No. 06-6407

In The Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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CAPITAL CASE

SUPPLEMENTAL QUESTION PRESENTED

Must petitioner's habeas application be dismissed as "second or successive" pursuant to 28 U.S.C. §2244?

TABLE OF CONTENTS

Page

SUPPLEMENTAL QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. The Plain Text of 28 U.S.C. §2244(b) Requires Dismissal of Panetti's Second Federal Habeas Application 3

II. Controlling Precedent Required Panetti To Assert His *Ford* Claim in His Initial Habeas Application 6

A. This Court's Precedent Strongly Suggests That the District Court Lacked Jurisdiction To Resolve Panetti's *Ford* Claim 6

B. Controlling Circuit Precedent Required Panetti To Present His *Ford* Claim in His Initial Habeas Application 9

III. Requiring *Ford* Claims To Be Presented in Initial Habeas Applications Is Both Equitable and Constitutional 11

A. Applying §2244(b) as Written Will Allow Habeas Petitioners To Have Their *Ford* Claims Heard 11

B. Section 2244(b)'s Requirement That *Ford* Claims Be Asserted in Initial Habeas Applications Is Constitutional 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Billiot v. *Puckett*, 135 F.3d 311 (CA5 1998) 10

Burton v. *Stewart*, 127 S.Ct. 793 (2007) (*per curiam*)..... 3, 8

Caldwell v. *Johnson*, No. 3-95-CV-625-T (N.D. Tex. Sept. 8, 1998) 10

Davis v. *Scott*, 51 F.3d 457 (CA5 1995)..... 9

Delk v. *Cockrell*, No. 02-40326, 2002 WL 32598585 (CA5 Feb. 28, 2002) (unpublished) 10

Ex Parte Caldwell, 58 S.W.3d 127 (Tex. Crim. App. 2000)..... 14

Felker v. *Turpin*, 518 U.S. 651 (1996)..... 2, 13, 14, 15

Ford v. *Wainwright*, 477 U.S. 399 (1986) .....*passim*

Grovey v. *Townsend*, 295 U.S. 45 (1935)..... 15

In re Davis, 121 F.3d 952 (CA5 1997)..... 1, 9, 10, 13

In re Provenzano, 215 F.3d 1233 (CA11 2000) 10

Nguyen v. *Gibson*, 162 F.3d 600 (CA10 1998) (*per curiam*)..... 10

Panetti v. *Quarterman*, No. 06-6407, 2007 WL 957524 (U.S. Apr. 2, 2007) (Mem.)..... 1

Patterson v. *Cockrell*, 69 Fed. Appx. 658, 2003 WL 21355999 (CA5 May 23, 2003) (unpublished)..... 10

Richardson v. *Johnson*, 256 F.3d 257 (CA5 2001)..... 10

Slack v. *McDaniel*, 529 U.S. 473 (2000) 7

Smith v. *Allwright*, 321 U.S. 649 (1944) 15

TABLE OF AUTHORITIES – Continued

Page

Staley v. *Dretke*, 126 Fed. Appx. 667 (CA5 Mar. 23, 2005) (unpublished)..... 10

Stewart v. *Martinez-Villareal*, 523 U.S. 637 (1998).....*passim*

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. art. I, §9..... 13

U.S. Const. art. III, §2..... 13

U.S. Const. amend. VIII..... 14

28 U.S.C. §1257(a)..... 14, 15

28 U.S.C. §1651 13

28 U.S.C. §2241(a)..... 13

28 U.S.C. §2244 .....*passim*

28 U.S.C. §2244(b).....*passim*

28 U.S.C. §2244(b)(1) 4, 7, 9

28 U.S.C. §2244(b)(2) .....*passim*

28 U.S.C. §2244(b)(2)(A) 5

28 U.S.C. §2244(b)(2)(B) 5, 6

28 U.S.C. §2244(b)(2)(B)(i)..... 5

28 U.S.C. §2244(b)(2)(B)(ii)..... 5

28 U.S.C. §2244(b)(3) 2, 8

28 U.S.C. §2244(b)(3)(A) 4, 6, 7, 9

28 U.S.C. §2244(b)(3)(C) 4, 5

28 U.S.C. §2254 3

Tex. Code Crim. Proc. art. 46.05..... 14

Sup. Ct. R. 20.4(a) 13

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Green v. *Livingston*, Federal Petition for Writ of Habeas Corpus, No. 4:07-CV-00827 (S.D. Tex. Mar. 6, 2007) 10

Hatten v. *Cockrell*, Federal Petition for Writ of Habeas Corpus, No. 2:02-CV-020 (S.D. Tex. Apr. 18, 2003) 10

Mines v. *Cockrell*, Federal Petition for Writ of Habeas Corpus, No. 3:00-CV-2044 (N.D. Tex. Apr. 20, 2001) 10

SUMMARY OF THE ARGUMENT

The Court asks whether Panetti's habeas petition raising an execution-competence claim under *Ford* v. *Wainwright*, 477 U.S. 399 (1986), must be dismissed as "second or successive" pursuant to 28 U.S.C. §2244. Order in *Panetti* v. *Quarterman*, No. 06-6407, 2007 WL 957524 (U.S. Apr. 2, 2007) (Mem.). The answer is yes: under the plain text of §2244(b), Panetti's second federal habeas application must be dismissed.

It is undisputed that Panetti's first federal habeas application, which was fully and finally adjudicated on the merits, failed to raise a *Ford* claim. Thus, Panetti's subsequent habeas application, which did raise a *Ford* claim, was a "second or successive" application under the terms of §2244(b). Because Panetti did not request prior authorization from the court of appeals to file that subsequent application, §2244(b) precluded district-court jurisdiction over it. And, even if Panetti had sought and obtained authorization from the court of appeals, the district court still would have lacked jurisdiction because Panetti's *Ford* claim could not, as a matter of law, have qualified as reviewable under the exacting test of §2244(b)(2).

The Court's precedent is in accord with this plain-text reading of the statute. Although *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), did not resolve the precise question presented here, it established that *Ford* claims raised in second or successive habeas applications cannot meet §2244(b)'s jurisdictional requirements, and it provided a clear path for preserving *Ford* claims for ultimate adjudication—by raising them in the first federal habeas application, then "reopening" them when an execution date is set.

Panetti failed to follow that clear path, and he also disregarded Fifth Circuit precedent when he failed to raise his *Ford* claim in his first federal habeas petition. Thus, Panetti cannot credibly argue that it is inequitable to subject him to the terms of §2244. Panetti was on full notice of the law—under the express terms of *Martinez-Villareal* and *In re Davis*, 121 F.3d 952 (CA5 1997), both decided *before* Panetti's first federal habeas application. He was also on

full notice of the facts underlying his claim—having alleged incompetence at every single stage of this litigation. Nonetheless, he failed to preserve the claim.

Finally, Panetti cannot demonstrate that §2244 is unconstitutional. Any such argument would necessarily fail in light of the availability of (1) preserving *Ford* claims on first federal habeas to be reopened under *Martinez-Villareal*, (2) certiorari review from state-court determinations of execution competence, and (3) original habeas proceedings raising *Ford* claims in this Court. See *Felker* v. *Turpin*, 518 U.S. 651 (1996).

ARGUMENT

The Court's request for briefing on whether Panetti's habeas application is jurisdictionally barred under §2244 does not mark the first appearance of that issue in this case. The State urged the district court to dismiss Panetti's petition on that very ground, or, alternatively, to transfer his petition to the court of appeals so that he could seek the necessary leave to file a second petition under §2244(b)(3). JA 122. In considering the State's motion, the district court noted that both this Court and the Fifth Circuit had expressly declined to resolve the successive-petition issue in the context of Panetti's scenario. JA 123-26. Faced with what it deemed an open question, the district court rejected the State's argument, holding that, because Panetti's execution date had not yet been set at the time of his first federal habeas petition, his execution-competence claim was not then ripe, and thus could be asserted for the first time in a second petition. JA 127. Ultimately, though, the district court found on the merits that Panetti is competent to be executed. JA 373.

Having prevailed on the merits of Panetti's execution-competence claim, the State chose to defend that result in the court of appeals and not to press the successive-petition issue that the district court found to be *res nova*. The court of appeals declined to address any issues under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")—even those raised by the

State—and affirmed the judgment that Panetti is competent to be executed. JA 376. And, before this Court, the State likewise focused initially on the competence issue that three courts had already resolved in its favor. Nonetheless, because authorization under §2244 is necessary for subject-matter jurisdiction, *Burton* v. *Stewart*, 127 S.Ct. 793, 796 (2007) (*per curiam*), it remains as an antecedent question for this Court to decide. Now, at the Court's request, the State has revisited that issue, and it once again urges that Panetti's second federal habeas petition should be dismissed for lack of jurisdiction under §2244.

I. The Plain Text of 28 U.S.C. §2244(b) Requires Dismissal of Panetti's Second Federal Habeas Application.

The Court recently confirmed that federal district courts lack jurisdiction over unauthorized second or successive habeas applications. *Burton*, 127 S.Ct., at 796. Authorization for such applications is governed by 28 U.S.C. §2244, which, in relevant part, provides as follows:

> "(b)(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 [this] 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.
>
> * * *
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. §2244(b).

The terms of §2244 are binary: either a claim was presented in first federal habeas, in which case §2244(b)(1) applies, or it was not presented in first federal habeas, in which case §2244(b)(2) applies. In this case, it is undisputed that Panetti's *Ford* claim was not presented in his first federal habeas application. Federal Petition for Writ of Habeas Corpus, No. 99-CV-260 (W.D. Tex. Sept. 7, 1999); see JA 355, n.1. Therefore, §2244(b)(1) is inapplicable. Rather, because Panetti's *Ford* claim was not presented until his second federal habeas application, see Second Federal Petition for Writ of Habeas Corpus, No. 04-CV-42 (W.D. Tex. Jan. 26, 2004); JA 355, that claim is governed by §2244(b)(2).

Under the plain text of §2244(b)(2), Panetti cannot obtain relief for two reasons. First, the statute requires that a petitioner must move, in the court of appeals, for an order authorizing the district court to consider his successive habeas application. 28 U.S.C. §2244(b)(3)(A). Second, in order for that claim to proceed, the court of appeals must find that the applicant made a prima facie showing of §2244(b)(2)'s substantive requirements. *Id*., §2244(b)(3)(C). Panetti satisfied neither statutory requirement. It is undisputed that he never filed a §2244(b)(3)(A) motion in connection with his *Ford* claim. That fact alone is dispositive. But even if he had filed such

a motion, he could not have satisfied §2244(b)(2)'s requirements.

First, Panetti could have pointed to no "new rule of constitutional law, made retroactive to cases on collateral review by [this] Court, that was previously unavailable." *Id.*, §2244(b)(2)(A). The sole claim at issue in Panetti's second habeas application is based on *Ford*—a case decided years before his conviction and sentence. Under no plausible theory of statutory interpretation could the Court's 1986 decision in *Ford* be considered, in 2004, to be a "new rule of constitutional law." Thus, review was barred under §2244(b)(2)(A).

Second, even assuming *arguendo* that "the factual predicate for [Panetti's] claim could not have been discovered previously through the exercise of due diligence," *id.*, §2244(b)(2)(B)(i),[1] Panetti could not, as a matter of law, have established the second necessary predicate for relief under §2244(b)(2)(B): that "no reasonable factfinder would have found [him] *guilty of the underlying offense*," *id.*, §2244(b)(2)(B)(ii) (emphasis added). By its nature, Panetti's *Ford* claim does not question the jury's finding of guilt; rather, it challenges only the State's current ability to carry out a sentence. As such, it falls outside the terms of §2244(b)(2)(B).

---

[1] Having asserted that "incompetency runs like a fissure through every proceeding in this case," Panetti Br. 6, and having devoted a substantial portion of his opening brief to establishing that claim, *id.*, at 6-28, Panetti cannot reasonably argue—much less make a prima facie showing, 28 U.S.C. §2244(b)(3)(C)—that his *Ford* claim "could not have been discovered previously through the exercise of due diligence," *id.*, §2244(b)(2)(B)(i); see also JA 123 (district court's observation that "Panetti's history of mental illness predates his first habeas petition"). Indeed, in his first federal habeas petition, Panetti asserted incompetence to stand trial and incompetence to waive counsel, Federal Petition for Writ of Habeas Corpus, No. 99-CV-260 (W.D. Tex. Sept. 7, 1999), and there is substantial overlap in the evidence he presented in support of those claims and the evidence he first presented in support of his *Ford* claim, compare *ibid.*, with JA 337-53, and Second Federal Petition for Writ of Habeas Corpus, No. 04-CV-42 (W.D. Tex. Jan. 27, 2004).

In sum, absent a motion requesting authorization from the court of appeals, the district court lacked jurisdiction to consider Panetti's second habeas application. 28 U.S.C. §2244(b)(3)(A). And even if Panetti had sought authorization, his *Ford* claim would have failed to qualify, as a matter of law, as a permissible basis for a second or successive habeas application. *Id.*, §2244(b)(2)(B). Applying the plain text of 28 U.S.C. §2244(b), the Court should vacate the court of appeals's judgment and instruct the district court to dismiss Panetti's second habeas application on remand. See *id.*, §2244(b)(2).

II. Controlling Precedent Required Panetti To Assert His *Ford* Claim in His Initial Habeas Application.

As the district court recognized, there is admittedly some tension between (1) the fact that §2244 facially bars an execution-competence claim raised for the first time in a second or successive habeas petition, see *supra* Part I, and (2) the reality that an execution-competence claim generally does not become ripe until after the final resolution of a convict's first federal habeas petition because the States—at the urging of the federal courts—usually delay setting execution dates until after that procedural dénouement. JA 123. That tension, however, is the necessary consequence of the plain text of §2244.

The Court largely harmonized this tension in *Martinez-Villareal*—sixteen months *before* Panetti filed his first federal habeas application. That decision, together with relevant Fifth Circuit precedent, provided Panetti with a clear road map for preserving the execution-competence claim that he was certain to make in light of his troubled mental-health history and his litigation strategy of raising competence challenges at every stage of this case.

A. This Court's Precedent Strongly Suggests That the District Court Lacked Jurisdiction To Resolve Panetti's *Ford* Claim.

The year before Panetti filed his first federal habeas application, *Martinez-Villareal* squarely addressed the intersection of *Ford* and §2244(b). In 1993 (before the AEDPA

had been enacted), Martinez-Villareal first raised a *Ford* claim in a federal habeas application in district court. 523 U.S., at 640.[2] Because Martinez-Villareal's execution date had not yet been set, the district court dismissed his *Ford* claim as premature. *Ibid*. It granted the writ on other grounds, and the court of appeals reversed and remanded on those other grounds. *Ibid*. By the time of remand, the AEDPA had become effective. *Ibid.* Fearing that any new habeas application would be jurisdictionally barred under §2244(b), Martinez-Villareal requested that the district court reopen his previous habeas application and rule on the *Ford* claim he had previously raised. *Ibid*. The district court denied that request. *Ibid*.

Martinez-Villareal then unsuccessfully raised execution competence in state court, and subsequently renewed his request that the federal district court reopen his *Ford* claim. *Ibid*. In 1997, after the district court ruled that the AEDPA deprived it of jurisdiction over that claim, Martinez-Villareal sought authorization from the court of appeals under §2244(b)(3)(A) to file a successive habeas application reasserting his *Ford* claim. *Id.*, at 641. The court of appeals, in turn, held §2244(b) inapplicable and directed the district court to rule on the *Ford* claim that Martinez-Villareal had raised in his previous federal habeas application. *Ibid*.

On certiorari review, the Court first observed that, if Martinez-Villareal was indeed presenting his *Ford* claim in a "second or successive" application distinct from the one that he had filed in 1993, that subsequent application "plainly should have been dismissed" under §2244(b)(1). *Id.*, at 642. The Court concluded, however, that "the only claim on which [petitioner] now seeks relief is the *Ford* claim *that he presented to the District Court . . . in 1993*." *Id.*, at 643 (emphasis added). The Court, in other words, rejected the notion that Martinez-Villareal's 1997 request for relief under

[2] Although Martinez-Villareal's 1993 application was his fourth overall, it was the first application that the district court did not dismiss as unexhausted. 523 U.S., at 640. Accordingly, it did not qualify as a "second or successive" petition. *Slack* v. *McDaniel*, 529 U.S. 473, 485-86 (2000).

Ford constituted a successive application for habeas relief separate from the one he had made in 1993. *Ibid.*; see also *Burton*, 127 S.Ct., at 797-98. Accordingly, the Court agreed with the court of appeals that §2244(b)(3)'s authorization procedures were inapplicable. 523 U.S., at 643-44.

In a footnote, the *Martinez-Villareal* Court limited the scope of its holding as applicable only to cases in which a petitioner had preserved his *Ford* claim by raising it initially, and expressly reserved judgment on the question now presented by Panetti:

> "[t]his case does not present the situation where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application. Therefore, we have no occasion to decide whether such a filing would be a 'second or successive habeas corpus application' within the meaning of AEDPA." *Id.*, at 645, n.*.

This footnote precisely describes the scenario in this case. It is undisputed that Panetti failed to raise his *Ford* claim in his first federal habeas application—and that he raised that claim for the first time in his *second* habeas application. Second Federal Petition for Writ of Habeas Corpus, No. 04-CV-42 (W.D. Tex. Jan. 26, 2004); see JA 355.

Moreover, the language and reasoning of *Martinez-Villareal* strongly suggest that Panetti's failure to assert his *Ford* claim in his initial federal habeas application deprived the district court of jurisdiction. To wit, the Court explicitly foreclosed any relief under (b)(2):

> "Even if we were to consider the *Ford* claim to be newly presented in the 1997 petition [i.e., to assume that it had not been previously presented], *it does not fit within either of subsection (b)(2)'s exceptions, and dismissal would still be required.*" 523 U.S., at 642 (emphasis added).

In short, *Martinez-Villareal* endeavored to harmonize the tension between *Ford* claims and the plain text of §2244. It created a limited avenue for *Ford* claims that were raised on first federal habeas to be "reopened" once

they became ripe. *Id.*, at 645-46. At the same time, *Martinez-Villareal* made clear that, absent reopening of an earlier *Ford* claim, the terms of §2244 preclude relief.

Despite this precedent from the Court handed down the year before he filed his first federal habeas application, Panetti failed to follow the clear road map that the Court had laid out as to how to preserve his *Ford* claim. Instead, he omitted that claim entirely from his first federal habeas application. Because, unlike in *Martinez-Villareal*, there is now no prior claim in Panetti's case to "reopen," the plain text of §2244 bars relief.

B. Controlling Circuit Precedent Required Panetti To Present His *Ford* Claim in His Initial Habeas Application.

Not only did *Martinez-Villareal* leave little doubt that Panetti was required to present his *Ford* claim in his initial habeas application, but controlling circuit precedent also confirmed that directive. Two years before Panetti filed his initial habeas application, the Fifth Circuit handed down *Davis*—a decision that, like *Martinez-Villareal*, directly addressed the intersection of *Ford* and §2244.

In *Davis*, a capital murderer requested authorization to file a second federal habeas application raising a *Ford* claim for the first time in federal district court. 121 F.3d, at 953; see *Davis* v. *Scott*, 51 F.3d 457, 458 (CA5 1995) (addressing Davis's first federal habeas application raising sentencing issues). Because Davis's execution date had not yet been set, the court denied as premature his motion for §2244(b)(3)(A) authorization without prejudice. *Davis*, 121 F.3d, at 953.

After finding §2244(b)(1) inapplicable because Davis had not presented a *Ford* claim in his previous federal habeas application, the *Davis* court concluded that §2244(b)(2) applied. *Id*., at 953-54; see *supra* Part I. It then surveyed other courts of appeals' decisions concluding that *Ford* claims could not satisfy either of the two

§2244(b)(2) elements, 121 F.3d, at 954-55, before reaching that same conclusion with respect to Davis's *Ford* claim.[3] *Id.*, at 956 (stating that the court was bound by the plain language of §2244(b)); see *supra* Part I.

Davis left no doubt about what Panetti should have done if he wanted to pursue a *Ford* claim in federal district court—raise it in his initial habeas application. It is noteworthy that numerous other Fifth Circuit habeas petitioners have understood §2244(b)'s requirements and raised *Ford* claims, unripe though they were at the time, in their initial habeas applications. See, *e.g.*, *Green* v. *Livingston*, Federal Petition for Writ of Habeas Corpus, No. 4:07-CV-00827 (S.D. Tex. Mar. 6, 2007); *Staley* v. *Dretke*, 126 Fed. Appx. 667, 668 (CA5 Mar. 23, 2005) (unpublished); *Patterson* v. *Cockrell*, 69 Fed. Appx. 658, 2003 WL 21355999, at *2 (CA5 May 23, 2003) (unpublished); *Hatten* v. *Cockrell*, Federal Petition for Writ of Habeas Corpus, No. 2:02-CV-020 (S.D. Tex. Apr. 18, 2003); *Delk* v. *Cockrell*, No. 02-40326, 2002 WL 32598585, at *1 (CA5 Feb. 28, 2002) (unpublished); *Mines* v. *Cockrell*, Federal Petition for Writ of Habeas Corpus, No. 3:00-CV-2044 (N.D. Tex. Apr. 20, 2001); *Billiot* v. *Puckett*, 135 F.3d 311, 313 (CA5 1998); *Caldwell* v. *Johnson*, No. 3-95-CV-625-T (N.D. Tex. Sept. 8, 1998).

Thus, in 1999, Panetti faced circuit precedent explicitly holding that *Ford* claims not raised on first

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[3] One of the cases that the *Davis* court referenced was the court of appeals's decision in *Martinez-Villareal*. *Davis*, 121 F.3d, at 954-55. It distinguished *Martinez-Villareal*, however, on the basis that Davis—unlike Martinez-Villareal—had *not* asserted a *Ford* claim in a previous federal habeas application. *Id.*, at 955; see *supra* Part II.A.

Since *Davis* was decided, two additional court of appeals decisions have similarly concluded that §2244(b) bars district-court jurisdiction over *Ford* claims raised for the first time in second or successive federal habeas applications. *In re Provenzano*, 215 F.3d 1233, 1235 (CA11 2000); *Nguyen* v. *Gibson*, 162 F.3d 600, 601 (CA10 1998) (*per curiam*). And the Fifth Circuit has subsequently confirmed that it considers *Davis* to be consistent with this Court's decision in *Martinez-Villareal*—precisely because the latter preserved his *Ford* claim whereas the former did not. See *Richardson* v. *Johnson*, 256 F.3d 257, 258-59 (CA5 2001).

federal habeas are barred by §2244 and Supreme Court precedent expressly laying out a road map to "reopen" such claims made initially in first federal habeas. Nevertheless, Panetti failed to follow that guidance.

III. Requiring *Ford* Claims To Be Presented in Initial Habeas Applications Is Both Equitable and Constitutional.

A. Applying §2244(b) as Written Will Allow Habeas Petitioners To Have Their *Ford* Claims Heard.

Martinez-Villareal allows all capital convicts—even those who are not presently incompetent—to preserve *Ford* claims by raising them contingently in their initial habeas applications. Approval of that practice would ensure eventual federal-district-court jurisdiction over *Ford* claims that were prematurely raised in initial habeas applications. See *Martinez-Villareal*, 523 U.S., at 644 (concluding that any such claim "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies"). At the same time, it would prevent any perceived need to loosen or circumvent §2244(b)'s restrictions on second and successive federal habeas applications in contravention of the statute's plain text and purpose.[4]

In response, Panetti can be expected to invoke broad principles of equity. But equity does not fit the facts of the instant case. At the intersection of possible *Ford* claims and the strictures of §2244, one could hypothesize three potential factual scenarios. *First*, one could imagine an individual,

[4] In its order rejecting the State's argument that Panetti's habeas application should be dismissed under §2244(b), the district court erroneously concluded that, under *Martinez-Villareal*, a capital convict in Panetti's position "cannot bring his *Ford* claim in an initial petition because it is not ripe." JA 126. In fact, *Martinez-Villareal* requires just that; such a claim will initially be dismissed *without prejudice*, and federal-district-court jurisdiction may eventually be secured only through the *reopening* of that claim once it ripens. See *supra* Part II.

totally sane at the time of his crime, his trial, and his first federal habeas application, who subsequently was stricken by mental illness and became incompetent to be executed. *Second*, one could imagine an individual, with some limited mental illness at the time of his first federal habeas application, whose condition subsequently deteriorated significantly so that he later became incompetent to be executed. And *third,* one could imagine an individual, with significant mental illness at the time of his first federal habeas application, who subsequently relied on that same indicia of mental illness to urge execution incompetence.

In terms of equity, the first scenario presents by far the most compelling circumstances—the treatment of which need not be resolved in this case. Panetti's circumstances, by any measure, are nowhere near that first scenario. Instead, Panetti presents the third scenario: from day one, his central defense has been his alleged incompetence—at the time of the crime, at trial, on habeas, and now at execution. Panetti's briefing does not demonstrate any material change in his condition that occurred after he filed his first federal habeas application. To the contrary, he asserts instead that "incompetency runs like a fissure through every proceeding in this case," Panetti Br. 6, and endeavors therefore to undermine all of his prior competence determinations.

The difference between each of these three hypothetical scenarios is notice, in particular the degree of notice that a defendant can be imputed to have had at the time of first federal habeas. For one caught totally unawares of any potential *Ford* claim, the strictures of §2244 may prove particularly harsh. But, for a defendant such as Panetti—who, given his prior litigation strategy, could not have conceivably been on greater notice that he would ultimately be bringing a *Ford* claim on the eve of execution, see *supra* n.1—there is nothing remotely inequitable about §2244's requirement that he first preserve that claim by bringing it on first federal habeas.

B. Section 2244(b)'s Requirement That *Ford* Claims Be Asserted in Initial Habeas Applications Is Constitutional.

Like other habeas petitioners before him, see, *e.g.*, *Davis*, 121 F.3d, at 956, Panetti may also argue that §2244(b) unconstitutionally precludes federal-court consideration of ripe *Ford* claims presented as soon as mental illness reaches a level arguably sufficient to deprive the petitioner of competence to be executed. In light of the numerous avenues for federal-court review of execution-incompetence claims other than through second or successive habeas petitions filed in federal district court, this argument fails at the outset.

In rejecting challenges to §2244(b) that a habeas petitioner might assert under the Constitution's Exceptions Clause (Article III, §2) and Suspension Clause (Article I, §9), the Court's decision in *Felker* highlighted several distinct ways that federal habeas relief may be sought and obtained from this Court. 518 U.S., at 654.

First, the *Felker* Court unanimously held that because the AEDPA "d[id] not deprive this Court of jurisdiction to entertain original habeas petitions," *id.*, at 658, "there can be *no plausible argument* that the [AEDPA] has deprived this Court of appellate jurisdiction[5] in violation of Article III, §2," *id.*, at 662 (emphasis added). Indeed, the statutory text of 28 U.S.C. §2241(a) expressly vests the Court with original jurisdiction to entertain habeas applications, and this Court's Rule 20.4(a) details the requirements for filing such applications. Sup. Ct. R. 20.4(a) (quoted in *Felker*, 518 U.S., at 665).

Second, in concurring opinions, Justices Stevens, Souter, and Breyer highlighted three additional avenues by which the Court could potentially review habeas applications—through

[5] See also *Felker*, 518 U.S., at 667, n.1 (Souter, J., concurring) ("Such a petition is commonly understood to be 'original' in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction." (citing Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 S. Ct. Rev. 153)).

the All Writs Act, 28 U.S.C. §1651; through review of a court of appeals's interlocutory orders; and through certified question from a court of appeals. *Felker*, 518 U.S., at 666 (Stevens, J., concurring); *id*., at 667 (Souter, J., concurring). In light of these three alternative ways to seek federal-court review of habeas applications, Panetti cannot plausibly argue that §2244(b) is unconstitutional. See also *id.*, at 664 (unanimously concluding that, because §2244(b)'s restrictions on second or successive habeas applications were "well within the compass" of measures that Congress may take to curb abuse of the writ of habeas corpus, §2244 "d[id] not amount to a 'suspension' of the writ contrary to Article I, §9").

The federal district court in this case nevertheless concluded that application of §2244(b) to *Ford* claims would impermissibly restrict federal-court habeas jurisdiction. JA 126. Specifically, the district court concluded that, because the Texas Court of Criminal Appeals (CCA) lacks jurisdiction to consider a capital convict's attempted appeal of a lower state court's execution-competence finding under Texas Code of Criminal Procedure Article 46.05, the Court likewise lacks jurisdiction to review a state court's determination of execution competence via a writ of certiorari. JA 126.

This conclusion overlooks 28 U.S.C. §1257(a), which grants the Court certiorari jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State *in which a decision could be had*" (emphasis added) whenever a constitutional right is claimed. Because any article 46.05 petitioner seeks vindication of his constitutional right to be free from cruel or unusual punishment, see U.S. Const. amend. VIII, and a Texas district court may qualify—as it did in this case—as "the highest court of a State in which a decision [on an article 46.05 claim may] be had," 28 U.S.C. §1257(a),[6] the Court's certiorari jurisdiction *does* extend to

[6] Because the CCA has jurisdiction to review a lower court's finding of execution *incompetence*, *Ex Parte Caldwell*, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000), some article 46.05 claims may proceed to the CCA. But any article 46.05 proceeding in which a state district court concludes that the convict is *competent* to be executed cannot. *Ibid*.

such state-court competence decisions. See *Grovey* v. *Townsend*, 295 U.S. 45, 47 (1935) (finding certiorari jurisdiction to review final order from Texas justice court, where that court was "the highest state court in which a decision may be had"), *overruled in part on other grounds*, *Smith* v. *Allwright*, 321 U.S. 649 (1944).

In sum, application of §2244(b) to *Ford* claims does not violate the Constitution. Even though the statute *restricts Ford* claimants' ability to secure federal-district-court jurisdiction over their claims, it does not *preclude* such jurisdiction over claims that were asserted in initial federal habeas applications. See *supra* Part II. And, even if §2244(b) had that effect, it would still be constitutional in light of the multiple avenues for review of *Ford* claims, either through invocation of the Court's original or appellate jurisdiction, see *Felker*, 518 U.S., at 658, 661-62; *id.*, at 666 (Stevens, J., concurring); *id.*, at 667 (Souter, J., concurring), or through certiorari review of final state-court execution-competence determinations, see 28 U.S.C. §1257(a).

CONCLUSION

The judgment of the court of appeals should be vacated, and the Court should remand the case with instructions for the district court to dismiss Panetti's second or successive application for habeas relief for want of jurisdiction.

Respectfully submitted,

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