SUPREME COURT OF THE UNITED STATES

No. 09–158

BILLY JOE MAGWOOD, PETITIONER *v.* TONY PATTERSON, WARDEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 24, 2010]

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE SOTOMAYOR join, concurring in part and concurring in the judgment.

I join the Court's well-reasoned opinion with the exception of Part IV–B. The Court neither purports to alter nor does alter our holding in *Panetti* v. *Quarterman*, 551 U. S. 930 (2007). See *ante,* at 14, n. 11. In *Panetti,* we "declined to interpret 'second or successive' as referring to all §2254 applications filed second or successively in time, *even when* the later filings address a state-court judgment *already challenged in a prior §2254 application."* 551 U. S. at 944 (emphasis added). In this case, by contrast, we determine how 28 U. S. C. §2244(b) applies to a habeas petition that is the *first* petition to address a *new* "state-court judgment" that has not "already [been] challenged in a prior §2254 application." And, for the reasons provided by the Court, such a "first" petition is not "second or successive." Of course, as the dissent correctly states, if Magwood were challenging an undisturbed state-court judgment for the second time, abuse-of-the-writ principles would apply, including *Panetti*'s holding that an "application" containing a "claim" that "the petitioner had no fair opportunity to raise" in his first habeas petition is not a "second or successive" application. *Post,* at 3 (opinion of KENNEDY, J.). Contrary to the dissent's assertion, *post,* at 6–8, the Court's decision today and our decision in *Panetti* fit comfortably together.