SUPREME COURT OF THE UNITED STATES

No. 97–300

TERRY STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTION, ET AL., PETITIONERS *v.* RAMON MARTINEZ-VILLAREAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND OTHER RELIEF

[May 18, 1998]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

From 1986 to 1991, respondent filed three petitions for federal habeas relief; each was dismissed on the ground that respondent had not yet exhausted his state remedies. In March 1993, respondent filed his fourth federal habeas petition presenting, *inter alia*, his claim under *Ford* v. *Wainwright*, 477 U. S. 399 (1986), that he was not competent to be executed. Finding that some of respondent's claims were procedurally defaulted, that others were without merit, and that respondent's *Ford* claim was not ripe for decision, the Court of Appeals held that the fourth petition should be denied. In May 1997, after the Arizona state courts rejected his *Ford* claim, respondent returned for a fifth time to federal court, again arguing that he was incompetent to be executed. Because this filing was a "second or successive habeas corpus application," respondent's *Ford* claim should have been dismissed. I therefore respectfully dissent.

Unlike the Court, I begin with the plain language of the statute. Section 2244(b)(1) provides that a "claim presented in a second or successive habeas corpus application

. . . that was presented in a prior application shall be dismissed." 28 U. S. C. A. §2244(b)(1) (Supp. 1998). An "application" is a "putting to, placing before, preferring a request or petition to or before a person. The act of making a request for something." Black's Law Dictionary 98–99 (6th ed. 1990); see also Webster's Ninth New Collegiate Dictionary 97 (1991) (application is a "request, petition . . . a form used in making a request"). Respondent's March 1993 federal habeas petition was clearly a habeas "application" (the Court concedes as much), because it placed before the District Court respondent's request for a writ of habeas corpus. Once this application was denied, however, none of respondent's claims for relief––including his claim that he was incompetent to be executed––remained before the Court. It was thus necessary for respondent to file a new request for habeas relief so that his *Ford* claim would again be "pu[t] to" or "plac[ed] before" the District Court. (The Court certainly did not raise respondent's *Ford* claim *sua sponte*.) Respondent's May 1997 request for relief was therefore a habeas application distinct from his earlier requests for relief, and it was thus undoubtedly "second or successive."

Respondent's *Ford* claim was also "presented" in both his March 1993 and his May 1997 habeas applications. To "present" is "to bring or introduce into the presence of someone" or "to lay (as a charge) before a court as an object of inquiry." Webster's Ninth New Collegiate Dictionary 930 (1991). Respondent clearly "presented" his *Ford* claim in both his 1993 and his 1997 habeas applications, for in each he introduced to the District Court his argument that he is not competent to be executed. Under the plain meaning of the statute, therefore, respondent's *Ford* claim was a "claim presented in a second or successive habeas corpus application . . . that was presented in a prior application." §2244(b)(1).

The reasons offered by the Court for disregarding the

plain language of the statute are unpersuasive. Conceding that "[t]his may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim," *ante*, at 5, the Court nevertheless concludes that respondent has really filed only "*one* application for habeas relief." *Ibid.* (emphasis added). The District Court, however, did not hold respondent's *Ford* claim in abeyance when it denied his March 1993 habeas petition, so that claim was no longer before the District Court in May 1997. At best, then, respondent's May 1997 filing was an effort to reopen his *Ford* claim. But that filing (which is most definitely an "application") is subject to the statutory requirements for second or successive habeas applications. As we have recently stated in a closely related context:

> "[A] prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of §2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, §2244(b)(1), or the bar against litigation of claims not presented in a prior application, §2244(b)(2)." *Calderon* v. *Thompson*, 523 U. S. __, __ (1998) (slip op., at 14).

In just the same way, habeas petitioners cannot be permitted to evade §2244(b)'s prohibitions simply by moving to reopen claims already presented in a prior habeas application.

The Court also reasons that respondent's "*Ford* claim here––previously dismissed as premature––should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies," for "in both situations, the habeas petitioner does not receive an adjudication of his claim." *Ante*, at 6–7. Implicit in the Court's reasoning is its assumption

that a prisoner whose habeas petition has been dismissed for failure to exhaust state remedies, and who then exhausts those remedies and returns to federal court, has not then filed a "second or successive habeas corpus application." §2244(b)(1). To be sure, "none of our cases . . . ha[s] ever suggested" that a prisoner in such a situation was filing a successive petition. See *ante*, at 6. But that is because, before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1218, a federal court could grant relief on a claim in a second or successive application so long as the ground for relief had not already been "presented *and determined*," 28 U. S. C. §2244(a) (emphasis added), or "adjudicated," §2244(b), in a previous application. Claims presented in a petition dismissed for failure to exhaust are neither "determined" nor "adjudicated." Thus, the pre-AEDPA practice of permitting petitioners to raise claims already presented in applications dismissed for failure to exhaust says nothing about whether those later applications were considered second or successive.

Even if the Court were correct that such an application would not have been considered second or successive, such a case is altogether different from this case, in which only one of many claims was not adjudicated. In the former situation, the federal court dismisses the unexhausted petition without prejudice, see *Rose* v. *Lundy*, 455 U. S. 509, 520–522 (1982), so it could be argued that the petition should be treated as if it had never been filed. In contrast, when a court addresses a petition and adjudicates some of the claims presented in it, that petition is certainly an "application," and any future application must be "second or successive."[1] Otherwise, the court would have adjudi-

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[1] If the Court's position is that respondent's May 1997 filing was an "application," but not a "second or successive" one, presumably 28 U. S. C. A. §2244(b) (Supp. 1998) would not have precluded respondent

cated the merits of claims that had not been presented in an "application."[2]

Ultimately, the Court's holding is driven by what it sees as the "far-reaching and seemingly perverse" implications for federal habeas practice of a literal reading of the statute. *Ante*, at 6. Such concerns are not, in my view, sufficient to override the statute's plain meaning. And to the extent concerns about habeas practice motivate the Court's decision, it bears repeating that federal habeas corpus is a statutory right and that this Court, not Congress, has expanded the availability of the writ. Before this judicial expansion, a prisoner seeking a writ of habeas corpus was permitted to challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody. See *Wright* v. *West*, 505 U. S. 277, 285–286 (1992) (opinion of THOMAS, J.). A *Ford* claim obviously does not present such a challenge.[3] A statute that has the effect of precluding adjudication of a claim that for most of our Nation's history would have been considered noncognizable on habeas can hardly be described as "perverse."

Accordingly, whether one considers respondent's March 1993 federal habeas petition to have been his *first* habeas

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from presenting, along with his *Ford* claim, a claim previously adjudicated *on the merits*, for §2244(b) operates to bar only those claims presented in "second or successive" applications.

[2] Even if a claim dismissed without prejudice could be treated as having never been presented, dismissal, as the Court concedes, would still be required because a claim under *Ford* v. *Wainwright*, 477 U. S. 399 (1986), does not fit within §2244(b)(2)(B)'s exceptions for claims not presented in prior applications. See *ante*, at 4.

[3] There is an additional reason why a state prisoner's *Ford* claim may not be cognizable on federal habeas. A state prisoner may bring a federal habeas petition "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §2254. A *Ford* claim does not challenge either the prisoner's underlying conviction or the legality of the sentence; it challenges *when* (or whether) the sentence can be carried out.

application— because his three previous applications had been dismissed for failure to exhaust— or his *fourth*— because respondent had already filed three previous habeas applications by that time— his May 1997 request for relief was undoubtedly either a "second" (following his first) or "successive" (following his fourth) habeas application. Respondent's *Ford* claim, presented in this second or successive application, should have been dismissed as a "claim . . . presented in a prior application." §2244(b)(1).