THE PRECIOUS SAFEGUARD IMPAIRED: *MAGWOOD V. PATTERSON* AND THE SUPREME COURT'S NEW APPROACH TO SECOND AND SUCCESSIVE FEDERAL HABEAS CORPUS PETITIONS

The federal writ of habeas corpus is one of a death row inmate's most powerful tools against state imposed capital punishment. The writ is issued in the final stages of an inmate's appeals process and often represents the last real opportunity for relief from a state judiciary's errors. In *Magwood v. Patterson*,[1] the United States Supreme Court changed how federal courts should address the filing of second or successive habeas petitions, departing from its previous claim-based precedent and choosing instead to take a judgment-based approach. In examining the Court's new approach, this note will discuss the background of the federal writ as it relates to the Court's jurisprudence on successive habeas petitions, including the *Magwood* decision. Finally, this note will attempt to explain the problems that the Court's new approach might produce for inmates seeking federal ha-

1. Magwood v. Patterson, 130 S. Ct. 2788 (2010).

beas relief and highlight as an alternative the claims-based approach that the Court employed in past decisions.

I. LEGAL BACKGROUND

A. The Federal Writ of Habeas Corpus

The writ of habeas corpus allows one in custody under a state or federal court judgment to have a federal court test the constitutionality of his custody.[2] In providing for the writ, the United States Constitution states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[3] The Court has underscored the importance of this writ, writing, "the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."[4]

B. Pre-AEDPA: Abuse of Writ Doctrine: A "Full Opportunity" Bar

Before statutory law, common law did not prohibit inmates from filing repetitive or successive petitions for habeas corpus to the court of their choice, leaving the opportunities for rehearing nearly unlimited.[5] Traditionally, courts held that res judicata principles do not apply to habeas corpus cases.[6] Early cases concerning second petitions of habeas corpus cautiously incorporated res judicata principles into the analysis by giving some weight to the refusal of the first writ when deciding whether the granting of the second writ was proper.[7] The Court focused instead on the concept of the "abuse of writ" when a petitioner "had full opportunity"[8] to raise the claim on the first writ and "good faith required"[9] that he seek to litigate the claim at that time.

The Court later defined the concept: "The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain

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2. *See* 28 U.S.C. §§ 2254-2255 (2000); *see also* Mark T. Pavkov, Comment, *Does "Second" Mean Second?: Examining the Split Among the Circuit Courts of Appeals in Interpreting AEDPA's "Second or Successive" Limitations on Habeas Corpus Petitions*, 57 CASE W. RES. L. REV. 1007, 1007-08 (2007).

3. U.S. CONST. art. 1, § 9, cl. 2.

4. Bowen v. Johnston, 306 U.S. 19, 26 (1939) (citing *Ex parte* Lange, 85 U.S. 163, 178 (1873)).

5. *See* McCleskey v. Zant, 499 U.S. 467, 479 (1991) *superseded by statute*, 28 U.S.C. § 2244, *as recognized in* Hazel v. United States, 303 F. Supp. 2d 753, 759 (E.D. Va. 2004).

6. *See id.*

7. *See* Wong Doo v. United States, 265 U.S. 239, 240-41 (1924); *see also* Salinger v. Loisel, 265 U.S. 224, 230 (1924) *superseded by statute*, FED. R. CIV. P. 18, *as recognized in* United States v. Gould, 508 F. Supp. 2d 896 (D.N.M. 2007).

8. *Wong Doo*, 265 U.S. at 241.

9. *Id.*

a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus."[10] The abuse of writ doctrine bars claims that "could and should have been raised"[11] or "could have been developed"[12] in the first petition, claims "essentially the same"[13] as those in the first petition, or claims that were not "unknown to [petitioner]"[14] at the time of filing the first petition. The failure to raise the claim in an earlier petition was not required to be deliberate.[15] Rather, the Court stated that the standard was met if, in light of the petitioner's claim history, a claim was identified as appearing for the first time when it was available at the time of an earlier petition.[16] In determining what was available at the time of the first petition, the Court looked to what the petitioner knew or could have discovered based upon what was reasonably available to him at the time of the first filing.[17] Overall, the predominant gatekeeping standard rested heavily on judicial discretion.[18]

C. The Modern Standard: AEDPA

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which sought to usher in a new era of habeas corpus review and which placed limitations on the ability of federal courts to grant a writ of habeas corpus.[19] AEDPA substantially amended §§ 2241–2255 of Title 28 of the United States Code by increasing the requirements that state and federal prisoners seeking federal relief must meet in an attempt to "restrict the filing of frivolous habeas petitions that are disruptive of judicial finality and parasitic upon official time."[20] Among the new requirements for the writ were a one-year statute of limitations for filing habeas claims, limits on appeals of denial of habeas relief, and limits on second or successive habeas petitions.[21]

D. Gatekeeping Under AEDPA: The "Second or Successive" Petitions Bar

For the purposes of this note, the pertinent gatekeeping provision of AEDPA is the bar on "second or successive" petitions. Under this provi-

10. *McCleskey*, 499 U.S. at 470.
11. Woodard v. Hutchins, 464 U.S. 377, 379 (1984) (per curiam) (Powell, J., concurring).
12. Delo v. Stokes, 495 U.S. 320, 321-22 (1991) (per curiam).
13. Antone v. Dugger, 465 U.S. 200, 207 (1984) (per curiam) (Stevens, J., concurring).
14. *Id.* at 206.
15. *See McClesky*, 499 U.S. at 489.
16. *See id.* at 494.
17. *See id.* at 497.
18. *See* Kyle P. Reynolds, Comment, *"Second or Successive" Habeas Petitions and Late-Ripening Claims After* Panetti v. Quarterman, 74 U. CHI. L. REV. 1475, 1478 (2007).
19. 28 U.S.C. § 2244 (2000).
20. Reynolds, *supra* note 18, at 1479.
21. *See generally* 28 U.S.C. § 2244.

sion, federal courts are to dismiss any claim "in a second or successive habeas corpus application . . . that was presented in a prior application."[22] Petitions deemed second or successive are to be denied unless they meet one of two exceptions: either the petition relies on newly discovered evidence[23] or on a new constitutional rule that was previously unavailable.[24]

AEDPA does not interpret the phrase "second or successive." The Court has stated that the phrase is a "term of art."[25] Further, the phrase is "not self-defining."[26] Rather, it takes its meaning from prior habeas corpus case law, including pre-AEDPA cases.[27] While the Court has refrained from providing a more concrete definition of the phrase, the Court, at the very least, has declined to interpret it as refusing all habeas petitions "filed second or successively in time."[28] However, the Court sees AEDPA standards as adding "new restrictions on successive petitions,"[29] a standard that "further restricts the availability of relief to habeas petitioners."[30]

The Court's interpretation is informed by any decision's potential "implications for habeas practice."[31] As such, some specific exceptions developed in post-AEDPA litigation. In developing these exceptions, the Court focused on the availability of claims brought by the petitioner in an earlier habeas petition. When a petitioner raises claims in a first habeas petition with claims not yet exhausted in the state court system, the federal court is directed to dismiss such a petition.[32] However, once the claims are properly exhausted, the petitioner may bring those claims on a second petition without violating the second or successive bar.[33] The rationale behind such an exception mirrors that of ripeness; a second petition raising a claim not yet ripe at the time of the first petition is deemed to not be second or successive.[34] A second petition, even following the adjudication

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22. 28 U.S.C. § 2244(b)(1).

23. *See* 28 U.S.C. § 2244(b)(2)(B)(i). This newly discovered evidence must be "sufficient to establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii) (2000) (emphasis added).

24. *See* 28 U.S.C. § 2244(b)(2)(A). The new rule of constitutional law would be "made retroactive to cases on collateral review by the Supreme Court." *Id.*

25. Slack v. McDaniel, 529 U.S. 473, 486 (2000).

26. Panetti v. Quarterman, 551 U.S. 930, 943 (2007).

27. *Id.* at 943-44.

28. *Id.* at 944; *see also Slack*, 529 U.S. at 487; Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998).

29. Felker v. Turpin, 518 U.S. 651, 664 (1996).

30. *Id.*

31. *Panetti*, 551 U.S. at 945 (citing *Martinez-Villareal*, 523 U.S. at 644).

32. Rose v. Lundy, 455 U.S. 509, 520-22 (1982) *superseded by statute*, 28 U.S.C. § 2254(b).

33. *See generally* Burton v. Stewart, 549 U.S. 147 (2007); *Lundy*, 455 U.S. 509; *Martinez-Villareal*, 523 U.S. 637.

34. *See Panetti*, 551 U.S. at 947; *see generally Martinez-Villareal*, 523 U.S. 637.

of a first federal petition, that raises a claim that is "first ripe" at the time of the second petition is allowed.[35]

The Court has also applied the same rule to mixed petitions that raise unexhausted and exhausted claims.[36] The petitioner with an initially mixed petition may withdraw, exhaust the remaining claims, and return with a fully exhausted petition.[37] The later, fully exhausted petition is not second or successive.[38] In a case where a habeas petition is dismissed on procedural grounds without reaching the underlying claim, a second-in-time petition raising the claim again would not be considered second or successive.[39] The important distinctions made in these cases are the Court's attention to the substantive nature of the claims and the petitioner's prior opportunity to litigate that claim. If the claims being brought in the successive petition were claims not yet exhausted or ripe, they were then unavailable at the time of the first petition. Consequently, the petition is not second or successive.[40]

II. THE *MAGWOOD V. PATTERSON* DECISION

A. Background

1. Facts

In June 1981, Billy Joe Magwood was sentenced to death for the 1979 murder of Coffee County, Alabama Sheriff Neil Grantham.[41] Prior to the murder, beginning in 1975, Magwood served four years in a Coffee County prison for narcotics possession, with Sheriff Grantham working as one of Magwood's jailers.[42] Shortly after Magwood's release on March 1, 1979, he waited in a parked car in the Coffee County jail parking lot for Sheriff Grantham to arrive.[43] Upon Grantham's arrival for work, Magwood confronted him and shot the sheriff three times.[44] Grantham was shot in the head, face, and chest and died at the scene as a result of the

35. *Panetti*, 551 U.S. at 947.
36. *See Burton*, 549 U.S. at 154; *see also Slack*, 529 U.S. at 489.
37. *See Slack*, 529 U.S. at 486-87.
38. *Id.* This new fully exhausted petition is treated "as any other first petition." *Id.* at 487.
39. *See Slack*, 529 U.S. at 489. In this scenario, the second-in-time petition can even raise claims that were not in the original first-in-time petition that was dismissed. The claims in the second petition will be treated as the petitioner's first application for habeas relief.
40. *See Martinez-Villareal*, 523 U.S. at 643 (The Court noted that in these situations the proper view is to not see two applications, but rather one claim that is considered to be part of the first application.).
41. Magwood v. State, 426 So. 2d 918, 920 (Ala. Crim. App. 1982), *rev'd sub nom.* Magwood v. Patterson, 130 S. Ct. 2788 (2010).
42. Brief of Respondent at 3, Magwood v. Patterson, 130 S. Ct. 2788 (2010).
43. *Magwood*, 426 So. 2d. at 920.
44. *Id.*

gunshot wounds.[45] Magwood was charged with the murder of a sheriff, a capital offense.[46] In finding Magwood guilty, the jury rejected an insanity defense, and the trial court rejected two statutory mitigating circumstances, determining that the aggravating circumstance of murdering a sheriff outweighed the two mitigating circumstances of age and lack of violent criminal history.[47]

2. Procedure

The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Magwood's death sentence.[48] In 1983, "as Magwood [further] litigated his state post-conviction petition, he simultaneously filed his first § 2254 habeas petition."[49] Following a district court order directing Magwood "to present all possible grounds for habeas relief,"[50] Magwood raised nine claims for relief. Magwood did not raise a fair warning claim in the 1983 petition.[51] Magwood's petition was successful, in part, and the district court granted conditional habeas relief on the basis that the state trial court improperly failed to weigh all mitigating circumstances.[52] The district court ordered that Alabama release or resentence Magwood and directed the state to correctly apply all four mitigating factors "rather than just the two originally considered."[53] The Eleventh Circuit affirmed the

45. *Id.*

46. ALA. CODE § 13-11-2(a)(5) (1975). The 1975 Code required the finding by a jury of the presence of an aggravating circumstance, combined with an intentional murder. In approving the death sentence, the court was required to weigh the aggravating circumstance against four statutory mitigating factors (age, violent criminal history, mental state, overall criminal history). With regard to aggravating circumstances, the 1975 Code provided two lists of aggravating circumstances, one in § 13-11-2 and one in § 13-11-6. The conflict in Magwood's case was that the court determined the aggravating circumstance of murdering a sheriff, from the § 13-11-2 list, was present, but determined that none of the § 13-11-6 circumstances were present. The question became whether the court was required to find one from each list or if one aggravating circumstance from either list would suffice.
At the center of the debate for Magwood's petitions was a fair warning claim. In validating the initial death sentence, despite the lack of a § 13-11-6 aggravating circumstance, the court relied on *Ex parte* Kyzer, 399 So. 2d 330 (Ala. 1981), which held that the murder of an on-duty sheriff was by definition a crime involving sufficient aggravation for a death sentence. *Kyzer* held that no other statutory aggravating circumstances needed to be found when an on-duty sheriff was murdered. Magwood asserted that, at the time he committed the 1979 murder, he had no way to know that the death penalty statute would be interpreted in such a manner. His fair warning claim asserted that the court sentenced him in accordance with a 1981 decision for a murder that was committed in 1979.

47. *Magwood*, 426 So. 2d at 928-29.

48. *Ex parte* Magwood, 426 So. 2d. 929, 932 (Ala. 1983), *rev'd sub nom.* Magwood v. Patterson, 130 S. Ct. 2788 (2010); *Magwood*, 426 So. 2d at 928.

49. Brief of Respondent, *supra* note 42, at 10.

50. Magwood v. Smith, 608 F. Supp. 218 (M.D. Ala. 1985), *rev'd sub nom.* Magwood v. Patterson, 130 S. Ct. 2788 (2010).

51. *See id.* at 220-29.

52. *Id.* at 228.

53. *Id.*

district court's decision.[54] In 1986, the State resentenced Magwood to death.[55]

In April 1997, Magwood filed his second § 2254 habeas petition against his 1986 resentence.[56] In the 1997 petition, Magwood raised a fair warning claim. In 2007, the district court granted habeas relief on grounds of Magwood's fair warning claim and an ineffective assistance of counsel claim.[57] The district court recognized that both of the claims could have been raised in the 1983 petition but deemed the petition non-successive because "the habeas petition on resentencing challenges a separate judgment."[58] On appeal, the Eleventh Circuit reversed, finding that the 1997 petition was barred as successive because it raised claims that were available at his first petition.[59] The United States Supreme Court granted certiorari.[60]

B. The Supreme Court's Opinion

The Court held Magwood's 1997 petition to be "not 'second or successive' under § 2244(b),"[61] based on the fact that it "challeng[ed] a new judgment for the first time."[62] In reaching this decision, the Court emphasized the presence of a "judgment intervening between the two habeas petitions."[63] Prior cases that dismissed petitions as second or successive because "the petitioners did not avail themselves of prior opportunities to present the claims"[64] did not challenge a new judgment. The introduction of a judgment intervening between the two petitions suggests a different analysis.[65]

The Court declined to apply the principle of "one, full and fair opportunity" to raise claims in defining the phrase second or successive, and instead adopted Magwood's argument that the judgment against which the habeas claim is raised is determinative.[66] In placing emphasis on the judgment that the habeas claim is challenging, the Court placed the phrase

54. Magwood v. Smith, 791 F.2d 1438, 1450 (11th Cir. 1986), *rev'd sub nom.* Magwood v. Patterson, 130 S. Ct. 2788 (2010).
55. Brief of Respondent, *supra* note 42, at 12.
56. *Id.* at 14.
57. *Id.*
58. Magwood v. Culliver, 481 F. Supp. 2d 1262, 1284 (M.D. Ala. 2007), *aff'd in part, rev'd in part*, 555 F.3d 968 (11th Cir. 2009), *rev'd sub nom.* Magwood v. Patterson, 130 S. Ct. 2788 (2010).
59. Magwood v. Culliver, 555 F.3d 968, 976 (11th Cir. 2009), *rev'd sub nom.* Magwood v. Patterson, 130 S. Ct. 2788 (2010).
60. Brief of Respondent, *supra* note 42, at 15.
61. *Magwood*, 130 S. Ct. at 2796.
62. *Id.*
63. *Id.*at 2801. (quoting *Burton*, 549 U.S. at 156).
64. *Id.* at 2799.
65. *Id.* at 2801 (citing *Burton*, 549 U.S. at 156).
66. *Id.* at 2796 (quoting Brief of Respondent, *supra* note 42, at 26).

"second or successive" in its statutory context. The Court found that both the statutory text and the relief provided indicate an interpretation "with respect to the judgment challenged."[67] Petitioners applying for habeas relief through § 2244, and under § 2254, the Court reasoned, are seeking "*invalidation* [in whole or in part] *of the judgment* authorizing [the prisoner's] confinement."[68] Further, if the petition is successful, it will result in the federal court altering the sentence or allowing the State to "seek a *new* judgment" by way of a new trial or re-sentencing.[69]

Under *Magwood*, the rules associated with second or successive principles apply directly to the petitions rather than the underlying claims.[70] Based on a pure textual approach, the Court found that the phrase "second or successive" modified application rather than claim.[71] On that basis, the Court inferred that the threshold inquiry in any case involving a second-in-time petition was whether the petition itself, and not the claims it raised, was second or successive.[72] The relevant inquiry, then, would look to whether prior petitions had challenged a given judgment.[73] In adopting this approach, the Court set aside the abuse-of-the-writ and "one opportunity" principles used in previous second or successive petition inquiries.[74]

An application of the one opportunity rule in post-AEDPA litigation, the Court reasoned, was "superfluous" and undermined the dismissal exceptions included in § 2244(b)(2).[75] In allowing exceptions for claims not presented earlier on the basis of "intervening and retroactive case law, or newly discovered facts suggesting 'that . . . no reasonable fact-finder would have found the applicant guilty of the underlying offense,'" the Court stated that AEDPA already provided an avenue to deal with claims a petitioner did not have a prior opportunity to raise.[76] Application of the one opportunity principle would simply duplicate the exceptions and in some instances, dilute others.[77] With regard to the dismissal of fact-based claims not presented in prior petitions, the Court read § 2244(b)(2) to only allow for an exception when "but for constitutional error, no reasonable factfinder would have found the applicant guilty," while a one opportunity approach dilutes this rule by only ascertaining whether "facts 'could not have been discovered previously through the exercise of due diligence.'"[78]

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67. *Magwood*, 130 S. Ct. at 2790.
68. *Id.* (quoting Wilkinson v. Dotson, 544 U.S. 74, 83 (2005)) (emphasis added).
69. *Id.* (emphasis added).
70. *Id.* at 2797.
71. *Id.* at 2798.
72. *Id.* at 2799.
73. *Magwood*, 130 S. Ct. at 2799.
74. *Id.*
75. *Id.* at 2798.
76. *Id.*
77. *Id.*
78. *Id.* at 2799 (citing 28 U.S.C. § 2244(b)(2)(b)(i)-(ii)).

Although the Court recognized that prior habeas jurisprudence had applied the one opportunity principle, the Court distinguished Magwood's case on the basis of judgment. Since Magwood's 1997 petition was his "*first* application challenging that intervening judgment,"[79] the Court reasoned that he was challenging new errors.[80] The Court further reasoned that were Magwood challenging errors committed in accordance with his first sentence, he, like the petitioner in *Burton*, would be deemed to have brought a second or successive petition.[81] However, since "[t]he errors he allege[d] [were] *new*,"[82] the Court found the present petition to be his first opportunity at relief against the errors. Accordingly, the Court held that "where, unlike in *Burton*, there is a 'new judgment intervening between the two habeas petitions,' an application challenging the resulting new judgment is not 'second or successive' at all."[83] As a result, the Court reversed the Eleventh Circuit and remanded the proceedings back to the Court of Appeals.[84]

C. Justice Kennedy's Dissent

In the dissenting opinion, Justice Kennedy expressed concern and criticism over the Court's seemingly new approach to analyzing second or successive petitions. Justice Kennedy criticized the majority for "misreading precedents" and "refus[ing] to grapple with the logical consequences of its own editorial judgment."[85] The dissent, however, focused much of its concern over the Court's abandonment of its prior claim-based approach in favor of a judgment-based approach in "determining whether an application is 'second or successive.'"[86] The correct approach, the dissent offered, and the "only way" to conclude that an application is not second or successive, is an approach that looks to "the nature of the claims raised in the second application."[87] A departure from this analysis, Justice Kennedy argued, "raises other difficulties."[88]

Deeming a petition second or successive on the grounds that a previous petition was not raised against the current judgment, Justice Kenne-

79. *Magwood*, 130 S. Ct. at 2801.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 2791 (quoting *Burton*, 549 U.S. at 156).
84. *Id.* at 22. As this article was being prepared for print, the Eleventh Circuit, on remand, concluded, "[t]he application of *Kyzer* to Magwood's case violated the fair-warning requirement of the Due Process Clause. Thus, we affirm the district court's grant of Magwood's habeas petition." Magwood v. Warden, No. 07-12208 (11th Cir. Dec. 19, 2011).
85. *Magwood*, 130 S. Ct. at 2804 (Kennedy, J., dissenting).
86. *Id.* at 2806.
87. *Id.* (The inquiry in such an approach would be whether the petitioner had a full and fair opportunity to raise a given claim in his earlier petition.).
88. *Id.* at 2807.

dy argued, risks barring second-in-time applications challenging the same judgment but that raise valid, non-successive claims.[89] Justice Kennedy described the Court's reliance on the idea that a state-court judgment is the substance requirement for a habeas petition to be "artificial," reading the judgment language of § 2254 to instead be a "mere status requirement."[90] While the Court relied on the idea that a new judgment creates the occurrence of all errors "anew," Justice Kennedy contended that following such an analysis would only lead to the petitioner's ability to raise any error on the second petition upon being resentenced, regardless of whether the error was raised on the first petition.[91]

The dissent further noted that the *Magwood* decision did not purport to limit *Panetti* or past cases, meaning that the Court left the "recognized exceptions to the abuse-of-the-writ doctrine" intact.[92] The *Magwood* holding, the dissent argued, modified those principles to now allow for abusive claims, creating a loophole in AEDPA.[93] Justice Kennedy argued that the result of the majority opinion was "irrational"[94] and would "allow[] petitioners to bring abusive claims so long as they have won any victory pursuant to a prior federal habeas petition."[95]

III. PROBLEMS WITH A JUDGMENT-BASED APPROACH

At first glance, the *Magwood* decision appears to be a victory for those who might oppose capital punishment, as it gives inmates sentenced to death one more avenue to bring potential relief claims to federal courts. Opponents of AEDPA have long seen it as a restrictive, detrimental bar to federal relief from state imposed capital punishments.[96] *Magwood* provides an alternate route for relief even when the petitioner has been resentenced to death. However, *Magwood* also evidences a shift in how the

89. *Id.* Justice Kennedy highlighted disputes over parole and good-time credits. Both, in past claim-focused approaches, have been excepted from the second or successive bar. Justice Kennedy highlighted these claims because, by their very nature, they would continue to challenge the same judgment, yet are claims that were previously unavailable. *Id.* at 2808.

90. *Id.* (quoting 1 R. HERTZ & J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 8.1, at 391 (5th ed. 2005)).

91. *Magwood*, 130 S. Ct. at 2808. ("Magwood's attorney could dig through anything that occurred from *voir dire* to the cross-examination of witnesses to the jury's guilty verdict, and raise any alleged errors for the first time in his second habeas application, all because the trial court did not properly consider two mitigating factors during Magwood's first sentencing proceeding.")

92. *Id.* at 2810.

93. *Id.*at 2811 ("This is inconsistent with the understanding that AEDPA adds 'new restrictions on successive petitions' and 'further restricts the availability of relief to habeas petitioners.'" (quoting *Felker*, 518 U.S. at 664)).

94. *Id.*

95. *Id.* at 2810.

96. *See* Pavkov, *supra* note 2, at 1007 (AEDPA "drastically limits the ability of federal courts to review and grant writs of habeas corpus."); *see* Reynolds, *supra* note 18, at 1515 (stating that AEDPA restrictions potentially foreclose on many valid claims, preferring instead pre-AEDPA principles, which erred on the side of allowing clams.).

Court will approach handling second or successive petitions. The shift is a fundamental change in focus, moving from inquiring into the nature of the claims raised to inquiring into which judgment the petition has been raised against. This shift in focus could potentially result in adverse effects for inmates seeking future habeas relief. Although *Magwood* appears to widen the route to federal relief, petitioners may only benefit if they are in the particular situation Magwood found himself.[97] For the vast majority of petitioners whose initial habeas petitions are denied, the judgment-based approach threatens to preemptively foreclose valid opportunities for future relief.

A. Foreclosure of Opportunities to Bring Valid Claims

With a judgment-based approach, the "threshold inquiry [is] . . . whether an application is 'second or successive . . . .'"[98] Any look to whether the claims in that application can be brought by a petitioner is a "subsequent inquiry."[99] The Court's distinction between the habeas application itself and the claims brought within that application was central to the Court's analysis in providing substance to this judgment-based approach.[100] Suppose a scenario in which a petitioner brings two claims on his first habeas petition. In deciding to dispose of the petition, the district court only reaches one claim, leaving the second claim untouched and unadjudicated. Under the Court's prior habeas jurisprudence, the unadjudicated claim could be brought again on a second-in-time petition and treated as part of the first application for habeas relief since the court did not previously touch it. Under a judgment-based approach, the opportunity to bring the unadjudicated claim is foreclosed. The threshold inquiry under the judgment-based approach would first ask of the second-in-time petition: has a habeas petition previously been raised against this current judgment? Under this scenario, the answer would be yes—the first-in-time petition—deeming the second-in-time petition raising the unadjudicated claim to be second or successive, prompting a dismissal.

Another problematic scenario arises when a petitioner first raises a mixed petition of exhausted and unexhausted claims. With a judgment-based approach, this type of petition would pass a threshold inquiry. However, the petitioner would be faced with choices less favorable than those posed by a claims-based approach. As noted earlier, the claims-based approach allows the petitioner to withdraw the petition, exhaust the

97. Here, the reference to Magwood's situation means a petitioner that is successful on his first habeas petition in getting some, albeit limited, relief.

98. *Magwood*, 130 S. Ct. at 2799.

99. *Id.*

100. *Id.* at 2809-10.

remaining claims, and file a second petition (not successive) that is now fully exhausted. Under a judgment-based approach, withdrawing the petition does not appear to be a viable option. Doing so to later return with a fully exhausted petition would cause the petitioner to raise a second petition against the same judgment—resulting in the second petition's dismissal. The only evident option would be to proceed with the initial mixed petition as is, resulting in procedural default of the unexhausted claims. The choice under a judgment-based approach, then, is to either withdraw the petition altogether, losing all claims, or be forced to proceed with a mixed petition and lose some claims.

Further, as Justice Kenendy's dissent noted, this approach has implications on existing lines of case law that are beneficial to state inmates in general.[101] Habeas petitions can be used by inmates to challenge a state's failure to grant parole or good-time credits.[102] For a petitioner that has failed on his first petition, any claim the petitioner brings based on parole or good-time credits, even violations occurring after denial of the first petition, may be barred as second or successive since a previous petition was raised against the same judgment.[103] Such results are inconsistent with prior abuse of the writ jurisprudence, which would have allowed the second petition to proceed because it raised valid claims not barred by the second or successive hurdle.[104]

B. A Simpler Approach?

Under *Magwood*, the judgment-based approach rationale was based upon simplifying the judicial task. When a federal court must determine whether a previous petition has been raised against the judgment at issue, the judgment-based approach certainly appears to be a simpler and more effective approach than looking back to the circumstances surrounding the first petition to determine if a claim could have been raised.[105] It is much simpler, Magwood argued, for a federal court to look back, ascertain what judgments are in effect against the petitioner, ascertain which judgment the present petition raises, and see if prior petitions have been made against this judgment. At this point a court could cut off the petition as second or

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101. *Magwood*, 130 S. Ct. at 2807-08 (Kennedy, J., dissenting).
102. *Id.*
103. *Id.*
104. *Id.*; *see also* Hill v. Alaska, 297 F.3d 895, 898-99 (9th Cir. 2001); Crouch v. Norris, 251 F.3d 720, 725 (8th Cir. 2001) (denying an application for permission to file a successive petition as unnecessary because petitioner's challenge of denial of parole did not raise "a claim challenging his conviction or sentence that was or could have been raised in his earlier petition . . . ."); *In re* Cain, 137 F.3d 234, 236 (5th Cir. 1998).
105. Transcript of Oral Argument at 35, Magwood v. Patterson , 130 S. Ct. 2788 (2010).

successive without having to inquire into the underlying claims, including when the claims should have been raised.[106]

In advocating this approach, Magwood and the Court put forth that a resentencing automatically creates a new judgment; it is the new judgment, then, which a court determines if prior petitions have been raised against.[107] This fosters simplicity in that it does not require a judge to reexamine a resentencing hearing to determine why the sentence was adjusted, to determine if new evidence was considered, or to determine if the resentencing hearing was merely done to cure procedural defects from an earlier sentence (Magwood fits here). The problem, however, is that it serves to oversimplify what truly is a new judgment, creating a scenario where any time a prisoner is resentenced he now has a new judgment, even if the resentencing relies wholly on the same basis as the original judgment. Under a judgment-based approach, a petitioner now has a new judgment that no prior claims have been raised against, allowing him to raise all claims anew.

The Court purports to cure this defect by relying on other mechanisms, such as procedural default to prevent these abusive claims. The Court suggests, "It will not take a court long to dispose of such claims . . . ."[108] This approach, though, only allows for the litigation process to be extended. Because the abusive or defaulted claims will be in a petition that is raised against a new judgment, they will pass any threshold inquiry that only looks to the judgment. Thus, the petition will pass through the initial gatekeeping barrier of a district court and will be allowed initially. The claims will not be deemed to be a default until adjudication on the claims themselves is heard in a different proceeding, at which point they would be barred. This only serves to needlessly extend the litigation, forcing parties to prepare briefs, extend time, and spend money in preparation for defending claims that would have been dismissed at the gatekeeping stage under an approach that first looks to the nature of the claims being brought.

An approach that focuses on the nature of the underlying claim itself presents a much simpler task to the courts. Under such an approach, a court need only ask whether the claim before them was available at the time of the first petition. If it was, the claim is abusive and renders the petition second or successive. If it is a claim that was not previously available, the court looks to the exceptions provided by AEDPA or the exceptions the Court has provided in its pre- and post-AEDPA jurisprudence. This avoids a petition proceeding because it is the first to be raised against a judgment only to be later dismissed for raising abusive claims. It

106. *Id.* at 35-36.
107. *Magwood*, 130 S. Ct. at 2800-01.
108. *Id.* at 2802, n.15.

also avoids a petition being denied because it is a second-in-time petition against the same judgment even though it raises valid claims that fit under AEDPA or case law exceptions.

C. What About Finality?

In *Panetti*, the Court relied upon AEDPA's "principles of comity, finality, and federalism" to limit successive petitions.[109] Those principles are not wholly in harmony with *Magwood*'s judgment-based approach. A defining basis of the Court's rationale in limiting petitions both pre- and post-AEDPA was the prevention of piecemeal legislation and relitigation of the same claims. Curbing piecemeal legislation allowed finality not only for the State, but also for victims' families. Indeed, the Court in *McCleskey* stated that the offense to comity and federalism only "increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition."[110] Under *Magwood*'s approach, a petitioner who gains post-sentencing relief, succeeding on any minor matter, would be able to raise any number of claims he failed to raise in his first petition.[111] AEDPA and the Court's habeas jurisprudence sought to eliminate such piecemeal and repetitive litigation.

IV. CONCLUSION

Magwood v. Patterson produces a new approach to second and successive federal habeas petitions that, while good for the petitioner in the instant case, seemingly creates far too many dangers for future petitioners who do not win post-sentence relief on their initial petition. The Court should limit its judgment-based approach to cases involving petitioners in the particular and rare fact pattern in which Magwood found himself. Any extension of this approach to more general cases of federal habeas relief, and a rejection of a more claims-focused approach, could result in future petitioners having valid opportunities of relief prematurely foreclosed. Having long recognized the writ as a "precious safeguard,"[112] the Court should seek to interpret the principles surrounding it in such a way that leaves the avenue to relief unimpaired.

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109. *Panetti*, 551 U.S. at 945 (quoting Miller-El v. Cockrell, 537 U.S. 322, 337 (2003)).

110. *McCleskey*, 499 U.S. at 492.

111. *Magwood*, 130 S. Ct. at 2810 (Kennedy, J., dissenting) ("[U]nder the Court's theory, 'a post-resentencing petitioner could simply staple a new cover page with the words, "§ 2254 Petition Attacking New Judgment," to his previously adjudicated petition.'" (quoting Brief of Respondent, *supra* note 42, at 47)).

112. *Bowen*, 306 U.S. at 26.

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