No. _____

In the Supreme Court of the United States

BRUCE WESTBROOKS, Warden,
Petitioner,
v.
WILLIAM G. ALLEN,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Magwood v. Patterson, 561 U.S. 320 (2010), held that when a state court amends a sentence, the Anti-terrorism and Effective Death Penalty Act (AEDPA) permits a fresh federal habeas challenge to that new sentence. The Court, however, expressly reserved the related question, on which the circuits are deeply divided, of whether that second-in-time petition may also challenge the undisturbed portion of the judgment—the underlying conviction. Here, Allen attacks his underlying murder conviction through a grand-jury-discrimination claim that was rejected during a prior habeas action in 1974. He does so on the basis of a 2007 intervening state-court judgment that modified only his sentence. The question presented is:

May a defendant use a state court judgment modifying only his sentence to launch a new federal habeas attack on his undisturbed conviction through a claim that was rejected on the merits during a prior federal habeas action?

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OPINIONS BELOW

The opinion of the court of appeals is not published but is available at *Allen v. Westbrooks*, No. 15-5356, 2017 U.S. App. LEXIS 11514 (6th Cir. June 23, 2017). (App. 1-10.) An additional prior order of the court of appeals is not published. (App. 32-38.) The memorandum and order of the district court are not published, but the memorandum is available at *Allen v. Colson*, No. 3:12-00242, 2015 U.S. Dist. LEXIS 38508 (M.D. Tenn. Mar. 26, 2015). (App. 11-29.) An additional prior memorandum and prior orders of the district court are not published, but the prior memorandum is available at *Allen v. Colson*, No. 3:12-00242, 2013 U.S. Dist. LEXIS 87047 (M.D. Tenn. June 19, 2013). (App. 39-56.)

JURISDICTION

The court of appeals entered its judgment on June 23, 2017. (App. 1.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2244(b)(1) provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(3)(A) provides that "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

INTRODUCTION

By way of an agreed-sentence modification from 2007 and a fourth federal habeas petition, Allen presented a grand-jury-discrimination claim that the Sixth Circuit Court of Appeals rejected in 1974, during a previous habeas action. He argued, under *Magwood*, that the sentence modification operates as a new judgment and permits a fresh attack on his undisturbed 1968 murder conviction. Imposing a second round of remand proceedings in this habeas action that commenced in 2012, the Sixth Circuit reversed its own prior determination that Allen's claim is second or successive and rejected Tennessee's argument that the claim must be dismissed as an abuse of the writ. (App. 9.)

But *Magwood* left open the question of whether a sentence modification like Allen's paves the way for a fresh attack on an undisturbed conviction. And the circuits are deeply split on this problem, resulting in disparate treatment of important state interests nationwide. Intervention by this Court is needed to answer the question left open by *Magwood*, to resolve an entrenched circuit conflict on that question, and to protect Tennessee's interest in finality. Absent review, the decision of the Sixth Circuit will flout Tennessee's interest in finalizing Allen's 1968 conviction and requires Tennessee now to allocate further resources to defend a claim that has seen exhaustive state and federal review.

STATEMENT OF THE CASE

The issue in this case stems from a long procedural history. In short, Allen relies on a fourth federal habeas petition and an intervening sentence modification to resurrect a grand-jury-discrimination claim that the federal court of appeals rejected on the merits in 1974, during a previous habeas action.

In 1968, a grand jury in Davidson County, Tennessee, indicted Allen for the murder of police officers Charles Wayne Thomasson and Thomas E. Johnson. *Allen v. State*, No. M2009-02151-CCA-R3-PC, 2011 Tenn. Crim. App. LEXIS 287, at *1 (April 26, 2011). The two murder counts were tried separately, and only the Thomasson murder conviction is at issue here. *Id*. Following a trial in December 1968, the jury convicted Allen of first-degree murder of Officer Thomasson and imposed a 99-year sentence. *Id*.

Before trial, Allen filed a "plea in abatement," arguing that the method of selecting grand jurors resulted in an under-representation of blacks. *Id*. at *5. The trial court denied relief. *Id*. The Tennessee Court of Criminal Appeals affirmed on direct appeal. *Canady v. State*, 461 S.W.2d 53, 64 (Tenn. Crim. App. 1970). The Supreme Court of Tennessee and this Court denied further review. *Allen*, 2011 Tenn. Crim. App. LEXIS 287, at *6.

In 1971, Allen filed a federal habeas petition and a state post-conviction petition, raising the grand-jury claim in both actions. (App. 33.) His federal petition was dismissed. (App. 33.) His state petition was denied by the trial court, and the denial was affirmed by the Tennessee Court of Criminal Appeals. (App. 33.)

In 1973, Allen filed a second federal habeas petition, which again raised the grand-jury claim. (App. 43.) The district court engaged in an "independent examination" of the state court record and determined that Allen "failed to establish . . . purposeful discrimination in the selection of the Grand Jury which indicted [him]." (App. 43.) The court of appeals affirmed in 1974, concluding that "the finding of the district court that there was no purposeful discrimination in the selection of the grand jury which indicted [Allen] is supported by substantial evidence and is, therefore, not clearly erroneous." (App. 43-44.)

In 1989, Allen filed a second post-conviction petition in state court, raising the grand-jury claim once again. (App. 44.) The post-conviction court deemed the claim "previously determined" and summarily dismissed the petition. (App. 44.) The Tennessee Court of Criminal Appeals affirmed. *Allen v. State*, No. 01-C-01-9008-CR-00186, 1991 Tenn. Crim. App. LEXIS 764 (Sept. 17, 1991). But the Supreme Court of Tennessee reversed and remanded, concluding that summary dismissal of Allen's petition was inappropriate. *Allen v. State*, 854 S.W.2d 873 (Tenn. 1993).

While Allen's second post-conviction appeal was pending in state court, the federal court of appeals found that another Tennessee prisoner, James Thomas Jefferson, had established a prima facie case of racial discrimination in the selection of the grand jury that indicted him. *Jefferson v. Morgan*, 962 F.2d 1185, 1192 (6th Cir. 1992). It was the same grand jury that had indicted Allen. (App. 45-46.) Shortly before the Supreme Court of Tennessee remanded Allen's second round of post-conviction proceedings, he filed a third

federal habeas petition. *Allen v. Dutton*, No. 94-5476, 1994 U.S. App. LEXIS 33243, at *2 (6th Cir. Tenn. Nov. 22, 1994). But the district court dismissed the petition for lack of exhaustion, and the court of appeals affirmed the dismissal. *Id*. at *2, 6.

Following remand from the Supreme Court of Tennessee, Allen re-asserted the grand-jury claim. *Allen*, 2011 Tenn. Crim. App. LEXIS 287, at *12. The parties stipulated that "[t]he facts in *Jefferson* relating to jury composition in Davidson County are . . . established for purposes of this case" and that "the Grand Jury which indicted James Thomas Jefferson also returned the indictment against [Allen]." (App. 45-46.) With the parties' consent, the post-conviction court entered an amended judgment modifying Allen's sentence from 99 years to life imprisonment.[1] (App. 14, 46.)

In 2009, the state post-conviction court denied Allen's petition, concluding that Allen failed to prove the existence of intentional racial discrimination or the systematic exclusion of African-Americans in the selection of grand-jury members. (App. 34.) The Tennessee Court of Criminal Appeals affirmed, holding that the grand-jury claim had been "previously

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[1] In *Collins v. State*, 550 S.W.2d 643 (Tenn. 1977), the Supreme Court of Tennessee invalidated all death-penalty provisions of Tennessee acts going back to Chapter 181 of the Public Acts of 1915. The 1915 law prescribed life imprisonment as the only legal sentence for first-degree murder. Thus, *Collins* rendered the Allen's 99-year sentence invalid, and life imprisonment became the only legal punishment for his conviction under Tennessee law. *See Miller v. State*, 584 S.W.2d 758, 762 (Tenn. 1979); *State v. Robinson*, 622 S.W.2d 62 (Tenn. Crim. App. 1980).

determined." *Allen*, 2011 Tenn. Crim. App. LEXIS 287, at *28. The appellate court noted that Allen had previously received a full and fair hearing on his grand-jury claim, both during the "plea in abatement" proceedings and during his initial state post-conviction proceedings. *Id*. at *22. The court also rejected the argument that the stipulated facts in *Jefferson* warranted an exception to the bar on reconsideration of "previously determined" issues. *Id*. at *18-19. The Supreme Court of Tennessee and this Court denied further review. *Allen v. State*, No. M2009-02151-SC-R11-PC, 2011 Tenn. LEXIS 819 (Aug. 25, 2011); *Allen v. Tennessee*, 2012 U.S. LEXIS 1705, 565 U.S. 1237 (2012).

In 2012, Allen filed his fourth federal habeas petition, raising one claim related to his life sentence and several claims, including the grand-jury claim, attacking his undisturbed murder conviction. (App. 35, 47.) The district court transferred the matter to the court of appeals as a successive petition, acknowledging a disagreement between the circuits about this approach. (App. 39-40, 51.) By transferring the case, the district court avoided the approach of some circuits that "resulted in more relaxed limits on successive claims than existed prior to the enactment of . . . AEDPA." (App. 51.) Allen filed a motion to remand, but the court of appeals deemed his petition "second or successive—except to the extent that he challenge[d] the imposition of sentence as the result of the 2007 amended judgement." (App. 37.) Accordingly, the court granted Allen's motion to remand his sentencing claim but denied permission to proceed on the grand-jury claim. (App. 38.) Allen petitioned for a writ of

certiorari from that decision, which this Court denied. (App. 31.)

On remand, the district court rejected Allen's sentencing claim. (App. 23-27.) The Sixth Circuit Court of Appeals initially denied Allen's motion for a certificate of appealability on both the sentencing claim and the grand-jury claim. (App. 5.) But upon rehearing, the court granted a certificate of appealability on the grand-jury claim in light of its intervening decision in *King v. Morgan*, 807 F.3d 154 (6th Cir. 2015).[2] (App. 5.)

The court of appeals then "reverse[d] the determination that Allen's grand-jury-discrimination claim is 'second or successive' . . . and reject[ed] the argument that the claim must be dismissed as an abuse of the writ." (App. 9.) The court explained the scope of its ruling:

> We decide today only that the abuse-of-the-writ doctrine did not permit the district court to dismiss this case as second or successive and thus requiring authorization from this court to proceed. We express no view on the district court's ability to consider the history and prior rulings in the case on remand.

(App. 9 n.12.)

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[2] In *King*, the Sixth Circuit found that the section 2244 restrictions on second or successive applications did not apply to a second-in-time habeas petition filed after an intervening sentence modification, even though the petition raised claims attacking the original undisturbed conviction. *Id*. at 157.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE IN ACKNOWLEDGED, WIDESPREAD, AND IRRECONCILABLE CONFLICT OVER THE IMPORTANT QUESTION THIS COURT RESERVED IN *MAGWOOD*.

Since this Court's decision in *Magwood v. Patterson*, 561 U.S. 320 (2010), nine circuits have split into opposing camps over the question the Court reserved there: the applicability of restrictions on "second or successive" applications to habeas petitions that are filed after a new sentencing judgment, but that challenge aspects of the undisturbed conviction. *See King*, 807 F.3d at 159 (recognizing the circuit split); *Kramer v. United States*, 797 F.3d 493, 502 (7th Cir. 2015) (same); *In re Brown*, 594 F. App'x 726, 729-730 (3d Cir. 2014) (per curiam) (same); *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273, 1280-1281 (11th Cir. 2014) (same). This entrenched split has caused unjustifiably disparate outcomes with respect to the designation of claims against which states must defend and allocate further resources. Review by this Court is essential to provide a uniform solution to this problem of federal law and to protect Tennessee's interest in the finality of Allen's 1968 murder conviction.

A. Successiveness and *Magwood*

Before 1996, state and federal prisoners were statutorily permitted to file repetitive habeas petitions in the district court without obtaining prior judicial authorization. Such repetitive filings, however, were often summarily dismissed based on judge-made doctrines like "abuse of the writ." *See, e.g., McCleskey*

v. Zant, 499 U.S. 467 (1991). AEDPA altered that practice by imposing "new restrictions on successive petitions" by state and federal prisoners. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). The statutory phrase "second or successive" as used in AEDPA is a "term of art." *Magwood*, 561 U.S. at 332 (quoting *Slack v. McDaniel*, 529 U.S. 473, 486 (2000)). This Court has recognized that the term draws meaning in part from judicial precedents predating AEDPA, as well as from AEDPA's purposes and statutory context. *Panetti v. Quarterman*, 551 U.S. 930, 943-45 (2007).

Magwood reflected the understanding that "second or successive" is a term of art. 561 U.S. at 332. On his first federal habeas petition, Magwood obtained relief from his capital sentence but not his underlying conviction. *Id*. at 326. After the State held a new sentencing hearing and Magwood's capital sentence was re-imposed, he filed a second habeas petition challenging the new capital sentence. *Id*. at 327-328. This Court held that his second-in-time petition was not "second or successive" within the meaning of AEDPA. *Id*. at 323-324.

The Court reached that conclusion due to the new criminal judgment that intervened between Magwood's two habeas petitions. In other words, the second petition was Magwood's "first application challenging that intervening judgment" and, critically, it was his first opportunity for review of "new" claims of error arising from the resentencing. *Id*. at 339 ("It is obvious to us . . . that his claim of ineffective assistance at resentencing turns upon new errors."). But the Court's focus on new errors would have been entirely

unnecessary if the only fact that mattered was the entry of an intervening criminal judgment.

Given the Court's focus on new errors arising after the original judgment, *Magwood* expressly reserved the question of whether "a petitioner who obtains a conditional writ as to his sentence" may "file a subsequent application challenging not only his resulting, new sentence, but also his original, undisturbed conviction." *Id*. at 342 & n.16.

Nine circuits have irreconcilably split on this question. Three circuits have taken a component-based approach. They consider the nature of the judgment modification and the component of the judgment being challenged to resolve the question of successiveness. Six circuits have adopted a unitary-judgment approach. They treat initial challenges to modified judgments as non-successive even with respect to claims pertaining to the undisturbed portion of the judgment.

B. The Minority Approach

Under the component-based approach, the Fifth, Seventh, and Tenth Circuits have held that a subsequent habeas petition challenging the original, undisturbed conviction is second or successive. *See Suggs v. United States*, 705 F.3d 279, 285 (7th Cir. 2013); *In re Lampton*, 667 F.3d 585 (5th Cir. 2012); *In re Martin*, 398 F. App'x 326, 327 (10th Cir. 2010).

In *Martin*, the Tenth Circuit held that a habeas petition was "second or successive" despite being the first petition following an "amended judgment," which "changed the offense of conviction" through correction of a "clerical error" that "did not rise to the level of constitutional error." 398 F. App'x at 327-28. The

Tenth Circuit later cited *Martin* to deem successive a second-in-time habeas petition that followed an amended judgment, which added a consecutive service provision to the sentence. *May v. Kansas*, 562 F. App'x 644, 645 (10th Cir. 2014).

The Fifth Circuit also cited *Martin* in its *Lampton* decision, which deemed "second or successive" a collateral challenge to a Section 848 CCE conviction that followed a successful collateral challenge to a lesser-included Section 846 conspiracy conviction. 667 F.3d at 589-590. The court did so despite the Second Circuit's contrary holding in *Johnson v. United States*, 623 F.3d 41 (2d Cir. 2010), on "virtually identical facts." *Id*. at 589. The Fifth Circuit instead followed a component-based approach, reasoning that notwithstanding vacatur of the separate count, no "new judgment" had been entered as to the challenged count. *Id*. at 588-589. *Lampton* noted that the prisoner had not been resentenced and suggested that "the rule announced in *Magwood* applies only when a new sentence was imposed as a result of the first habeas proceeding." *Id*. at 589. Consequently, courts in the Fifth Circuit "must consider the impetus and effect of the amended judgment" before applying *Magwood*. *In re Parker*, 575 F. App'x 415, 418 (5th Cir. 2014) (citing *Lampton*, 667 F.3d at 586-587); *see also In re Hensley*, 836 F.3d 504, 506-07 (5th Cir. 2016).

Similarly, in *Suggs*, the Seventh Circuit deemed successive a motion that "challenge[d] the [prisoner's] underlying conviction, not his resentencing," while "recogniz[ing] that [this] reading of *Magwood* differs from the approach taken by other circuits." 705 F.3d at 284-85 (citing *Wentzell v. Neven*, 674 F.3d 1124 (9th

Cir. 2012); *Johnson*; 623 F.3d 41). Judge Sykes dissented, arguing that after *Magwood*, "when a first habeas petition results in a new judgment, a subsequent habeas petition seeking relief from that judgment is not second or successive under § 2244(b), and this is so regardless of whether it challenges the amended or unamended part of the judgment." *Id*. at 288.

Nevertheless, the Seventh Circuit later followed *Suggs* in holding that an amendment to one count of a judgment does not permit new AEDPA challenges to other counts. *Kramer*, 797 F.3d at 502. The court in *Kramer* acknowledged that "a circuit split on the *Suggs* issue . . . continues to the present time." *Id*.

C. The Majority Approach

The Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits espouse a unitary-judgment approach. *See In re Gray*, 850 F.3d 139, 144 (4th Cir. 2017); *King*, 807 F.3d at 159; *Brown*, 594 F. App'x at 729-730; *Insignares*, 755 F.3d at 1280-1281; *Wentzell*, 674 F.3d at 1127-28; *Johnson*, 623 F.3d at 46.

In *Johnson* the Second Circuit found that *Magwood* adopted a categorical—not claims-based—approach to evaluate whether a collateral challenge was second or successive: "[W]here '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.'" *Johnson*, 623 F.3d at 45-46 (quoting *Magwood*, 561 U.S. at 341-342). Thus, the Second Circuit held that courts must decide the second or successive question "with respect to the

judgment challenged and not with respect to particular components of that judgment." *Id*. at 46.

The Ninth Circuit expressly "agree[d] with the Second Circuit's reasoning in *Johnson*," adopting the unitary-judgment approach, while acknowledging the "tension" among the courts of appeals on this subject. *Wentzell*, 674 F.3d at 1127.

Following suit, the Eleventh Circuit held that an initial collateral challenge to a post-relief judgment is not "second or successive," regardless of whether it attacks the newly imposed sentence or the original underlying conviction. *Insignares*, 755 F.3d at 1281. In *Insignares*, the court emphasized that "there is only one judgment, and it is comprised of both the sentence and the conviction." 755 F.3d at 1281. Thus, the court reasoned that a resentencing results in a new judgment—one subject to collateral review without permission from a court of appeals. *Id*.

An unpublished decision of the Third Circuit agreed with the Second, Ninth, and Eleventh Circuits' approach. *Brown*, 594 F. App'x at 729. *Brown* held that resentencing after vacatur of one count in a multi-count conviction results in a new judgment, which may be subject to a new, not "second or successive," collateral attack. *Id*. The Third Circuit noted that the Fifth and Seventh Circuits had "interpreted *Magwood* differently." *Id*. (citing *Suggs*, 705 F.3d at 285; *Lampton*, 667 F.3d at 588-89). The court concluded, however, that *Magwood* "makes clear that 'a habeas petition is deemed initial or successive by reference to the judgment it attacks—not which component of the judgment it attacks or the nature or genesis of the

claims it raises.'" *Id*. at 730 (quoting *Suggs*, 705 F.3d at 287-288 (Sykes, J., dissenting)).

In *King*, the Sixth Circuit held that "a habeas petitioner, after a full resentencing and the new judgment that goes with it, may challenge his undisturbed conviction without triggering the 'second or successive' requirements." 807 F.3d at 156. *King* expressly recognized that its interpretation of the statute was irreconcilable with the one the Seventh Circuit adopted in *Suggs*. *Id*. at 159.

Most recently, the Fourth Circuit joined the majority in concluding that "when a habeas petition is the first to challenge a new judgment, it is not second or successive within the meaning of section 2244(b), regardless of whether it challenges the sentence or the underlying conviction." *Gray*, 850 F.3d at 143.

D. The Circuit Conflict Is Ripe for Settlement.

The issue left open by *Magwood* has been exhaustively considered by the lower courts and is ripe for settlement. The problem posed by subsequent habeas petitions that launch fresh attacks on undisturbed components of modified judgments is important and arises frequently. The full-blown circuit split born of the question left open by *Magwood* shows no sign of fading or resolving absent review by this Court.

Nine circuits, which control the standards for habeas review in more than three quarters of the States, have now given contradictory, or at least distinctly nuanced, solutions to that problem. Whether the circuits that follow a component-focused approach

have it right, or whether the circuits that follow a unitary-judgment approach are correct, the lower courts, habeas petitioners, and the state and federal governments all need a uniform answer to this important and recurring question of federal law. The states have an interest in the efficient disposal of claims that could have been, or as here, were raised in a prior habeas action because they have an established interest in the finality of their criminal judgments. Fulfillment of those interests must be uniform and not turn at circuit boarders.

Concurring in the Eleventh Circuit's unitary-judgment approach to the question left open by *Magwood*, Judge Fay poignantly stated:

> [T]here is language in *Magwood* that indicates to me that the Supreme Court may well take a different tack should it deal with a case like this one. In response to the dissenters, Justice Thomas goes to some lengths to emphasize: "This is Magwood's first application challenging that intervening judgment. The errors he alleges are *new*. It is obvious to us—and the State does not dispute—that his claim of ineffective assistance at resentencing turns upon new errors." *Magwood*, 561 U.S. at 339, 130 S. Ct. at 2801. That is not the situation with *Insignares*. There is nothing new in his petition attacking his new judgment. Instead, he raises exactly the same issues he raised in his earlier application. Consequently, except for the intervening "new judgment," we are dealing in this case with an otherwise clear abuse of the writ.

> When the Supreme Court has a case exactly like this one, we will know the answer.

Insignares, 755 F.3d at 1285. This is that case. With it, the Court can answer the problem left unresolved in *Magwood*.

II. ALLEN'S REASSERTION OF THE PREVIOUSLY REJECTED GRAND-JURY CLAIM IS A CLEAR ABUSE OF THE WRIT.

The problem left open by *Magwood* arises with claims like Allen's that are abusive, but that under certain interpretations of *Magwood*, may be allowed to pass through the successive-petition limitations of section 2244.

Under the common law's abuse-of-the-writ doctrine, a court need not entertain a petition that exploits the habeas process. This doctrine has survived AEDPA and continues to inform the restraints on federal habeas relief. The Court has relied on abuse-of-the-writ principles to interpret and apply AEDPA. *See Felker*, 518 U.S. at 664 (noting that section 2244 codified and added restrictions that were "well within the compass of th[e] evolutionary process" of the abuse-of-the-writ doctrine, which is a "complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions"). Specifically, the phrase "second or successive" has often been construed in light of abuse-of-the-writ principles that reflect a longstanding concern for whether there has already been a full and fair opportunity to raise a given claim. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-45 (1998); *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006); *Benchoff v.*

Colleran, 404 F.3d 812, 817 (3d Cir. 2005); *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003); *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998) (per curiam); *Esposito v. United States*, 135 F.3d 111, 113 (2d Cir. 1997) (per curiam); *Pratt v. United States*, 129 F.3d 54, 60 (1st Cir. 1997); *Reeves v. Little*, 120 F.3d 1136, 1138 (10th Cir. 1997) (per curiam).

Indeed, the doctrine not only comes into play in interpreting AEDPA; it may itself preclude individual claims that AEDPA does not. As the Second Circuit has recognized:

> While the standards for determining whether a petition "abuses the writ" under the doctrine of *McCleskey v. Zant* have much in common with those for determining whether a petition is 'second or successive' under §§ 2244 and 2255, the two doctrines are not coterminous. The fact that a petition is not technically "second or successive," and subject to the gatekeeping requirements of §§ 2244 and 2255, does not necessarily mean that its filing might not be found abusive under the traditional equitable doctrine.

Whab v. U.S., 408 F.3d 116, 119 n.2 (2d Cir. 2005).

AEDPA's absolute bar on redundant claims in successive petitions furthers rather than abrogates this common-law principle. 28 U.S.C. § 2244(b)(1). Before AEDPA and since, courts have labeled claims abusive that could have been raised during a prior habeas action. *See McCleskey*, 499 U.S. at 492-93 (recognizing that the "abuse of the writ" doctrine respects the finality of state court convictions by respecting the

finality of a first federal habeas proceeding); *Wong Doo v. United States*, 265 U.S. 239, 241 (1924) (recognizing that a petitioner "make[s] an abusive use of the writ of habeas corpus" when he attempts to use a second federal proceeding to revisit grounds raised in a first proceeding); *Esposito v. Ashcroft*, 392 F.3d 549, 550 (2d Cir. 2004) ("[T]he repetition of a previously asserted claim can be at least as abusive as raising new claims that could have been pursued in a prior petition.")

But the unitary-judgment approach followed by the court of appeals in this case undermines the fundamental habeas "principles of comity, finality, and federalism." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). That approach gives patently abusive claims like Allen's a pass through the redundant-claims bar of section 2244(b)(1). And the court of appeals' decision goes even further by "reject[ing] the argument that [such] claim[s] must be dismissed as an abuse of the writ." (App. 9.) This pushes *Magwood* to its limits and represents "not only a step back from AEDPA protection for States but also a step back even from abuse-of-the-writ principles that were in place before AEDPA." *Magwood*, 561 U.S. at 344 (Kennedy, J., dissenting).

The court of appeals' refusal to recognize Allen's claim as abusive is inconceivable given that the same court rejected it as meritless in 1974 and deemed it successive in 2014. Review by this Court is warranted to reign in this regressive extension of *Magwood*. Even if Allen's claim is not barred by AEDPA's "new restrictions on successive petitions," the time has come to enforce common-law authority that would otherwise

deem his claim a clear abuse of the writ. *Felker*, 518 U.S. at 664.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS A REOCCURRING ISSUE OF GREAT IMPORTANCE.

The designation of claims subject to further federal review after an intervening judgment is a concern of widespread and frequently reoccurring importance. The decisions cited herein to illustrate the circuit split are but a minuscule sample of the many cases dealing with the issue. It is not unreasonable to estimate that the issue is likely to arise in hundreds of cases annually. More than 42,000 habeas petitions and section 2255 motions were filed in 2016 alone. *See U.S. Courts, Caseload Statistic Data Tables, C2: U.S. District Courts - Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit* (Dec. 31, 2016).[3] And, according to a study funded by the Department of Justice, about 0.82% of habeas petitions are granted in non-capital cases. Nancy J. King, *Non-Capital Habeas Cases after Appellate Review: An Empirical Analysis*, 24 Fed. Sent'g Rep. 308, 309 (2012) (Table 2). These figures suggest that roughly 350 modified judgments were entered in 2016 as a result of federal collateral review alone. And that number does not account for amended judgments, like Allen's, that result from state collateral review proceedings.

Litigants on both sides of this issue have recognized its significance. Most notably, Allen's certiorari

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[3] Available at http://www.uscourts.gov/sites/default/files/data_tables/stfj_c2_1231.2016.pdf (last visited Sept. 1, 2017.)

petition in 2014 acknowledged a "robust circuit conflict" that "needs to be resolved and should be resolved here." Pet. for Cert at 6, *Allen v. Carpenter*, No. 14-6304 (U.S. Sept. 10, 2014). In response to Suggs' certiorari petition, the United States acknowledged that the issue would need to be addressed by this Court "if and when it returns to issues it left open in *Magwood*." Br. in Opp'n at 16, *Suggs v. United States*, No. 12-978, 2013 WL 1462053 (U.S. April 10, 2013). Similarly, when Kramer sought certiorari, the United States noted that the lower "courts have reached differing conclusions about *Magwood*'s scope" and that "[t]he question presented here and related questions may warrant this Court's review in an appropriate case." Br. in Opp'n at 15, 16, *Kramer v. United States*, No. 15-787, 2016 WL 676133 (U.S. Feb. 18, 2016).

The court of appeals' decision in this case is particularly well-suited for review. The court expressly "reverse[d] the determination that Allen's grand-jury-discrimination claim is 'second or successive' . . . and reject[ed] the argument that the claim must be dismissed as an abuse of the writ." (App. 9.) Thus, this case presents an opportunity to address the intersection of both (1) the question—driving the circuit split—of successiveness and (2) the common law's traditional intolerance for redundant or abusive claims.

Finally, this case is particularly deserving of review because it neatly presents the precise scenario left hanging in *Magwood*, through the most abusive of claims—one that has already seen exhaustive state and federal review. In response to Suggs' petition for certiorari, the United States urged the Court to allow this issue further percolation in lower courts. Br. in

Opp'n at 16, *Suggs v. United States*, No. 12-978, 2013 WL 1462053 (U.S. April 10, 2013). The United States suggested that percolation would enable the lower courts to "articulate and apply consistent principles of law that respect *Magwood* and apply across the range of scenarios." *Id*. Percolation has taken place; the time is now right to bring uniformity to federal law, to protect the states' interests in the finality of their criminal judgments, and to curb abuse of the writ of habeas corpus.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 17a0364n.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-5356

[Filed June 23, 2017]

WILLIAM G. ALLEN, Petitioner-Appellant,	)
v.	)
BRUCE WESTBROOKS, Warden, Respondent-Appellee.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BEFORE: KEITH, MCKEAGUE, and WHITE, Circuit Judges.

PER CURIAM. Petitioner-Appellant William Allen, an African American, was convicted of murder in 1968 by a Davidson County, Tennessee, jury and was sentenced to 99 years in prison. He has consistently argued—from a pre-trial plea in abatement to direct appeal, and through numerous rounds of state post-conviction and federal habeas proceedings—that

African Americans had been systemically excluded from grand-jury service in Davidson County at the time he was indicted. After a resentencing in 2007, Allen again sought federal habeas relief, challenging his new sentence and renewing his challenge to the grand-jury selection method. The district court rejected his sentence-based challenge on the merits and determined that his grand-jury-discrimination claim requires authorization from this court as a "second or successive" petition.[1] We initially denied a certificate of appealability (COA) as to the grand-jury-discrimination claim, but granted rehearing and issued a COA after our decision in *King v. Morgan*, 807 F.3d 154 (6th Cir.

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[1] 28 U.S.C. § 2244(b) provides:

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. . . . .

2015). Because the district court erroneously characterized Allen's grand-jury-discrimination claim, we **REMAND** for further proceedings.

I

The last reasoned state-court opinion on the merits of the grand-jury-discrimination claim is a 1973 decision of the Tennessee Court of Criminal Appeals affirming the state trial court's denial of post-conviction relief after an evidentiary hearing, holding that African Americans had not been systematically excluded from grand-jury service during the relevant time.[2] *Allen v. Tennessee* (Tenn. Crim. App. Feb. 1, 1973) (1973 TCCA Opinion). Allen then raised the grand-jury-discrimination claim in federal habeas proceedings. The district court dismissed Allen's petition, holding that he "failed to establish . . . purposeful discrimination in the selection of the Grand Jury which indicted [him]."[3] This court affirmed in an unpublished opinion, holding that the district court's finding that there was no purposeful discrimination in the selection of the grand jury that indicted Allen was supported by

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[2] Allen contends that this exclusion stemmed from the use of the "key man" system to select grand juries. Under this system trial judges personally selected grand jurors. Between September 1958 and Allen's indictment in March 1967, Davidson County grand juries had a significantly lower proportion of African Americans than their proportion of the county's population. The 1973 TCCA Opinion is available at R. 32-2, at 92, Case No. 3:12-cv-00242 (M.D. Tenn.).

[3] The order, dated September 24, 1973, is available at R. 41-26, at 11, Case No. 3:12-cv-00242 (M.D. Tenn.) (citing *Swain v. Alabama*, 380 U.S. 202 (1965)).

substantial evidence and thus was not clearly erroneous. *Allen v. Rose*, No. 73-2215, at *3–4 (6th Cir. Apr. 30, 1974).[4] These proceedings all occurred prior to the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) and the present 28 U.S.C. § 2254(d) framework.

In 2007, Allen again pursued post-conviction relief in state court, seeking resentencing and reasserting his grand-jury-discrimination claim. He was granted resentencing and was resentenced to life imprisonment, but the state trial[5] and criminal-appeals courts determined that the grand-jury-discrimination claim had been "previously determined" and thus could not be the subject of a new petition. *Allen v. State*, 2011 WL 1601587, at *9 (Tenn. Crim. App. Apr. 25, 2011). After exhausting state post-conviction proceedings, Allen brought the instant petition for habeas relief, raising a claim related to his resentencing and again asserting the grand-jury-discrimination claim. The district court determined that under the Supreme Court's holding in *Magwood v. Patterson,* 561 U.S. 320 (2010), Allen's petition was not "second or successive" with respect to the sentencing claim; the court addressed this claim on the merits and denied relief. The district court did not, however, address the grand-jury-discrimination claim, other than to state that the claim is "second or successive" because it was already heard on the merits in the 1973/1974 federal habeas

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[4] The opinion is available at R. 41-30, at 2, Case No. 3:12-cv-00242 (M.D. Tenn.).

[5] The trial-court order is available at R. 42-9, at 7–8, Case No. 3:12-cv-00242 (M.D. Tenn.).

proceedings,[6] and thus requires this court's authorization to proceed.

After additional procedural history not recounted here, Allen applied for a COA. This court denied the application, and Allen petitioned for rehearing. While the petition for rehearing was pending, this court decided *King*, *supra*, holding that a habeas petition that challenges a new judgment entered as a result of a resentencing is not second or successive, even if the new judgment leaves the underlying conviction undisturbed and the issues in the petition relate to that underlying judgment. Concluding that the grand-jury-discrimination claim "merits a rehearing certificate of appealability in light of this court's intervening decision in *King v. Morgan*," we granted rehearing and a COA as to this one claim. *See* Order, Case No. 15-5356, R. 16-1 (6th Cir. Feb. 8, 2016).

Our COA order is ambiguous regarding whether the issue before us is 1) whether the district court properly deemed Allen's petition second or successive relative to the grand-jury-discrimination claim and correctly required this court's permission to proceed, or 2) a merits review of the underlying claim, including the standards to be applied in addressing it—questions the district court never reached because it believed the petition to be second or successive. Due perhaps to the COA's ambiguity, the merits review was not fully

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[6] In addition to the instant habeas petition and the 1973/1974 petition, Allen filed federal habeas petitions in 1971 and 1993, which were dismissed for lack of exhaustion of state post-conviction remedies.

briefed by the parties.[7] Given the state of the case and briefing, we must follow the "general rule . . . that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). What is clear is that our decision in *King* controls and Allen's petition is not second or successive. The grand-jury-discrimination claim was thus properly before the district court. *See King*, 807 F.3d at 154.

II

In *King*, we held that the entry of a new judgment resets the "second or successive" count so that the first habeas petition challenging a new judgment is not second or successive, even when it challenges the bases for an undisturbed conviction. The Warden acknowledges as much, but argues that the pre-AEDPA abuse-of-the-writ doctrine nevertheless applies and bars Allen's grand-jury-discrimination claim because it was previously determined on the merits. In reply, Allen contends that § 2244(b) codifies and modifies the abuse-of-the-writ doctrine and thus the abuse analysis should end because his petition is not "second or successive." *Cf. Magwood v. Patterson*, 561 U.S. 320, 337 (2010) ("The dissent . . . errs by interpreting the

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[7] On the merits, Allen provides an analysis under 28 U.S.C. § 2254(d)(1), but mostly relies on *Jefferson v. Morgan*, 962 F.2d 1185 (6th Cir. 1992). *Jefferson* is a published decision of this court affirming the grant of habeas relief based on grand-jury discrimination in Davidson County, Tennessee, decided nearly eighteen years after this court rejected Allen's claim challenging the same selection practice in the same county. The Warden does not address the application of *Jefferson* beyond relying on the abuse-of-the-writ bar, nor does he provide analysis of the 1973 TCCA Opinion.

phrase 'second or successive' by reference to our longstanding doctrine governing abuse of the writ. AEDPA *modifies* those abuse-of-the-writ principles and creates new statutory rules under § 2244(b). These rules apply only to 'second or successive' applications.") (Thomas, J., writing for himself and Justice Scalia) (emphasis added).

In *King*, the state argued that extending *Magwood* to permit post-resentencing habeas claims challenging the petitioner's undisturbed conviction, rather than the newly imposed sentence—claims that likely would have been barred under pre-AEDPA abuse-of-the-writ case law—would conflict with AEDPA's animating purpose to cut back on successive habeas petitions. We replied that the animating purpose could not trump the statute's focus on "judgments," not "claims," "sentences" or "convictions." We acknowledged that,

> It is not clear at any rate what the net effect of our decision will be on habeas practice in this circuit. Yes, if a new judgment resets the "second or successive" count with respect to all claims, that may allow more habeas petitions than would have been the case under the State's approach. And, yes, many tools for addressing repeat claims may not be available in this setting: (1) The entry of a new judgment normally resets the statute-of-limitations clock, 28 U.S.C. § 2244(d)(1)(A); *Rashad*, 675 F.3d at 567–68; (2) res judicata generally does not apply to habeas challenges even when a petitioner raises the same claim after resentencing as he had in an earlier petition, *see Felker*, 518 U.S. at 664, 116 S.Ct. 2333; *McCleskey*, 499 U.S. at

> 480–81, 111 S.Ct. 1454; and (3) the law-of-the-case doctrine likely would not apply due to the intervening judgment, *cf. Rosales–Garcia v. Holland,* 322 F.3d 386, 398 n. 11 (6th Cir. 2003) (en banc).[8]

We went on to explain,

> But other obstacles remain. All habeas petitioners, including King on remand, must show that they did not procedurally default each claim and that they exhausted each claim. And if the federal courts previously addressed the merits of the claim, that likely will not be difficult to sort out. "It will not take ... long to dispose of such claims where the court has already analyzed the legal issues." *Magwood*, 561 U.S. at 340 n. 15, 130 S.Ct. 2788. It thus is fair to say, as *Magwood* has said, that any concern that our decision will set off a flood of "abusive claims" is "greatly exaggerated." *Id.* at 340, 130 S.Ct. 2788.[9]

Post-*King*, we again observed, in *In re Stansell*, 828 F.3d 412, 419 (6th Cir. 2016), that although AEDPA generally raised the bar petitioners must clear to make successive collateral attacks, in some circumstances (like King's and now Allen's) petitions that might have been treated as abuses of the writ before AEDPA now

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[8] *King*, 807 F.3d at 159–60.

[9] *Id.* at 160.

face a lower bar to reach merits review.[10] To hold, as the Warden argues, that AEDPA places *King* claims at our threshold only for us to apply pre-AEDPA law and label them abusive, thus closing the door that AEDPA left open, would be at odds with the statute.[11]

For the foregoing reasons, we reverse the determination that Allen's grand-jury-discrimination claim is "second or successive," requiring authorization by this court, and reject the argument that the claim must be dismissed as an abuse of the writ.[12] The

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[10] In *Stansell* we observed that "[w]hile the statute might have made it more difficult across the board for applicants to file successive petitions, that does not mean that every petition barred as an abuse of the writ must also be barred by the new requirements. The statute might have lowered the barrier for a few applicants (those challenging new judgments) and raised it for many others (those challenging old ones), resulting in fewer successive applications overall. That is the conclusion to which the statute's text leads, and that is the conclusion the Supreme Court reached in *Magwood*." 828 F.3d at 419. Applying that reasoning here, § 2244(b)(1)'s bar on claims that were presented in a prior application applies to second and successive applications, which Allen's is not.

[11] *Cf. Magwood*, 561 U.S. at 338 ("In light of this complex history of the phrase 'second or successive,' we must rely upon [AEDPA's] text to determine when the phrase applies, rather than pre-AEDPA precedents or superseded statutory formulations.") (Thomas, J., writing for himself and Justice Scalia).

[12] We decide today only that the abuse-of-the-writ doctrine did not permit the district court to dismiss this case as second or successive and thus requiring authorization from this court to proceed. We express no view on the district court's ability to consider the history and prior rulings in the case on remand. *Compare Colon v. Sheahan,* No. 13-CIV-6744, 2016 WL 3919643,

parties shall address all other issues to the district court. We **REMAND** for further proceedings.

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at *10 (S.D.N.Y. Jan. 13, 2016), report and recommendation adopted, No. 13-cv-6744, 2016 WL 3926443 (S.D.N.Y. July 14, 2016) (reading *Magwood*'s dicta that it will "not take long" to dispose of claims "where the court has already analyzed the legal issues" to allow for the summary dismissal of previously adjudicated habeas claims under abuse-of-the-writ principles) *with Smalls v. Lee*, No. 12-CV-2083, 2016 WL 5334986, at *9 (S.D.N.Y. Sept. 22, 2016) (expressing uncertainty as to whether *Magwood*'s dicta "empowers district courts to summarily dismiss [previously adjudicated] habeas claims properly raised a second time without undertaking an independent examination of the merits.").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:12-00242
JUDGE CAMPBELL

[Filed March 26, 2015]

WILLIAM G. ALLEN	)
	)
v.	)
	)
RONALD COLSON, WARDEN	)
	)

MEMORANDUM

I. Introduction

Pending before the Court are Petitioner's Motion For Summary Judgment And Entitlement To Habeas Corpus Relief (Docket No. 83); Respondent's Motion For Waiver Of M.D. Tenn. Local Rule 56.01(b) (Docket No. 88); Respondent's Response To Petitioner's Motion for Summary Judgment And Respondent's Cross-Motion For Summary Judgment (Docket No. 89); and Petitioner's Reply (Docket No. 91).

For the reasons set forth herein, Petitioner's Motion For Summary Judgment And Entitlement To Habeas Corpus Relief (Docket No. 83) is DENIED, and Respondent's Cross-Motion For Summary Judgment

(Docket No. 89) is GRANTED. Respondent's Motion For Waiver Of M.D. Tenn. Local Rule 56.01(b) (Docket No. 88) is also GRANTED.

II. Procedural Background

In 1968, the Petitioner was indicted for the murders of two Davidson County police officers, Charles Wayne Thomasson and Thomas E. Johnson. Allen v. State, 2011 WL 1601587, at *1 (Tenn. Crim. App. April 26, 2011). The two murder counts were tried separately. Id. In December, 1968, the Petitioner was tried and convicted of the first degree murder of Officer Thomasson, and received a sentence of 99 years. Id. This Section 2255 action concerns the conviction and sentence for the murder of Officer Thomasson.

The conviction was affirmed by the Tennessee Court of Criminal Appeals. Canady v. State, 3 Tenn. Crim. App. 337, 461 S.W.2d 53, 64 (Tenn. Crim. App. 1970). The Tennessee Supreme Court and the United States Supreme Court denied certiorari. Allen v. State, supra, at *2. The Petitioner then filed a petition for habeas corpus in federal district court, which was dismissed on November 24, 1971. Id. (Docket No. 41-23, at 18-23).

In December, 1971, the Petitioner filed a post-conviction petition in state court, which was denied after a hearing. (Docket No. 42-9, at 33, 32-47); Allen v. State, supra, at *2. On February 1, 1973, the Tennessee Court of Criminal Appeals affirmed the post-conviction court's decision. Id. The Tennessee Supreme denied certiorari on June 4, 1973. (Docket No. 41-26, at 4).

Subsequently, in 1973, the Petitioner filed a second petition for writ of habeas corpus in federal district

court, which was denied. (Docket No. 41-26). On appeal, the Sixth Circuit affirmed in an opinion issued on April 30, 1974. (Docket No. 41-30, at 4-5).

The Petitioner escaped state custody in 1974 and remained at large until he was recaptured in 1986. Allen v. State, supra, at *3.[1]

On July 22, 1989, the Petitioner filed his second state post-conviction petition, which was summarily dismissed without a hearing on February 21, 1990. Allen v. State, supra, at *3; (Docket Nos. 42-1; 42-11, at 72). The Tennessee Court of Criminal Appeals affirmed the dismissal. Allen v. State of Tennessee, 1991 WL 181059 (Tenn. Crim. App. September 17, 1991); (Docket No. 42-4, at 2). On June 1, 1993, the Tennessee Supreme Court reversed the summary dismissal and remanded the case to permit the Petitioner to amend his petition. Allen v. State, 854 S.W.2d 873 (Tenn. 1993); (Docket No. 42-8, at 2).

In February, 1994, on remand of the second post-conviction petition, the Petitioner re-filed his petition, and amended it three times. (Docket No. 42-11, at 89, 165, 180, 209). The court held a "waiver" hearing on

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[1] In 1986, a Davidson County grand jury issued a superseding indictment charging the Petitioner with Officer Johnson's murder. Allen v. State, supra, at *3, n. 2. In 1989, the Petitioner was tried and convicted of the first degree murder of Officer Johnson, and sentenced to 78 years of imprisonment to be served consecutively to the 99-year sentence he received for Officer Thomasson's murder. Id. The 78-year sentence was subsequently converted to a life sentence. Allen v. State, 2004 WL 1908809 (Tenn. Crim. App. Aug. 25, 2004)(Remanding case to trial court for entry of life sentence).

May 15, 1995, during which an issue arose regarding a possible conflict of interest on the part of Petitioner's counsel. (Docket No. 42-12, at 2-66). The post-conviction court subsequently appointed new counsel for the Petitioner, and the case was removed from the active docket subject to reactivation by Petitioner's new counsel. Allen v. State, supra, at *3. In November, 2001, through a third attorney, the Petitioner filed a consolidated petition for post-conviction relief. Id., at *4; (Docket No. 42-9, at 4).

On April 3, 2007, the court granted the Petitioner's motion to modify his sentence to one of life imprisonment, which the State conceded was appropriate, and entered an Amended Judgment reflecting the change. (Docket Nos. 42-9, at 48, 50). The Order further provided that the Petitioner "consents to the imposition of a life sentence without waiving his right or conceding the constitutionality of the order that the 99 year sentence should be converted to a life sentence." (Id.) The Petitioner's position "is that he could only be sentenced to the lesser included offense of Second Degree Murder, and a sentence of 20 years was the maximum allowed according to law at the time of the offense." (Id.)

After holding two evidentiary hearings, the court entered an order, on September 28, 2009, denying relief on Petitioner's claims. (Docket Nos. 42-9, at 67-74; 42-13, 42-14). The Tennessee Court of Criminal Appeals affirmed the lower court's judgment, on April 26, 2011. Allen v. State, supra, at *5-9; (Docket No. 42-19). On August 25, 2011, the Tennessee Supreme Court denied Petitioner's application for permission to appeal. Id.

Petitioner filed his initial petition for writ of habeas corpus in this case on March 5, 2012, and subsequently filed amendments to the Petition (Docket Nos. 1, 24, 53). In his Second Amended Petition (Docket No. 53), the Petitioner raised five claims. The parties sought partial summary judgment on Petitioner's grand jury discrimination claim, and the Court determined that the claim was "second or successive. " (Docket Nos. 54, 55). The Court ordered the Petitioner to amend his petition by omitting the grand jury discrimination claim, or the case would be transferred to the Sixth Circuit Court of Appeals for consideration as a second or successive petition. (Id.) When the Petitioner failed to file such an amendment, the Court transferred this case to the appeals court. (Docket No. 63).

The Sixth Circuit subsequently determined that, with the exception of the claim regarding the imposition of his life sentence, the Petitioner's claims were second or successive, and the appeals court denied permission to file those claims. (Docket No. 73). The appeals court remanded the claim challenging the imposition of the life sentence. (Id.) That claim is the subject of the parties' pending motions.

III. Analysis

A. Petitioner's claim

Petitioner argues that the imposition of the life sentence violates his due process rights under the Fourteenth Amendment because: (1) a term of life imprisonment was not an available punishment for the Petitioner's conviction at the time it was imposed; (2) the court imposing the sentence denied the Petitioner the sentencing process to which he was

entitled under state law; and (3) the court's imposition of the life sentence produced an impermissible *ex post facto* effect.

B. Tennessee murder statutes

The Petitioner has filed a Statement Of Material Facts and supporting exhibits relating to the history of legislation imposing punishment for first degree murder in Tennessee. (Docket No. 84). The Respondent has not contested the Petitioner's discussion of that history.

In 1915, the Tennessee General Assembly enacted Chapter 181 of the Public Acts of 1915, which abolished the death penalty and substituted a term of life imprisonment for all crimes except rape and offenses committed by convicts sentenced to life imprisonment. (Docket No. 84-1). In 1917 and 1919, the General Assembly repealed this law. (Docket Nos. 84-2, 84-3). Later in 1919, the General Assembly enacted Chapter 5 of the Public Acts of 1919, which provided that the punishment for a first-degree murder conviction was presumed to be death, but the jury could fix the punishment for a term of life or any period of time over 20 years. (Docket No. 84-4). Chapter 5 also expressly repealed Chapter 181. (Id.)

At Petitioner's trial in 1968, the jury sentenced him to a term of 99 years imprisonment based on the 1919 statute. (Docket No. 84, at ¶ 5).

In 1979, the Tennessee Supreme Court held in Miller v. State, 584 S.W.2d 758 (Tenn. 1979) that because the 1919 statute was unconstitutional in its entirety, "the legally effective punishment for first

degree murder on the date of the crime [April 7, 1976] . . . was life imprisonment." Id., at 762, 764.

As noted above, during post-conviction proceedings in 2007, the Davidson County Criminal Court granted the Petitioner's motion to modify his sentence to one of life imprisonment, which the State conceded was appropriate, and entered an Amended Judgment reflecting the change. (Docket Nos. 42-9, at 48, 50).

C. Tennessee courts' consideration of Petitioner's claim

Petitioner's claim was addressed by the Tennessee Court of Criminal Appeals in its consideration of Petitioner's most recent post-conviction petition:

> The Petitioner contends that his sentence is voidable because no constitutionally valid sentencing provision for first-degree murder existed at the time he was sentenced. He argues that, as a consequence, the only valid punishment that may be imposed upon him is the 1919 Act's second degree murder punishment statute, which Miller did not find unconstitutional. Miller v. State, 584 S.W.2d 758 (Tenn.1979). The State responds that this Court is bound by the Tennessee Supreme Court's holding, in Miller v. State, that the 1915 Sentencing Act was in effect when the Defendant was sentenced.
>
> In 1968, when this offense was committed, the statute that prescribed the punishment for first degree premeditated number (sic) authorized a sentence of death, life imprisonment, or a term over twenty years. T.C.A. § 39–2405. The Petitioner was convicted in Officer Thomasson's

death and sentenced to a term of ninety-nine years. Canady v. State, 3 Tenn.Crim.App. 337, 461 S.W.2d 53, 55-56 (Tenn.Crim.App.1970). In 1973, the Tennessee General Assembly repealed the existing penalty provisions for first degree murder and enacted a new version of section 39–2405. The Tennessee Supreme Court, however, struck down the 1973 Act because it embraced more than one subject and was broader than its title. State v. Hailey, 505 S.W.2d 712, 715 (Tenn.1974). In response the General Assembly enacted Chapter 462 of the Public Acts of 1975, which provided that all person convicted of first degree murder would receive the death penalty. In 1977, the Tennessee Supreme Court declared that this provision, too, was unconstitutional and explained that its ruling revived the non-capital sentencing provisions of the 1919 Act, which allowed a jury to sentence a person convicted of first degree murder to life imprisonment or some other period of imprisonment over twenty years. Collins v. State, 550 S.W.2d 643 (Tenn.1977). In 1979, however, the Tennessee Supreme Court overruled Collins, thereby reviving the 1915 Act prescribing the punishment for first degree murder. Miller, 584 S.W.2d at 758. The court in Miller explained that its holding had the effect of reviving the 1915 Act, which provided a mandatory sentence of life imprisonment for all persons convicted of first degree murder. Id. at 762.

The Petitioner's contention that no constitutionally valid punishment for first

degree murder existed in 1968 is based upon the fact that the General Assembly expressly repealed Chapter 181 of the 1915 Act four days before it enacted the 1919 first-degree punishment statutes, which were subsequently found to be unconstitutional in Miller. See 1919 Tenn. Pub. Acts, Ch. 4; State v. Bomer, 209 Tenn. 567, 354 S.W.2d 763, 766 (1962); Smith v. Bomar, 212 Tenn. 149, 368 S.W.2d 748, 750-51. He argues that, because a repealed act may only be re-enacted by 'positive re-enactment in constitutional form,' and no such legislative action has taken place, the 1915 Act has never been re-enacted. Further, he contends that, because the 'saving statute' of the Tennessee Code provides for the 'revival' only of the statute existing immediately before the enactment of the statute found unconstitutional, the saving statute did not revive the repealed 1915 Act when the Miller court found the 1919 Act unconstitutional. As a consequence, he argues, no constitutional first degree murder punishment statute existed in 1968. He argues that, given the separation of powers doctrine, the Supreme Court overstepped its jurisdiction when it attempted to revive the 1915 Act in Miller.

The Petitioner supports his argument with a well reasoned analysis and extensive citation to authority. We, however, are constrained by the Tennessee Supreme Court's holding in Miller that the first degree murder provisions of the 1915 Act apply to offenses, such as the present one, committed in 1968. Wallace v. State, 121

> S.W.3d 652, 656 (Tenn.2003); Nichols v. State, 90 S.W.3d 576, 586 (Tenn.2002). The Petitioner is not entitled to relief on this issue.

Allen v. State, supra, at *9-10.

D. Application of AEDPA

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") govern the Court's review of Petitioner's clam. Under AEDPA, a habeas petition shall not be granted "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . ." 28 U.S.C. § 2254(d).

The Petitioner argues that the Tennessee Court of Criminal Appeals did not adjudicate his claim "on the merits" under AEDPA because the court "simply concluded it was bound by Miller and could not therefore grant Mr. Allen relief." (Docket No. 85, at 9). That the state court determined it was bound by precedent, however, does not mean its adjudication was not "on the merits." In Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), the Supreme Court held that a state court order that summarily rejects a claim without discussion is presumed to be an adjudication "on the merits" under AEDPA. See also Werth v. Bell, 692 F.3d 486 (6th Cir. 2012). Logic distates that if a decision with no discussion is "on the merits," a decision explaining that the court is bound by *stare decisis* clearly meets that standard. As the state court's decision was "on the

merits," this Court must determine whether the state court's decision was "contrary to" or "involved an unreasonable application of clearly established Federal law."

In making that determination, the Sixth Circuit has explained that a state court decision is "contrary to" a clearly established federal law if it applies a rule that contradicts Supreme Court law in the area, or if it arrives at a different result from Supreme Court precedent based on materially indistinguishable facts. Stewart v. Erwin, 503 F.3d 488, 493-94 (6th Cir. 2007)(citing Mitchell v. Esparza, 540 U.S. 12, 15-16, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003)). A state court decision is an "unreasonable application" of clearly established federal law if the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts of the case. Id. (citing Wiggins v. Smith, 539 U.S. 510, 520, 123 S.Ct. 2527, 2534-35, 156 L.Ed.2d 471 (2003)). "Unreasonable application" requires more than an incorrect or erroneous decision; rather, the decision must have been "objectively unreasonable." Id.

"Clearly established federal law" is the law set forth by the Supreme Court at the time the state court rendered its decision, though decisions of lower federal courts may be instructive. Id. The state court need not cite Supreme Court cases, however, as long as neither the reasoning nor the result contradicts them. Id. (citing Early v. Packer, 537 U.S. 3, 8, 123 S.Ct. 362, 365, 154 L.Ed.2d 263 (2002). Where a state court does not articulate the reasons for its decision, the court is to "conduct an independent review of the record and applicable law to determine whether the state court

decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented." Id., at 494 (quoting Harris v. Stovall, 212 F.3d 940, 943 (6th Cir.2000)).

The Petitioner argues that the state court's decision was contrary to, and an unreasonable application of, clearly established law that: (1) a person convicted of a crime is eligible for, and the court may impose, only those punishments that are authorized by statute for his offense, based on Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); (2) a defendant has a substantial and legitimate expectation that the State will deprive him of his liberty only in accordance with established State procedures, and the State violates a defendant's rights when it restricts his liberty without following those procedures, based on Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 343 (1980); and (3) the Fourteenth Amendment limits a State court's authority to impose by judicial interpretation a result in derogation of *ex post facto* guaranties, based on Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) and Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

As to the first argument, the Petitioner essentially contends that the Tennessee Supreme Court erred in concluding in Miller that the 1915 statute provided an available punishment for murder prior to 1977 because the 1915 statute had been expressly repealed before Chapter 5 purported to replace it in 1919. That error, according to the Petitioner, violates his due process

rights as recognized in Chapman v. United States, supra.

In Chapman, the Supreme Court held that the federal drug trafficking statute requires that the weight of the carrier medium of a drug be included when determining the appropriate sentence. On the specific page of the case cited by Petitioner, the Court explains that a person who has been convicted "is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual," and "as long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." 500 U.S. at 465.

The Petitioner does not argue that the state court's decision here resulted in cruel and unusual punishment, or that it made an arbitrary distinction. Instead, the Petitioner argues that his life sentence was not "authorized" under Tennessee law, and is therefore, unconstitutional. In essence, the Petitioner disagrees with the Miller court's determination that the 1915 statute was a prior valid act that could be revived when the 1919 Act was held to be unconstitutional. In so finding, Petitioner argues, the state's judicial branch usurped the authority of the state's legislative branch. That the Petitioner disagrees with the state court's interpretation of state law on this issue, however, does not establish that the state violated "clearly established" federal due process guaranties. Petitioner has not shown that the state did not have the authority under *federal law* to impose a life sentence on individuals convicted of first degree murder. Accordingly, the Petitioner has not established

that the Tennessee Court of Criminal Appeals decision applying Miller to his case resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.

Petitioner relies on Hicks v. Oklahoma to support his second argument – that he has a liberty interest in being sentenced only in accordance with established State procedures, and the State deprived him of that interest by imposing the life sentence. In Hicks, the Supreme Court held that a state statute requiring jury sentencing created a liberty interest, which was denied without due process when the trial judge instructed the jury that they were required to impose a sentence of 40 years pursuant to a statute that was later declared unconstitutional, and the appellate court failed to remand for resentencing. In reaching its decision, the Court rejected the state appellate court's conclusion that the defendant was not prejudiced because the 40-year sentence was within the range of punishment that could have been imposed under the appropriate statute. 447 U.S. at 346. The Court explained that when a statute provides for the imposition of a sentence in the discretion of a trial jury, which was conceded by the state, the defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion. . . " Id.

In this case, the Petitioner does not argue that Tennessee requires that his sentence be imposed by a jury as in Hicks. Rather, Petitioner argues that Tennessee law entitled him to receive a sentence provided in a statute that had not been repealed by the legislature, and because, in his view, a life sentence did

not exist as an available punishment because of that repeal, the state courts violated his due process rights by imposing such a sentence.

Unlike the Hicks case, however, the Respondent here does not concede that a life sentence was not an available punishment for the Petitioner under state law. Indeed, Tennessee's highest appellate court in Miller has ruled that such a sentence was available for defendants similarly situated to the Petitioner. Under these circumstances, the Petitioner's claim to a liberty interest in his own interpretation of Tennessee law is unavailing. Accordingly, the Petitioner has not shown that the Tennessee Court of Criminal Appeals decision applying Miller to his case resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.

Finally, the Petitioner argues that the state court's decision upholding the imposition of the life sentence violates *ex post facto* guaranties, based on Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) and Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). In Bouie, the Supreme Court held that a state court's unforeseeable and indefensible interpretation retroactively expanding a state criminal statute violates fair warning and *ex post facto* guaranties.

In Miller v. Florida, the Court held that a state trial court violated *ex post facto* guaranties when it sentenced the petitioner under Florida's new sentencing guidelines, which yielded a higher sentencing range than the guidelines in place at the time of his crime. In reaching its decision, the Court explained that to establish an *ex post facto* violation,

"two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" 482 U.S. at 430 (quoting Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1987)).

The Petitioner contends that by deciding that the statute in effect at the time of his crime was the 1915 statute requiring a mandatory life sentence, the Miller court "repealed" the more lenient 1919 statute, and consequently, produced an *ex post facto* result in violation of the Fourteenth Amendment.

To meet the first requirement set forth in Miller v. Florida, the Petitioner must show that the decision to apply the 1915 statute to defendants similarly situated to the Petitioner, who committed his crime in 1968, resulted in a retroactive application of a new, stricter law. Unlike the situation in Miller v. Florida, however, the law applied to the Petitioner was not enacted after he committed the offense, then retroactively applied to yield a higher sentence.[2] As the Petitioner has not met

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[2] As to the second element, Petitioner contends that changing his 99-year sentence to a life sentence disadvantages him because a 99-year sentence has an expiration date during his lifetime, with "good time" and "honor time" credits, whereas a life sentence does not expire until he dies. Petitioner also points out that the 99-year sentence was a discretionary sentence and the life sentence is mandatory. The Respondent argues, on the other hand, that modification of a 99-year sentence to a life sentence may practically result in a shorter sentence because parole eligibility with a life sentence is earlier than with a 99-year sentence. See Robert Irwin Gwin v. State, 1997 WL 627632 (Tenn. Crim. App. Oct. 13, 1997), *rev'd on other grounds* Taylor v. State, 995 S.W.2d

this first element, he cannot establish that the Tennessee Court of Criminal Appeals decision applying Miller to his case resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.

IV. Conclusion

For the reasons set forth herein, Petitioner's Motion For Summary Judgment And Entitlement To Habeas Corpus Relief (Docket No. 83) is denied, and Respondent's Cross-Motion For Summary Judgment (Docket No. 89) is granted.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

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78 (Tenn. 1999)(Modifying 100-year sentence to life sentence has the effect of reducing the amount of time defendant has to serve before he is eligible for parole); Harris Percy Wynn v. State, 1993 WL 153198 (Tenn. Crim. App. May 12, 1993)(same). The Court need not decide this issue, however, as Petitioner has failed to show that the statute mandating the life sentence was applied as punishment for a crime committed prior to its enactment.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:12-00242
JUDGE CAMPBELL

[Filed March 26, 2015]

WILLIAM G. ALLEN	)
	)
v.	)
	)
RONALD COLSON, WARDEN	)
	)

ORDER

Pending before the Court are Petitioner's Motion For Summary Judgment And Entitlement To Habeas Corpus Relief (Docket No. 83); Respondent's Motion For Waiver Of M.D. Tenn. Local Rule 56.01(b) (Docket No. 88); Respondent's Response To Petitioner's Motion for Summary Judgment And Respondent's Cross-Motion For Summary Judgment (Docket No. 89); and Petitioner's Reply (Docket No. 91).

For the reasons set forth in the accompanying Memorandum, Petitioner's Motion For Summary Judgment And Entitlement To Habeas Corpus Relief (Docket No. 83) is DENIED, and Respondent's Cross-Motion For Summary Judgment (Docket No. 89) is GRANTED. Respondent's Motion For Waiver Of M.D. Tenn. Local Rule 56.01(b) (Docket No. 88) is also GRANTED.

This Order shall constitute the judgment in this case pursuant to Fed. R. Civ. P. 58.

Should the Petitioner give timely notice of an appeal from this Memorandum and Order, such notice shall be treated as a application for a certificate of appealability, 28 U.S.C. 2253(c), which will not issue because the Petitioner has failed to make a substantial showing of the denial of a constitutional right. Castro v. United States, 310 F.3d 900 (6th Cir. 2002).

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

No. 3:12-0242
JUDGE CAMPBELL

[Filed March 26, 2015]

WILLIAM G. ALLEN	)
	)
v.	)
	)
RONALD COLSON, WARDEN	)
	)

ENTRY OF JUDGMENT

Judgment is hereby entered for purposes of Rule 58(a) and/or Rule 79(a) of the Federal Rules of Civil Procedure on 3/26/2015.

KEITH THROCKMORTON, CLERK
s/Dalaina Thompson, Deputy Clerk

APPENDIX C

Allen v. Carpenter

Supreme Court of the United States

No. 14-6304.

[Filed December 8, 2014]

December 8, 2014, Decided

Reporter
2014 U.S. LEXIS 8160 *; 135 S. Ct. 755; 190 L. Ed. 2d 632; 83 U.S.L.W. 3348

William G. Allen, Petitioner v. Charles Wayne Carpenter, Warden.

Judges: [*1] Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13-6226

[Filed April 14, 2014]

In re: WILLIAM G. ALLEN, Movant.

O R D E R

Before: COLE, GRIFFIN, and KETHLEDGE, Circuit Judges.

William G. Allen, a counseled Tennessee prisoner, moves this court to remand his habeas petition to the district court, alleging that it was erroneously transferred for consideration as a second or successive petition. Alternatively, he moves for an order authorizing the district court to consider his second or successive petition. *See* 28 U.S.C. § 2244(b).

In 1968, Allen was indicted for the murders of two Davidson County, Tennessee police officers. He was subsequently convicted of the first-degree murder of both officers, but only his conviction for the murder of Charles Wayne Thomasson, for which he received a sentence of ninety-nine years, is at issue here. Allen appealed, arguing that the method used to select grand jurors systematically excluded African-Americans; the appellate court affirmed his conviction and sentence.

Canady v. State, 461 S.W.2d 53, 64 (Tenn. Crim. App. 1970). The Tennessee Supreme Court and the United States Supreme Court both denied certiorari.

In 1971, Allen filed a federal habeas petition and a state petition for post-conviction relief, raising the grand jury claim in both actions. His federal petition was dismissed. His state petition was denied by the trial court, and the denial was affirmed by the Tennessee Court of Criminal Appeals. *Allen v. State*, No. 1004 (Tenn. Crim. App. Feb. 1, 1973) (unpublished). He filed a second federal habeas petition in 1973, raising the grand jury claim, which was also denied. We affirmed. *Allen v. Rose*, 495 F.2d 1373 (6th Cir. 1974) (table).

In 1989, Allen filed a second petition for state post-conviction relief, again alleging discrimination in the selection of the grand jury. The trial court summarily dismissed the petition. The Tennessee Court of Criminal Appeals affirmed. *Allen v. State*, No. 01-C-019008CR00186, 1991 WL 181059 (Tenn. Crim. App. Sept. 17, 1991). Allen appealed to the Tennessee Supreme Court and, while his appeal was pending, we issued an opinion holding that intentional discrimination took place in the selection of a grand jury in Davidson County in 1968. *See Jefferson v. Morgan*, 962 F.2d 1185, 1192 (6th Cir. 1992). Also while his appeal was pending, Allen filed a third petition for habeas relief in the district court. After the petition was filed, the Tennessee Supreme Court remanded Allen's post-conviction petition, *Allen v. State*, 854 S.W.2d 873 (Tenn. 1993), and the district court dismissed Allen's petition for lack of exhaustion.

We affirmed. *Allen v. Dutton*, No. 94-5476, 1994 WL 659132 (6th Cir. Nov. 22, 1994) (unpublished).

Several delays occurred after remand to the state trial court. Finally, in 2001, Allen filed an amended petition for post-conviction relief alleging several constitutional violations in his 1968 trial, including the claim that the grand jury selection process was racially discriminatory. On April 3, 2007, by agreement of the parties, the trial court granted Allen's motion to modify his sentence and entered an amended judgment modifying his ninety-nine year sentence to a term of life imprisonment. The trial court subsequently held two hearings on the post-conviction petition, with the parties agreeing that the facts found by this court in *Jefferson* "relating to jury composition in Davidson County are . . . established for purposes of this case," and that the grand jury that indicted Jefferson also indicted Allen. Ultimately, the trial court denied the petition, finding that the allegations he raised therein were raised in his first petition and he presented "no additional substantiating evidence" on the grand jury issue. The trial court concluded that Allen failed to prove the existence of intentional racial discrimination or the systematic exclusion of African-Americans in the grand jury selection method. The Tennessee Court of Criminal Appeals affirmed, finding that the grand jury claim was barred by state law because it was "previously determined" by the state courts; the appellate court rejected Allen's claim that the stipulated facts from *Jefferson* warranted an exception to the bar on reconsideration of previously determined issues. *Allen v. State*, No. M2009-02151-CCA-R3-PC, 2011 WL 1601587 (Tenn. Crim. App. Apr. 26, 2011). The Tennessee Supreme Court denied leave to appeal

and the Supreme Court denied a writ of certiorari. *Allen v. Tennessee*, 132 S. Ct. 1639 (2012).

On March 5, 2012, Allen filed the instant habeas petition, his fourth, raising the following claims: 1) racial discrimination occurred in the selection of the members of the grand jury; 2) the state violated the Fourteenth Amendment by presenting false testimony and withholding evidence; 3) counsel rendered ineffective assistance; 4) the trial court's jury instructions violated the Fourteenth Amendment; and 5) his life sentence violates the Sixth, Eighth, and Fourteenth Amendments. Both parties filed motions seeking summary judgment on the grand jury claim. In addition, respondent requested that the district court transfer the case to this court for consideration as a second or successive petition. After consideration, the district court rejected Allen's claim, made pursuant to *Magwood v. Patterson*, 561 U.S. 320, 130 S. Ct. 2788 (2010), that he was challenging the "new judgment" entered on April 3, 2007, that modified his sentence from ninety-nine years to life imprisonment and, thus, his petition was not second or successive. The court concluded that *Magwood* did not apply to the grand jury claim, which was previously considered on its merits and did not relate to the "new judgment." The court denied Allen's motion for partial summary judgment and granted the respondent's partial summary judgment motion, and ordered Allen to file an amended petition omitting the grand jury claim or the case would be transferred to this court for consideration as a second or successive petition. Allen failed to file the amended petition and the case was transferred.

Allen has now filed a motion to remand the case to the district court on the basis that his petition is not "second or successive," upon the authority of *Magwood*. At the very least, Allen requests that this court should remand his fifth claim, which challenges the imposition of a life sentence. Allen has also filed a motion seeking to file his petition as second or successive, should this court determine that his petition was properly classified as such by the district court.

In *Magwood*, the Supreme Court held that "where . . . there is a new judgment intervening between [] two habeas petitions, an application challenging the resulting new judgment is not 'second or successive.'" 130 S. Ct. at 2802. The Court reasoned that "second or successive" is a term that applies to the judgment being challenged, and since the judgment being challenged did not exist at the time the petitioner's first § 2254 petition was brought, the habeas petition before the Court was not "second or successive." *Id.* at 2796-97. The Court emphasized, however, that the petition Magwood sought to file was the first one challenging the new judgment and that the "errors [the petitioner] alleges are *new*." *Id*. at 2801. The Court expressly declined to extend its holding to a situation where the second petition is filed after resentencing, but challenges the original conviction, not the new sentence, noting–without overruling or casting doubt upon–several Courts of Appeals opinions, including one from this court, which have held that a petitioner who succeeds on a first habeas application and is resentenced may challenge only the "portion of a judgment that arose as a result of a previous successful action." *Id.* at 2802-03 and n.16 (citing *Lang v. United States*, 474 F.3d 348, 351 (6th Cir. 2007) (citing

decisions); *Walker v. Roth*, 133 F.3d 454, 455 (7th Cir. 1997); *Esposito v. United States*, 135 F.3d 111, 113-14 (2d Cir. 1997)).

This case represents the situation that the Supreme Court did not address in *Magwood*, in that the bulk of Allen's claims in his current petition challenge his underlying conviction. The claim that Allen raises regarding the imposition of his life sentence is new, relates to the amended judgment entered in 2007, and could not have been brought before. *See Burton v. Stewart*, 549 U.S. 147, 156 (2007) ("Final judgment in a criminal case means sentence. The sentence is the judgment.") (citation and internal quotation marks omitted). Allen's remaining claims are not new, do not relate to the 2007 amended judgment, and could have been raised at any time since Allen's conviction in 1968. In *Lang*, cited by the Supreme Court in *Magwood*, this court held that a subsequent petition avoids "second or successive" treatment only to the extent that it complains of errors that "originate[d] at resentencing." *Lang*, 474 F.3d at 353. Therefore, pursuant to the law of this circuit, which *Magwood* did not overrule, Allen's petition is second or successive–except to the extent that he challenges the imposition of sentence as the result of the 2007 amended judgment.

To obtain our permission to file a second or successive § 2254 habeas petition, Allen must make a prima facie showing that: 1) there is newly discovered evidence which, if proven and viewed in light of the evidence as a whole, sufficiently establishes that no reasonable factfinder would have found him guilty; or 2) a new rule of constitutional law applies to his case

which the Supreme Court has made retroactive to cases on collateral review. *See* 28 U.S.C. §§ 2244(b); *In re Green*, 144 F.3d 384, 388 (6th Cir. 1998).

Allen cannot make a prima facie showing. To the extent that this court's findings in *Jefferson*, relating to the grand jury selection, could be considered newly discovered evidence, the findings do not establish Allen's innocence. Allen has otherwise failed to present new evidence in connection with his remaining claims alleging presentation of false testimony, withholding of evidence, ineffective assistance, and erroneous jury instructions. In addition, he has not cited a new rule of constitutional law that has been made retroactive by the Supreme Court and which is applicable to his case.

Allen's motion to remand is granted in part as to his fifth habeas claim, challenging his term of life imprisonment. The motion is denied in part as to the remaining claims. Allen's motion for leave to file a second or successive habeas petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:12-00242
JUDGE CAMPBELL

[Filed September 10, 2013]

WILLIAM G. ALLEN	)
	)
v.	)
	)
RONALD COLSON, WARDEN	)
	)

ORDER

In prior Orders (Docket Nos. 55, 58, 62), the Court determined that the Petitioner's habeas application is second or successive, and indicated that this case would be transferred to the Sixth Circuit Court of Appeals unless the Petitioner filed a amended petition omitting the grand jury discrimination claim. As the Petitioner has failed to file such an amended petition as of the date of this Order (which is approximately three weeks after the deadline set by the Court), this case is transferred to the Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1631, in accordance with In re Sims, 111 F.3d 45 (6th Cir. 1997), and the pending habeas application is denied and dismissed for lack of jurisdiction.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:12-00242
JUDGE CAMPBELL

[Filed June 19, 2013]

WILLIAM G. ALLEN	)
	)
v.	)
	)
RONALD COLSON, WARDEN	)
	)

MEMORANDUM

I. Introduction

Pending before the Court are Petitioner's Motion For Partial Summary Judgment (Docket No. 30), and the Respondent's Cross Motion For Partial Summary Judgment (Docket No. 47).

For the reasons set forth herein, Petitioner's Motion For Partial Summary Judgment (Docket No. 30) is DENIED, and the Respondent's Cross Motion For Partial Summary Judgment (Docket No. 47) is GRANTED as set forth herein.

Because the Petitioner's grand jury discrimination claim was previously denied on the merits, the Petitioner's habeas application is "second or

successive." Accordingly, the Court intends to transfer the Second Amended Petition (Docket No. 53) to the Sixth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1631, in accordance with In re Sims, 111 F.3d 45 (6th Cir. 1997), unless the Petitioner files an amended petition, on or before July 1, 2013, that omits the grand jury discrimination claim.

II. Procedural Background

In March, 1968, the Petitioner was indicted for the murders of two Davidson County police officers, Charles Wayne Thomasson and Thomas E. Johnson. Allen v. State, 2011 WL 1601587, at *1 (Tenn. Crim. App. April 26, 2011). The two murder counts were tried separately. Id. In December, 1968, the Petitioner was tried and convicted of the first degree murder of Officer Thomasson, and received a sentence of 99 years. Id. Prior to trial, Petitioner's trial counsel filed a "plea in abatement" seeking dismissal of the indictment based on a challenge, on equal protection and due process grounds, to the method used to select the grand jurors who indicted him. Id., at *2. Specifically, the Petitioner argued that the method used to select grand jurors resulted in a grand jury consisting of a lower percentage of blacks than were represented in the population of Davidson County. Id. The parties stipulated to certain demographic information regarding the grand jurors and the population of Davidson County. Id. The trial court denied the plea in abatement. Id.

The Petitioner raised the claim on appeal, but it was rejected and the conviction affirmed by the Tennessee Court of Criminal Appeals. Canady v. State, 3 Tenn. Crim. App. 337, 461 S.W.2d 53, 64 (Tenn.

Crim. App. 1970). The Tennessee Supreme Court and the United States Supreme Court denied certiorari. Allen v. State, supra, at *2.

The Petitioner filed a petition for habeas corpus in federal district court, which was dismissed on November 24, 1971 for failure to present the grand jury discrimination claim to the state courts. Id. (Docket No. 41-23, at 18-23).

In December, 1971, the Petitioner filed a post-conviction petition in state court in which he raised the grand jury discrimination claim. (Docket No. 42-9, at 33). The court rejected the claim after holding a hearing which included testimony by Davidson County judges relating to the grand jury selection process. Allen v. State, supra, at *2; (Docket No. 42-9, at 32-47). On February 1, 1973, the Tennessee Court of Criminal Appeals affirmed the post-conviction court's decision. Id. The Tennessee Supreme denied certiorari on June 4, 1973. (Docket No. 41-26, at 4).

Subsequently, in 1973, the Petitioner filed a second petition for writ of habeas corpus in federal district court. (Docket No. 41-26, at 2-6). On September 24, 1973, the court engaged in an "independent examination" of the state court record and determined that although the grand juror selection method "did produce a statistical imbalance, in that the number of black grand jurors were substantially less than the percentage of the black population in Davidson County, the petitioner failed to establish that such statistical imbalance resulted from purposeful discrimination in the selection of the Grand Jury which indicted this petitioner." (Docket No. 41-26, at 12). On appeal, the Sixth Circuit affirmed in an opinion issued on April 30,

1974, concluding that "the finding of the district court that there was no purposeful discrimination in the selection of the grand jury which indicted petitioner is supported by substantial evidence and is, therefore, not clearly erroneous." (Docket No. 41-30, at 4-5).

The Petitioner escaped state custody in 1974 and remained at large until he was recaptured in 1986. Allen v. State, supra, at *3.[1]

On July 22, 1989, the Petitioner filed his second state post-conviction petition, which was later amended to include the grand jury discrimination claim. Allen v. State, supra, at *3; (Docket Nos. 42-1, at 4; 42-11, at 72). By Order entered February 21, 1990, the state trial court dismissed the second petition without a hearing, finding that the Petitioner's claims had been "previously determined" or "waived" under the applicable state statute governing post-conviction proceedings. Allen v. State, supra, at *3; (Docket No. 42-1, at 15-16). The Tennessee Court of Criminal Appeals affirmed the dismissal. Allen v. State of Tennessee, 1991 WL 181059 (Tenn. Crim. App. September 17, 1991); (Docket No. 42-4, at 2). On June 1, 1993, the Tennessee Supreme Court reversed the dismissal, holding that the State should have been required to file a response and the record of prior hearings, and that the court should have appointed

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[1] In 1986, a Davidson County grand jury issued a superseding indictment charging the Petitioner with Officer Johnson's murder. Allen v. State, supra, at *3, n. 2. In 1989, the Petitioner was tried and convicted of first degree murder and sentenced to 78 years of imprisonment to be served consecutively to the 99-year sentence he received for Officer Thomasson's murder. Id. The 78-year sentence was subsequently converted to a life sentence. Id.

counsel and allowed Petitioner to amend his petition. Allen v. State, 854 S.W.2d 873 (Tenn. 1993); (Docket No. 42-8, at 2).

While the Petitioner's second post-conviction petition was pending in the state appeals courts, the Sixth Circuit Court of Appeals issued its decision in Jefferson v. Morgan, 962 F.2d 1185, 1192 (6th Cir. 1992). The Sixth Circuit held in Jefferson that the petitioner in that case had established a prima facie case of race discrimination in the selection of the grand jury that indicted him, and that the State had not rebutted the prima facie case. The court ordered the State to re-indict the petitioner within 90 days or release him from custody. Id., at 1192.

In February, 1994, on remand of his second post-conviction petition, the Petitioner in this case re-filed his petition, and subsequently, filed three amendments to the petition. (Docket No. 42-11, at 89, 165, 180, 209). The court held a "waiver" hearing on May 15, 1995, during which an issue arose regarding a possible conflict of interest on the part of Petitioner's counsel. (Docket No. 42-12, at 2-66). The post-conviction court subsequently appointed new counsel for the Petitioner, and the case was removed from the active docket subject to reactivation by Petitioner's new counsel. Allen v. State, 2011 WL 1601587, at *3.

In November, 2001, through yet another attorney, the Petitioner filed a consolidated petition for post-conviction relief, which included the grand jury discrimination claim. Id., at *4; (Docket No. 42-9, at 4).

By an Agreed Order entered on March 29, 2007 (Docket No. 42-10, at 99) in that case, the parties

agreed that "[t]he facts in Jefferson [v. Morgan, supra] relating to jury composition in Davidson County are . . . established for purposes of this case" and that "the Grand Jury which indicted James Thomas Jefferson also returned the indictment against William G. Allen, Petitioner." (Docket No. 42-10, at 99). On April 3, 2007, the court granted the Petitioner's motion to modify his sentence to one of life imprisonment, which the State conceded was appropriate, and entered an Amended Judgment reflecting the change. (Docket Nos. 42-9, at 48, 50).

On November 20, 2007, the court held a hearing during which Petitioner's trial counsel testified. (Docket No. 42-13). On April 30, 2008, the court held another hearing, during which a witness from the original trial testified, and the parties addressed the merits of the grand jury discrimination claim. (Docket No. 42-14).

On September 28, 2009, the court entered an order denying relief on Petitioner's claims with little discussion of the evidence presented by the Petitioner. (Docket No. 42-9, at 67-74). The Tennessee Court of Criminal Appeals affirmed the lower court's judgment, on April 26, 2011, holding that the grand jury discrimination claim was barred by the applicable state post-conviction statute because it had been "previously determined" by the state courts. The court pointed out that the Petitioner had received a full and fair hearing on his grand jury discrimination claim twice – at the plea in abatement proceedings and at the hearing on his first post-conviction petition. Allen v. State, 2011 WL 1601587, at *5-9; (Docket No. 42-19). The court rejected the Petitioner's argument that the stipulated

facts of Jefferson v. Morgan warranted an exception to the bar on reconsideration of "previously determined" issues. Id. On August 25, 2011, the Tennessee Supreme Court denied Petitioner's application for permission to appeal. Id.

Petitioner filed his initial Petition for writ of habeas corpus in this case on March 5, 2012 (Docket No. 1) and it was assigned to the undersigned judge, forty-four years after the events in question. The Petitioner subsequently filed amendments to the Petition (Docket Nos. 24, 53). In his Second Amended Petition (Docket No. 53), the Petitioner raises one claim challenging his life sentence, and four claims challenging his conviction, including the grand jury discrimination claim. Id.

III. Analysis

The Petitioner requests that the Court grant him summary judgment on the grand jury discrimination claim. The Respondent requests that the Court transfer this case to the Sixth Circuit Court of Appeals as a "second or successive" habeas petition. Alternatively, the Respondent requests summary judgment denying the grand jury discrimination claim.

The threshold issue the Court must decide is whether the Petitioner's habeas application is "second or successive" under 28 U.S.C. § 2244(b). If the application is "second or successive," the Petitioner must obtain authorization from the Sixth Circuit before filing it in the district court. 28 U.S.C. § 2244(b)(3)(A); Magwood v. Patterson, ___ U.S. ___, 130 S.Ct. 2788, 2796, 177 L.Ed.2d 592 (2010). Although it is clear that the Petitioner has previously filed a habeas petition in

federal district court, in 1973, the Supreme Court has made clear that not all second-in-time habeas applications are considered "second or successive" under the statute. Id. The Court has recognized exceptions for second applications raising claims that would have been unripe in an earlier petition, or for those filed after the petitioner concludes a direct appeal that was ordered in response to an earlier petition. Storey v. Vasbinder, 657 F.3d 372, 376-77 (6th Cir. 2011).

The Petitioner argues that the pending habeas application is not "second or successive" because he is challenging a "new judgment" – the Amended Judgment entered by the state court on April 3, 2007 modifying his sentence from 99 years to life. The Petitioner argues that the Supreme Court's decision in Magwood v. Patterson, supra, supports his position.

In Magwood, the petitioner, who was sentenced to death in an Alabama state court, challenged both his conviction and sentence through a habeas application filed in federal district court. 130 S.Ct. at 2791. The district court conditionally granted the writ as to the sentence. Id. The state trial court subsequently conducted a new sentencing hearing and again sentenced the petitioner to death. Id. The petitioner then filed another habeas application in federal district court challenging the new death sentence. Id. The district court again conditionally granted the writ, but the Eleventh Circuit reversed, holding that the petitioner's challenge to the new death sentence was a "second or successive" petition because the petitioner could have raised the same challenge to his original death sentence. Id., at 2791-92. The Supreme Court

reversed, holding that "[b]ecause Magwood's habeas application challenges a new judgment for the first time, it is not 'second or successive' under § 2244(b)." Id., at 2792 (footnote omitted).

In reaching its decision, the Court's language seems to suggest a straightforward rule – when a "new judgment" has been entered, a habeas application challenging that judgment is not "second or successive" regardless of whether it contains a claim that could have been raised in the prior habeas application. Thus, the Petitioner here argues that once the state trial court entered the Amended Judgment changing his sentence, his subsequent habeas application cannot be considered "second or successive" even if it contains claims that challenge his original conviction, which could have been raised, or were raised, in the prior habeas application.

The last paragraph of the Magwood opinion, however, leaves open an issue that casts doubt on the Petitioner's suggested application of the Court's holding:

> The State objects that our reading of § 2244(b) would allow a petitioner who obtains a conditional writ as to his sentence to file a subsequent application challenging not only his resulting, *new* sentence, but also his original, *undisturbed* conviction. The State believes this result follows because a sentence and conviction form a single 'judgment' for purposes of habeas review. This case gives us no occasion to address that question, because Magwood has not attempted to challenge his underlying conviction. We base our conclusion on the text,

> and that text is not altered by consequences the State speculates will follow in another case.

130 S.Ct. at 2802-03 (footnotes omitted). The Court pointed out in a footnote that "[s]everal Courts of Appeals have held that a petitioner who succeeds on a first habeas application and is resentenced may challenge only the 'portion of a judgment that arose as a result of a previous successful action.'" Id., at 2802 n.16.

This language suggests that the Magwood holding does not purport to apply to the Petitioner's habeas application, which raises four claims challenging the undisturbed conviction, but only one claim challenging the sentence imposed in the Amended Judgment.

The Courts of Appeals have reached differing conclusions about how Magwood applies to the issue it expressly left open. In Suggs v. United States, 705 F.3d 279, 281 (7th Cir. 2013), the petitioner filed a habeas application challenging his conviction and sentence on several grounds.[2] The petitioner succeeded on one of those grounds, and the court imposed a new, reduced sentence. Id. The petitioner then filed a second habeas application raising a claim challenging his conviction. Id. The Seventh Circuit held that the habeas application was a "second or successive" application. Id. In reaching its decision, the court explained that Magwood expressly left open the question it faced, and

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[2] Although Suggs involved a habeas application brought by a federal prisoner under 28 U.S.C. § 2255, the courts have not distinguished those habeas applications from those brought by state prisoners under 28 U.S.C. § 2254 in construing the meaning of "second or successive." See, e.g., Suggs, 705 F.3d at 283 n.1.

under its own circuit precedent, the application was "second or successive." Id., at 284-85. The court recognized disagreement with its approach by the Second and Ninth Circuits, but noted that the approach taken by those courts resulted in more relaxed limits on successive claims than existed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Id.

In the Second Circuit decision referenced in Suggs, the petitioner filed a habeas application challenging his convictions for bank robbery, armed bank robbery, and using a firearm in furtherance of a crime of violence. Johnson v. United States, 623 F.3d 41, 42-43 (2nd Cir. 2010). The petitioner was successful in challenging the separate convictions for bank robbery and armed bank robbery on double jeopardy grounds, and the district court modified the judgment of conviction by vacating the conviction and sentence for bank robbery. Id. In a subsequent habeas application, the petitioner raised a challenge to the amended judgment, as well as claims that the indictment against him was defective and that he received the ineffective assistance of counsel at various stages of his case. Id. Noting that the Magwood Court expressly declined to address whether a subsequent application challenging a new sentence as well as an undisturbed conviction was "second or successive," the court nonetheless held that the language used by the Court dictated the result:

> Under Magwood, however, where '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.' Id. (internal quotation marks

> omitted). And the Supreme Court has previously stated that '[a] judgment of conviction includes both the adjudication of guilt and the sentence.' Deal v. United States, 508 U.S. 129, 132, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993). It follows that, where a first habeas petition results in an amended judgment, a subsequent petition is not successive regardless of whether it challenges the conviction, the sentence, or both.

Id., at 45-46.

In the Ninth Circuit case referenced in Suggs, Wentzell v. Neven, 674 F.3d 1124 (9th Cir. 2012), the petitioner's first habeas application was dismissed as barred by AEDPA's one-year statute of limitations. The petitioner subsequently filed a post-conviction petition in state court, which determined that petitioner's conviction and sentence on one of three counts should be dismissed, and entered an amended judgment reflecting that decision. Id., at 1125. Relying on Magwood and Johnson, the Ninth Circuit held that the petitioner's subsequent habeas application was not "second or successive" because it was the first petition challenging the amended judgment of conviction. Id., at 1126-27.

Although the Sixth Circuit has not addressed the specific question at issue here, it did cite Magwood in a case involving the issue of whether a habeas application filed after a direct appeal had been ordered was a "second or successive" application. In Storey v. Vasbinder, 657 F.3d 372, 376 (6th Cir. 2011), the petitioner filed his first habeas application raising eight claims, and the district court granted relief on one of the claims – that petitioner's appellate counsel

had been ineffective by failing to argue that trial counsel was ineffective. The court ordered that the petitioner be granted a new direct appeal, and declined to consider petitioner's other claims. Id. After denial of his appeal claims by the state courts, the petitioner filed another habeas application five years after the first was filed. Id. The petition included claims that had been in his earlier petition, as well as new claims. Id. The district court ultimately denied all petitioner's claims. Id.

In considering the threshold issue of whether the most recent habeas application was "second or successive," the Sixth Circuit cited Magwood as holding that "an application challenging an earlier criminal judgment did not count for purposes of determining whether a later application challenging a new judgment in the same case was second or successive." Id., at 377. In discussing the majority rule – that a petition filed after a new direct appeal has been ordered is not "second or successive" – the court stated: "One important limitation on this rule, however, is that the petitioner cannot 'resurrect' claims that the district court 'denied on the merits' in his first petition." Id. The court cited the Fourth Circuit decision in In re: Williams, 444 F.3d 233 (4th Cir. 2006) as recognizing this limitation.

In Williams, the court held that a second-in-time habeas application filed after a new direct appeal has been ordered will be treated as "second or successive" if the petitioner includes claims that the district court denied *on the merits* in the first habeas application: "circuit precedent and common sense dictate that a habeas petitioner cannot be allowed to resurrect claims

previously denied on the merits simply because the district court has granted relief on an appeal claim." Id., at 236. The court held that the habeas application would not be treated as "second or successive" if the petitioner omitted the repetitive claims, and gave the petitioner an opportunity to delete those claims. Id., at 237.

In this case, the Petitioner has filed a habeas application that contains a claim that was raised in a previous habeas application and denied *on the merits* by the federal district court (and raised and denied on appeal by the Sixth Circuit). In the opinion of the Court, neither Magwood nor the Courts of Appeals decisions applying Magwood have addressed this situation. In the Court's view, the decision in Williams, cited by the Sixth Circuit in Storey, is more applicable to the situation presented here. Because the Petitioner's grand jury discrimination claim was previously denied *on the merits* by the federal district court, the Petitioner's habeas application is "second or successive." Accordingly, the Court intends to transfer the Second Amended Petition (Docket No. 53) to the Sixth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1631, in accordance with In re Sims, 111 F.3d 45 (6th Cir. 1997), unless the Petitioner files an amended petition, on or before July 1, 2013, that omits the grand jury discrimination claim.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:12-00242
JUDGE CAMPBELL

[Filed June 19, 2013]

WILLIAM G. ALLEN	)
	)
v.	)
	)
RONALD COLSON, WARDEN	)
	)

ORDER

Pending before the Court are Petitioner's Motion For Partial Summary Judgment (Docket No. 30), and the Respondent's Cross Motion For Partial Summary Judgment (Docket No. 47).

For the reasons set forth in the accompanying Memorandum, Petitioner's Motion For Partial Summary Judgment (Docket No. 30) is DENIED, and the Respondent's Cross Motion For Partial Summary Judgment (Docket No. 47) is GRANTED as set forth herein.

Because the Petitioner's grand jury discrimination claim was previously denied on the merits, the Petitioner's habeas application is "second or successive." Accordingly, the Court intends to transfer the Second Amended Petition (Docket No. 53) to the Sixth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1631, in accordance with In re Sims, 111 F.3d 45 (6th

Cir. 1997), unless the Petitioner files an amended petition, on or before July 1, 2013, that omits the grand jury discrimination claim.

It is so ORDERED.

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