the constitutional infirmity was that the Court identified in that case.

The answer to Justice Kennedy's question is: There are four things under Alabama law at the time of this case that were necessary to have a death sentence. The first was an indictment with an aggravating circumstance. The second was a conviction of a capital offense. The third was the State announcing an aggravating circumstance. And the fourth was a penalty phase recommendation from the jury that was unanimous.

When this case went back, all four of those things were carried over from the first trial. We didn't do any of those things again. They were all carried over. They are relics from the original trial. The only thing new that happened was we added the two mitigators to the weighing calculus and it was reweighed. And we know that is true from the district court's opinion in the second case.

Mr. Magwood claimed that he could bring a claim against the fact that we didn't re-empanel the penalty phase jury, which, again, is a sentencing claim, and the district court said no, the State court didn't have to re-empanel the jury to give another recommendation, because that wasn't the problem in the

first case. The only problem in the first case was not having the two additional mitigators. And under the same rationale, the State's announcement of the aggravator was also a relic from the first case. And in fact, we know that, because in the circuit court's opinion in the first case, it specifically told the State court: If you will weigh the same aggravating circumstance against the four instead of two, we won't question your judgment.

JUSTICE BREYER: This argument -- I am making it up, but I mean, he doesn't have to apply these arguments -- but it seems to me that the argument against this is: What you are proposing is too complicated. There are thousands of these in the courts of appeals. All you would like is you would like the court of appeals to look back and say: What part of the original sentence did the district court, habeas, vacate?

MR. MAZE: Right.

JUSTICE BREYER: Not look into the reasons for it, et cetera. Because once we start going into the reasons for it, the litigation is just going to mushroom.

MR. MAZE: Right.

JUSTICE BREYER: And -- and, you know, you

have this new witness but not that new witness, et cetera. So his argument is one from simplicity. Start with the judgment. Second, keep it the same insofar as the district court didn't vacate it. And deal with it as a new judgment, which it is, insofar as they did.

MR. MAZE: There is a simple answer to why the Federal courts can deal with this, and we know they can deal with it. And the answer is: When this happens on direct appeal in a Federal prisoner's case -- for example, if a Federal prisoner says you shouldn't have enhanced my sentence for this one reason, and he gets a remand where the sentence is vacated, he is resentenced and it comes back up -- the circuit courts are unanimous. They all say you can't challenge other enhancers from the original sentence because you could have raised it the first time. I can give you case after case after case where they have done that. A good example: Judge Posner had the case U.S. v. Parker 101 at 3rd 527, where he says the exact same thing and his analysis is exactly what we are saying. A party cannot use the accident of a remand to raise in a second appeal an issue that he just as well could have raised in the first appeal. And the principle is exactly the same, that the Federal courts in State habeas will look to see is this was an issue you could have raised the first

time, and if it was, you are out.

It would make no sense under AEDPA for a Federal prisoner on direct appeal to give the U.S. government a finality interest in enhancers that could have been challenged the first time, but not to give the same finality interest to States when they are coming into Federal court under AEDPA for aggravators that have been challenged the first time. Again, the whole purpose of AEDPA was to give finality to the State. If Federal government is going to get a greater interest than the States, then AEDPA is completely -- I mean, it's just completely wrong.

Now, another problem with Magwood's argument is, he is going to kill an entire line of cases, the Kyzer cases, where you can challenge good time credits, parole credits. If you remember, in Kyzer, you said if you are challenging your good time, you can raise that in a 2254 petition. Now, under Magwood's rule, if you read it as a second or successive application against a judgment -- let's assume that you've lost in your first habeas, so your first petition is now done and you have lost. Good time credits are taken away from you. Under this Court's precedent, you raised that in a 2254 petition, but that petition will be the second petition under the same judgment. And he would be barred because

the good time credit claims would meet an exception. It's not new facts or law that proves he's innocent, and therefore it is barred.

The only way that the circuits have been able to deal with that situation is exactly the way the State's saying here and that Justice Scalia is saying. You ask the question first: Is this a claim that has been available before? And if it's not a claim that was available before, and because it's a good time claim that wasn't, then you say this is not a second or successive application, because it is the first application in which he could have brought the claim. That's directly --

JUSTICE GINSBURG: And Mr. Fisher uses the word "claim" as -- differently.

MR. MAZE: Yes.

JUSTICE GINSBURG: He makes a distinction between "issue" and "claim." Yes, it's the same issue; could have been -- the issue could have been raised earlier, but, he says, it's not the same claim. And the statute uses the word "claim."

MR. MAZE: I have two answers to that, if I can, Justice Ginsburg. The first is: This Court has defined a claim in Gonzalez v. Crosby, which is a 2254 case, as the assertion of a ground that entitles the

Petitioner to habeas relief.

If you'll look at the question presented, Magwood agrees that this -- this says at the end: "The Petitioner could have challenged his previously imposed but now vacated sentence on the same constitutional grounds." If the claim is grounds that can give you relief and he admits that it's the same grounds he could have gotten relief on the first time, it is the same claim.

Now, to the extent he is telling you this is a new injury, that -- the smoke example that Mr. Magwood is talking about, we disagree with that; to the extent that he would be right, the difference is in this case, he asked us to blow the smoke at him a second time. Remember what happened in the first proceeding. Magwood didn't challenge the aggravating circumstance, and then when we got to the court of appeals, he asked specifically the Eleventh Circuit to send this case back for resentencing so that the four mitigators could be weighed against the original aggravator. He asked for this to go back and to -- asked to have the aggravator applied to him again. So he invited the error. This is not like a normal civil case where --

JUSTICE SCALIA: What -- what would happen if it had been sent back on this ground, but there was

another ground that he had appealed on which the Court never reached?

MR. MAZE: Right.

JUSTICE SCALIA: Okay. Would he still be able to raise that one on habeas?

MR. MAZE: Yes. And again, the reason is -- it's just like you said in Espinoza yesterday -- you get one full and fair opportunity to litigate a claim. If you raise the claim in the first petition, it's not abusive, as this Court said it in McCleskey, because McCleskey says it is only abusive if you could have but didn't. And this Court's really already answered that question in Slack.

JUSTICE KENNEDY: I think you are right, but McCleskey was pre-AEDPA.

MR. MAZE: It was.

JUSTICE KENNEDY: What was the answer under AEDPA to Justice Scalia's problem?

MR. MAZE: I think it's the same, and the reason I say that because in Slack, you had a first petition that raised an exhausted claim. It was dismissed. He raised what everybody acknowledged was a second in time petition, but you said because he didn't get an adjudication on the merits, we're going to let him do it again. The same thing happened in

Martinez-Villareal.

JUSTICE KENNEDY: But we just found that to be successive under the words of the statute?

MR. MAZE: Right. But in Panetti -- if you remember, in Panetti, he raised a -- he did not raise a Ford claim the first time around, and this Court said yes, if we looked at it only a second in time, this would be barred, but we defined second or successive application under the abuse of the writ doctrine. And because this was the first time this claim was right you allowed him to do it and called it a first application, and the reason was because he couldn't raise it the first time.

Now, back to the point --

JUSTICE GINSBURG: I thought your answer to Justice Scalia's point: Suppose it was raised but the Court didn't decide it.

MR. MAZE: Right.

JUSTICE GINSBURG: Your test, I take it, is that he must have one full and fair opportunity to litigate the question; that means to raise it, to have it aired, and to have it decided.

MR. MAZE: Absolutely. The point would be, it's not an abuse of the writ if you raise a claim the first time but don't have the chance to have it

adjudicated. You abuse the writ, as this Court has always said, by having a chance to raise the claim but then not doing it.

JUSTICE BREYER: That's what they raised -- your view is a simple rule, no matter how many judgments there are.

MR. MAZE: Right.

JUSTICE BREYER: If this claim could have been raised and would have been fully adjudicated had it been, it's barred.

MR. MAZE: Yes.

JUSTICE BREYER: But if either it couldn't have been raised, or if it could have been raised and wouldn't have been fully adjudicated or was not fully adjudicated, not barred.

MR. MAZE: Yes, that's it. And that's directly in line --

JUSTICE BREYER: And applied to everything.

Can we reconcile that with the language? Does it work in terms of the language?

MR. MAZE: What this Court has done since AEDPA came out on two different occasions, has said the second or successive petition is a term of art, which would give substance in our previous habeas corpus cases, the abuse of the writ doctrine cases.

This Court has always said since AEDPA came out that we have to define the term by looking at what's an abuse of the writ. And that's what the circuit courts have done. The circuit courts are applying the same rule that we have given you, which is precisely what Justice Scalia said earlier.

JUSTICE BREYER: One judgment. One judgment. Never come up on appeal. Yes, it did, the first one. And let's see. There were 15 issues that were raised. They only answered -- you know, they answered one. Now we go back and then five years later he wants to bring up a different one. Fine. You can do it. Not second or successive.

MR. MAZE: Can you repeat? I'm sorry. I lost you.

JUSTICE BREYER: It -- it's there in the case.

MR. MAZE: Okay. The claim is available.

JUSTICE BREYER: It's one judgment. He makes five claims.

MR. MAZE: Okay. Right.

JUSTICE BREYER: The district court doesn't decide, for some reason, I don't know, number 3 or 4. Maybe I -- maybe it's not realistic, what I say. Let me think about it some more.

MR. MAZE: Okay. While you are doing that, I want to make another point.

CHIEF JUSTICE ROBERTS: Well, now, just to follow up: It's very realistic. I think a reasonable judge might decide: Look, if I can dispose of this case on ground one, you know, why should I go and decide all these other issues, which may be difficult?

MR. MAZE: Right. And it does happen.

CHIEF JUSTICE ROBERTS: Yes. And so I assume your point is that he can raise -- he can raise again issues that he raised before; it's no fault of his that the Court didn't reach --

MR. MAZE: Yes, that's right. Because he didn't have the full and fair opportunity to have it adjudicated. Now, in this --

JUSTICE BREYER: Full -- see, he filed his petition -- this would get rid of -- I think there are -- I am worried about that there are cases out there that say the opposite. But we get rid of all those cases, if there are any, and you just say that he has not had the full opportunity to have the litigation on a claim that he did raise.

MR. MAZE: Right.

JUSTICE BREYER: Or if he couldn't have raised it, it doesn't matter if there was one judgment

forever. He can raise it again and again, as long as he only does each one once, and they are not second or successive even if they appear in petitions 1, 2, 3, 4, 5, 6, and 7.

MR. MAZE: That seems to be what the Court said in Martinez-Villareal.

JUSTICE SCALIA: Well, he'd have to bring them all in petition, too. You can't say, you know, there are five that weren't reached and bring a separate habeas reach for each one of the five. At first habeas, you would have to bring all of them, right?

MR. MAZE: Right. And in the forum -- and in the forum rule, number 9 in the instructions, in big, bold letters, informs the Petitioner: You have to raise every claim, subject to the fact that you will lose it if you don't.

Now, I want to bring up a point on why this matters to the State. On page 48 of our red brief, we showed you some statistics about the number of claims the Petitioners bring, but what we didn't cite -- it's on page 51 and 52 of the same study. The study shows that after AEDPA, 13 percent of capital habeas petitions nationwide -- and if you take Texas out, it's actually 18 percent -- are granted. 70 percent of capital habeas petitions that are granted are granted on penalty phase

claims alone. In Alabama, we looked, and we haven't found a conviction-based grant in over a decade, but we have had two penalty phases in the last two years.

So what Mr. Magwood is doing is asking you to adopt the rule that, 10 percent of the time, would put the State and district courts in the position of relitigating an entire capital habeas case. And what we showed you was capital habeas proceedings are the absolute most time-consuming cases in the district courts. And he's wanting you to throw away the abuse of the writ doctrine and the successive petition doctrine in cases where there was a limited grant in the first case. And it --

CHIEF JUSTICE ROBERTS: It's not the whole case. I mean, he concedes that the conviction can't be challenged. It's just the sentencing aspect.

MR. MAZE: Right. As the point we have been making with Justice Alito, I just don't see where he can make that distinction between conviction and sentence. And if this Court just comes back and says: New judgment means it resurrects, I can assure you that the next petitioner will come along and say: I am not making the same concession that Mr. Magwood did; judgment means conviction and sentence, see Burton. And he's going to raise 50 repetitive claims from his

conviction and from his original sentence. And then we have the problem that the Federal district courts are already dealing with, if the habeas petitions, as we showed in the brief --

JUSTICE SOTOMAYOR: I'm sorry. Wouldn't collateral estoppel block the relitigation of all sentencing -- resentencing issues that were decided that were identical?

MR. MAZE: No, Justice Sotomayor, and the reason is collateral estoppel is a res judicata principle that doesn't apply to Federal habeas proceedings. That's the reason that the abuse of writ doctrine and the successive petition doctrine were created. When you go all the way back to Salinger --

JUSTICE KENNEDY: What -- what case do I read that supports that proposition?

MR. MAZE: Salinger.

JUSTICE KENNEDY: I -- I had thought that law of the case issue preclusion would apply.

MR. MAZE: No. The Court has always said that res judicata in -- forms, and the case to lack back to is all the way back to Salinger. If you remember Salinger, he had two habeas petitions. The first one raised a claim on which lost. The second petition raised exactly the same claim, and he lost again.

And the Federal Government -- the reason he lost is because they said it was barred by res judicata, in this case claim preclusion. It went up to this Court and this Court said res judicata doesn't apply in Federal habeas proceedings, so that court is wrong.

But we understand the problems the courts are going to have because there is no res judicata; therefore we are creating this abuse of the writ doctrine, this equitable doctrine, that will allow the courts to deal with the law of collateral estoppel. The only thing that Mr. Magwood has been able to cite --

JUSTICE SCALIA: I guess if res judicata applied, you wouldn't bring habeas in the first place on an issue that was wrongly decided, right? If it was decided res judicata.

MR. MAZE: Yes. Right.

JUSTICE SCALIA: And so your -- your habeas claim would be barred.

MR. MAZE: Right. And -- and again, a further point would be that, you know, Mr. Magwood keeps saying that just because he won, this was different. But --

JUSTICE KENNEDY: Well, the old -- the former rule of course, was that you could bring writ after writ after writ.

MR. MAZE: Yes.

JUSTICE KENNEDY: Was it -- was McCleskey the first time that that -- that that was foreclosed? No.

MR. MAZE: No.

JUSTICE KENNEDY: That -- that just -- that just incorporated a whole body of law which was very much like issue preclusion, was it not?

MR. MAZE: Yes. No. The courts always said it is a modified sort of res judicata, but they are different in some respects. You can use it sort of as an analogy, but they are different. The Court has said res adjudicata doesn't apply; that's why we have to have this similar doctrine because without it you could raise repetitive claims. It was the whole reason that the rule came into existence.

JUSTICE BREYER: What happens if in the first trial, the lawyer thinks, you know, I have two claims here; one is mediocre and one is great. And I'm not going to win in the court of appeals unless I make the great one; just forget about the mediocre. And he brings it and he wins. Okay? Now he goes back. Now can he make the mediocre one?

MR. MAZE: No. If he didn't raise it the first time, he has lost his opportunity. That's Wong

Doo. The very first case that this Court ever decided under abuse of the writ principles, Wong Doo raised two claims, but the second claim he decided wasn't good enough. He failed to put on evidence and abandoned it.

JUSTICE BREYER: So he better put in everything.

MR. MAZE: Right.

JUSTICE BREYER: And if he puts in everything and they don't reach the other ones, he's okay, because he can raise it again.

MR. MAZE: Right. And we will let him do that.

If the Court has no further questions.

JUSTICE STEVENS: Let me just ask, is this the cases in which the claim is he's ineligible for the death penalty?

MR. MAZE: The underlying claim itself.

JUSTICE STEVENS: And is that -- is that a meritorious claim?

MR. MAZE: The first -- the first answer is, the claim itself is that I have did I have fair notice in 1978 that I could get the death penalty? The claim itself, no, is not meritorious, but of course that's our opinion. The Eleventh Circuit hasn't decided that issue yet, nor has it decided what has always been our

principle argument: this claim is also procedurally defaulted because he didn't fairly present it to the State courts. The State courts never had an opportunity to decide this fair warning claim --

JUSTICE STEVENS: The merits of the claims have never been decided?

MR. MAZE: Not -- not by the State courts because it wasn't fairly presented to them. The only -- only court to have even talked about it was the district court.

But again, the Eleventh Circuit hasn't dealt with it because second or successive is a jurisdictional question, and if the claim is second or successive, then it's barred and we simply haven't gotten to it.

Again, Your Honors, all we are asking you to do is uphold the abuse of the write doctrine for the same reason the Court adopted it in 1924 all the way through AEDPA, and that is we are going to force petitioners to raise every claim they could the first time, so we prevent the State, the victim's family and the Federal court from going through second or third rounds of Federal habeas litigation on grounds they could have raised the first time.

If the Court has no further questions I will cede my time to the Court.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Maze.

Mr. Fisher, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Thank you. Let me make two points, Your Honor.

If I leave you with nothing else, think about the argument that you just heard that again and again talks about abuse of the writ, abuse of the writ, abuse of the writ. Well, there is now a statute that occupies this field, it's section 2254. And abuse of the writ principles apply only if a petition is second or successive. So if this Court does nothing else, it has to define that term, and we are the only ones who have given you a definition of second or successive.

And Congress made that decision for a reason. It thought it was fair to impose strict burdens oh relitigation to the extent that the defendant lost. But when he wins, and gets a brand-new trial or a brand-new sentencing hearing --

JUSTICE SOTOMAYOR: Can we go back to Justice -- to the Chief Justice's example to you at the very beginning of your argument?

MR. FISHER: Pardon me?

JUSTICE SOTOMAYOR: To the Chief Justice's

argument.

MR. FISHER: Yes.

JUSTICE SOTOMAYOR: There is an order to resentence, to reduce a sentence from 10 to 8 years. The prior sentence was vacated. There is a new proceeding, a new Booker type 35538 proceeding where the judge is thinking about everything, and he says I am going to reduce it from 10 to 8 years. I am leaving everything else the same, because there was no arguments about it; there is no anything about it.

Does your rule then mean that that petitioner can come back and say, my fine was wrong, my supervised release was wrong, other convictions, other sentences that were consecutive or concurrent are wrong?

MR. FISHER: Probably not. But let me tell you, Justice Sotomayor, that question can arise only in a Federal situation. It cannot arise under section 2244 which gets to the other important point I wanted to make.

The State keeps talking about what the district court said. Well, when the State -- when this case went to the Eleventh Circuit the first time, the State made it very clear. It complained, it said the district court can't remand this to the State courts, it can't micromanage what a State court does.

All it can do -- and, Justice Scalia, this is, I think, most clearly put in your Wilkinson concurrence is order the release or not. The Federal court in this case ordered Magwood's release from the death penalty unless the defendant -- unless the State wanted to elect to have a brandnew sentencing proceeding.

Now, the State elected to do that, and had every right to do it. But Magwood also had every right to insist on every constitutional protection in that circumstance.

And if I might finish this sentence, Mr. Chief Justice, when he -- we agreed if that Mr. Magwood had not properly preserved this argument the second time around, it would be procedurally defaulted. And if the State wants to make that argument on remand, it can. But understand that the State's argument is asking you to say that a claim is barred from Federal habeas even if the defendant completely properly raises it the second time around and loses it and wants to then bring it to the Federal courts.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:01 p.m., the case in the

above-entitled matter was submitted.)