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BILLY JOE MAGWOOD, :

Petitioner : No. 09-158

v. :

TONY PATTERSON, WARDEN, ET AL. :

Wednesday, March 24, 2010

APPEARANCES:

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

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1 P R O C E E D I N G S

2 (11:08 a.m.)

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

5 Mr. Fisher.

6 ORAL ARGUMENT OF JEFFREY L. FISHER

7 ON BEHALF OF THE PETITIONER

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

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

17 What that section does is it restricts
18 claims that can be brought in, quote, "a second or
19 successive habeas corpus application" under section
20 2254. So this text establishes a two-step framework.
21 First, the court needs to decide whether it's dealing
22 with a second or successive petition. And second, if it
23 is and only if it is, then the Court applies the
24 modified res judicata principles set forth in that
25 section.

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

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

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

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

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

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

13 JUSTICE ALITO: I understand that.

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

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

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

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

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

9 MR. FISHER: That's right.

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

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

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

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

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

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

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

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

25 In the Federal context in section 2255, the

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

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

10 MR. FISHER: If he's challenging --

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

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

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

1 context it ought to treat them as able to be divided.

2 The other place you look is the words "second" --

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

6 MR. FISHER: Correct.

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

9 MR. FISHER: Well, certainly it has --

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

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

20 JUSTICE SCALIA: That's true. But --

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

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

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

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

14 Now, Justice Alito, on --

15 JUSTICE KENNEDY: That followed from the
16 first conviction.

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

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

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

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

13 JUSTICE GINSBURG: Mr. Fisher --

14 MR. FISHER: And so --

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

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

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

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

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

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

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

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

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

1 raised then.

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

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

9 JUSTICE BREYER: Then -- then you get to --
10 you get to Justice Alito's question, because in fact
11 what we have here is we have piece of paper issued in
12 1981, and on that piece of paper it says: You, Billy
13 Joe Magwood, are guilty and sentenced to death by
14 electrocution. Then we have another piece of paper
15 which was issued in 1986, and that says: You are
16 ordered and adjudged guilty of the offense of aggravated
17 murder and sentenced to death by electrocution. So the
18 words are identical. And one was issued in '81 and one
19 was issued in '86.

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

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

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

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

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

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

20 MR. FISHER: Pardon me?

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

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

25 JUSTICE BREYER: Ah! But it is not new in

1 respect to the words. They are identical.

2 MR. FISHER: Well, it's --

3 JUSTICE BREYER: All that happened --

4 MR. FISHER: -- they imposed --

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

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

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

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

1 it's challenging something new.

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

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

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

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

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

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

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

6 MR. FISHER: But remember, the act --

7 JUSTICE SCALIA: It's the very same act.

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

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

21 MR. FISHER: Well, the trial judge --

22 JUSTICE KENNEDY: Is there new witnesses,
23 et cetera?

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

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

4 JUSTICE KENNEDY: But then it's --

5 MR. FISHER: They had every right --

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

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

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

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

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

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

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

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

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

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

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

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

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

1 continue that.

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

9 The State's proposal -- and it's laid out at
10 page 17 of its brief, at the top of the page, right
11 after the number 1 -- the State's proposed rule -- and I
12 think it's useful to put it next to the statute. The
13 State's proposed rule is if a claim could have been or
14 was raised in a prior petition, it is barred by Section
15 2244 (2) or (1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. FISHER: The word --

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

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

13 JUSTICE SCALIA: It doesn't use --

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

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

19 MR. FISHER: Well, it refers to section
20 2254, and section 2254 uses the word "judgment," so it's
21 our belief it is by incorporation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 I would like to reserve what time I have
22 left.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Fisher.

25 Mr. Maze.

1 ORAL ARGUMENT OF COREY L. MAZE

2 ON BEHALF OF THE RESPONDENT

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

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

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

25 And if I may, I want to go straight to

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

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

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

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

1 contained both.

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

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

6 MR. FISHER: Right.

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

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

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

18 MR. MAZE: Right.

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

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

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

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

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

13 MR. MAZE: Right.

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

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

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

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

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

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

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

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

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

19 MR. MAZE: Right.

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

24 MR. MAZE: Right.

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

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

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

1 time, and if it was, you are out.

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

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

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

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

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

16 MR. MAZE: Yes.

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

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

1 Petitioner to habeas relief.

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

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

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

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

3 MR. MAZE: Right.

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

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

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

16 MR. MAZE: It was.

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

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

1 Martinez-Villareal.

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

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

14 Now, back to the point --

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

18 MR. MAZE: Right.

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

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

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

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

7 MR. MAZE: Right.

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

11 MR. MAZE: Yes.

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

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

18 JUSTICE BREYER: And applied to everything.

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

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

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

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

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

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

18 MR. MAZE: Okay. The claim is available.

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

21 MR. MAZE: Okay. Right.

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

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

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

8 MR. MAZE: Right. And it does happen.

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

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

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

23 MR. MAZE: Right.

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

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

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

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

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

17 Now, I want to bring up a point on why this
18 matters to the State. On page 48 of our red brief, we
19 showed you some statistics about the number of claims
20 the Petitioners bring, but what we didn't cite -- it's
21 on page 51 and 52 of the same study. The study shows
22 that after AEDPA, 13 percent of capital habeas petitions
23 nationwide -- and if you take Texas out, it's actually
24 18 percent -- are granted. 70 percent of capital habeas
25 petitions that are granted are granted on penalty phase

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

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

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

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

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

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

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

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

17 MR. MAZE: Salinger.

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

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

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

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

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

16 MR. MAZE: Yes. Right.

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

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

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

1 MR. MAZE: Yes.

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

5 MR. MAZE: No.

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

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

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

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

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

5 JUSTICE BREYER: So he better put in
6 everything.

7 MR. MAZE: Right.

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

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

13 If the Court has no further questions.

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

17 MR. MAZE: The underlying claim itself.

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

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

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

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, Mr. Maze.
2 Mr. Fisher, you have 2 minutes remaining.

3 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

4 ON BEHALF OF THE PETITIONER

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

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

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

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

24 MR. FISHER: Pardon me?

25 JUSTICE SOTOMAYOR: To the Chief Justice's

1 argument.

2 MR. FISHER: Yes.

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

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

1 above-entitled matter was submitted.)
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