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THE AEDPA AND THE INCOMPETENT DEATH-ROW PRISONER: WHY FORD CLAIMS SHOULD BE EXEMPT FROM THE ONE-YEAR AND ONE-BITE RULES

I. INTRODUCTION

In 1982, Alvin Ford, a Florida prisoner awaiting execution for murder, began to display symptoms of a severe psychiatric disorder.¹ He experienced paranoid delusions, became convinced that he had won a landmark case and could not be executed, and finally “regressed . . . into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word ‘one,’ making statements such as ‘Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one.’”²

In 1986, Ford petitioned the Supreme Court for certiorari, challenging Florida's determination that he was competent to be executed.³ The Court granted certiorari and held that the Eighth Amendment⁴ forbids execution of the insane.⁵ Although the Ford Court did not select a particular rationale for the prohibition, it did enumerate various reasons advanced throughout history for the view that execution of the insane is a “savage and inhuman” practice.⁶ Among these reasons are the possibility that a prisoner might, if he were sane, put forward a reason why he should not be executed; the low value of such an execution for purposes of example, deterrence, or retribution; the injustice of dispatching a person while he is incapable of preparing himself for the next world; the adequacy of madness as *58 punishment in itself; and the fact that such an execution offends humanity.⁷ The Court concluded that, for any or all of these reasons, most societies, including the United States, agree in principle that the insane are not to be executed.⁸ Thus, “[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.”⁹

The Eighth Amendment protection against execution of the incompetent is limited by procedural requirements . These requirements have been elucidated and amended in the years since the Ford decision. The two major sources of current procedures governing Ford claims are the common law imminence requirement, set down in *Herrera v. Collins*,¹⁰ and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).¹¹ Both of these sources of law set limits on when and how petitioners may raise Ford claims in federal courts.

This article examines those limitations and suggests changes that would ensure that Ford claims are available to all those who need them. In particular, this article argues that strict application of the AEDPA to Ford claims is both unnecessary and constitutionally impermissible. By contrast, the exemption of Ford claims from the AEDPA's scope will restore constitutional protections formerly (and still nominally)¹² extended to capital prisoners without diminishing legitimate state interests in the efficiency and finality of criminal convictions and sentences.

This article is divided into four parts. Part I details the requirements imposed on Ford petitioners by the common law imminence rule and by the AEDPA. Part II explores the federal courts' divergent interpretations of the AEDPA and points out flaws in the

reasoning of courts on each side of the debate. Part III examines several possible solutions for Ford petitioners confronting the AEDPA and concludes that exemption of Ford claims from the AEDPA's purview gives practical effect to the right not to be executed while incompetent. Part IV supports this conclusion by reference to analogous cases in Supreme Court and other federal jurisprudence.

***59 II. RESTRICTIONS ON FORD CLAIMS: THE IMMINENCE RULE AND THE AEDPA**

A. The Imminence Rule

In 1993, the Supreme Court restricted petitioners' opportunities to raise Ford incompetence claims by holding that "the issue of sanity is properly considered in proximity to the execution," and, therefore, that Ford claims are not ripe for review until execution is imminent.¹³ The rationale underlying the imminence rule is that, because incompetence to be executed is constitutionally relevant only at the time of execution, early evaluation is a wasted exercise that "will certainly have to be repeated when the time for execution finally arrives."¹⁴ State and federal courts have deemed an execution imminent once an execution date has been set.¹⁵ Thus, premature Ford claims will be dismissed without prejudice.¹⁶

B. The Antiterrorism and Effective Death Penalty Act of 1996

In 1996, in the wake of the bombing of the Alfred P. Murrah Building in Oklahoma City, Congress passed the AEDPA,¹⁷ which was intended "to solidify the finality of . . . criminal convictions" by eliminating frivolous and repetitive petitions for habeas corpus.¹⁸ To accomplish this goal, the AEDPA imposed new restrictions on the availability of habeas relief.

The AEDPA made two key changes in the procedural requirements for habeas claims in capital cases. First, it limited second or successive petitions by instituting a "one bite at the apple" regime in which all claims, with narrow exceptions, must be brought in a single petition.¹⁹ A prisoner *60 may bring a second or successive petition only if he or she alleges either a new and retroactive rule of law or new evidence that tends to show factual innocence.²⁰

Second, the AEDPA instituted a one-year statute of limitations within which habeas petitions must be filed.²¹ By consensus, this provision is interpreted as providing, in general, a filing period of one year from the date of final judgment (the conclusion of direct review), which is tolled during state habeas review.²²

III. THE AEDPA'S EFFECT ON FORD JURISPRUDENCE

Opinions differ as to how the AEDPA's new rules apply to habeas *61 petitions that raise claims of incompetence to be executed. Several circuit courts have stringently applied the AEDPA's "second or successive" limitation to Ford claims,²³ while one court has held that certain Ford claims are exempt from the limitation.²⁴ The Supreme Court has declined to resolve the issue; in the one Ford case it has decided since the AEDPA's enactment, the Court articulated a holding effectively limited to its facts.²⁵

This section will critique major decisions of circuit courts on both sides of the AEDPA/Ford issue and will argue that each decision is flawed in a way that threatens the ability of Ford petitioners to obtain habeas review of their constitutional claims.

A. The Ninth Circuit: *Martinez-Villareal v. Stewart*

In 1997, the Ninth Circuit held that the AEDPA's "second or successive" limitation does not apply to petitions raising only Ford claims that were unavailable at the time of previous petitions.²⁶ The petitioner in *Martinez-Villareal* raised his Ford claim in his first petition, but it was dismissed as unripe because execution was not imminent.²⁷ The Ninth Circuit permitted *Martinez-Villareal* to raise the claim in a successive petition,²⁸ reasoning that the imminence requirement can never be met in a first Ford petition because a stay of execution must be issued in order to hear a Ford claim.²⁹ Once the stay is issued, execution

is no longer imminent.³⁰ According to the court, this paradox, combined with strict application of the AEDPA's "second or successive" limitation (restricting Ford claims to first petitions), would effectively abolish such claims altogether.³¹

***62** The Supreme Court narrowly affirmed the Ninth Circuit's decision in *Martinez-Villareal*, holding only that a petitioner whose initial Ford claim is dismissed without prejudice as unripe has not yet had one full bite at the federal habeas apple.³² The Court did not address the issue of a Ford claim brought in a second petition after the first petition has been dismissed on the merits.³³

The Ninth Circuit had based its decision in *Martinez-Villareal* on the rationale that, due to the imminence requirement, a Ford claim can never be raised in a first petition.³⁴ The court reasoned that for a Ford claim to be ripe, execution must be imminent; i.e., an execution date must have been set.³⁵ However, the very fact that an execution date has been set forces a court wishing to hear a Ford claim to issue a stay of execution "to prevent the case from becoming moot."³⁶ Once a stay of execution has been issued, execution is no longer imminent, and the Ford claim becomes unripe.³⁷

The Ninth Circuit therefore concluded that because Ford claims can never properly be raised in first habeas petitions, the AEDPA must be construed to permit their consideration in second or successive habeas proceedings to avoid a constitutional problem.³⁸ But the Ninth Circuit's holding only superficially avoids the single petition rule under the AEDPA; the *Martinez-Villareal* court did not explain why the paradox created by the imminence rule does not affect second or subsequent petitions as well as initial petitions. In fact, the court's reasoning--if correct--must apply to every Ford petition. All Ford claims are subject to the imminence ***63** requirement,³⁹ and all habeas claims by petitioners whose execution dates have been set--including, obviously, all ripe Ford claims--require a stay of execution if they are to be heard before they become moot.⁴⁰ Logically, therefore, if the Ninth Circuit is correct in stating that a Ford claim becomes unripe as soon as a stay is issued in order to hear it, then no Ford claim may ever be heard by any court, at any stage of review.

Commentators generally accept the Ninth Circuit's rationale in *Martinez-Villareal*,⁴¹ as has at least one other circuit court.⁴² However, the court's reasoning in the case is faulty at best, because preemption of any habeas review of a Ford claim runs counter to the Ninth Circuit's apparent intent to construe the AEDPA to allow Ford claims in second or successive habeas petitions. Such preemption also raises the very constitutional problem, a violation of the Suspension Clause, that the court was trying to avoid.⁴³

B. The Fifth Circuit: From *Davis* to *Richardson*

Is the correct conclusion, then, that despite the near certain preemption of some Ford claims, the AEDPA is to be applied to such claims in the same manner in which it is applied to other habeas claims? According to the Fifth Circuit, at least, the answer is yes.⁴⁴ In 1997, the Fifth Circuit decided *In re Davis*, in which a death row inmate sought leave to file a second habeas petition raising a Ford claim for the first time.⁴⁵ The petitioner in *Davis* advanced three arguments supporting his contention that ***64** consideration of such a claim should not be precluded by the AEDPA.⁴⁶ The Fifth Circuit rejected all three lines of reasoning.⁴⁷

First, *Davis* argued that his Ford claim fell under one of the AEDPA's exceptions to the bar on second or successive habeas petitions;⁴⁸ namely, the provision that allows successive petitions alleging claims arising under new and retroactive rules of law.⁴⁹ *Davis* argued that the Ford rule was "new" as applied to him because the claim became available only when he had satisfied both of its preconditions (incompetence and imminent execution).⁵⁰ The court rejected this argument as being inconsistent with the AEDPA's plain language requiring that the rule itself be new.⁵¹ Ford was handed down in 1986;⁵² thus, the right it elucidated was not "new" eleven years later, when *Davis* raised his claim.⁵³

Second, *Davis* argued that, since he had raised his Ford claim as soon as it became ripe, the claim did not constitute abuse of the writ and therefore did not fall within the class of claims that Congress intended to bar in enacting the AEDPA.⁵⁴ The Fifth

Circuit conceded that the claim was not an abuse of the writ but declined to “disregard the plain wording of § 2244(b) in order to create . . . an equitable exception.”⁵⁵

Nevertheless, the following year, the Fifth Circuit repudiated this inflexible position, holding:

[A] prisoner's application is not second or successive simply because it follows an earlier federal petition . . . [A] later petition is successive when it: 1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes an abuse of the writ.⁵⁶ *65 Although it appears that this new standard would, if applied to Davis, have permitted him to file his successive petition, the Fifth Circuit distinguished Davis in a footnote.⁵⁷ The court noted that unlike most other habeas claims, which seek only to reduce or otherwise amend petitioners' sentences, Ford claims are intended to preclude execution of petitioners' sentences altogether. Further, the court stated that “a petition containing a Ford claim that is filed after the petitioner has challenged the validity of his sentence in another application strongly resembles the type of petition Congress intended to preclude as successive under the AEDPA.”⁵⁸

Davis's third and final argument, that § 2244(b) is unconstitutional if it operates to foreclose review of new Ford claims raised in second or successive petitions, received similarly short shrift from the Fifth Circuit.⁵⁹ The court rejected Davis's contention that such a reading of the statute violates the Suspension Clause by “preclud[ing] consideration by a federal court of a mature Ford claim presented for the first time.”⁶⁰ The Fifth Circuit also rejected the claim that Ford confers a right to a competency determination in federal court,⁶¹ holding that even if Ford claimants do have a constitutional right to competency review, that right is adequately protected by certiorari to the Supreme Court and by the Supreme Court's original habeas jurisdiction.⁶²

Several years after Davis, the Fifth Circuit cemented its anti-Ford stance in *Richardson v. Johnson*.⁶³ The *Richardson* majority noted the Supreme Court's opinion affirming the Ninth Circuit in *Martinez-Villareal* but distinguished Davis on the ground that, while *Martinez-Villareal* had raised his Ford claim in his first petition (which was dismissed without prejudice as unripe), the petitioner in Davis had not raised his Ford claim *66 until later.⁶⁴ The *Richardson* court conceded that Ford claims are an “uneasy fit”⁶⁵ with the AEDPA's “second or successive” limitation and that applying the imminence requirement to post-AEDPA Ford claims would require exemption of Ford claims from this limitation if they were ever to be heard. Nevertheless, the court concluded that Davis was correct and that the AEDPA requires Ford claims to be raised in a first petition or not at all.⁶⁶

C. The Eleventh Circuit: *In re Medina*

The Eleventh Circuit has also held that Ford claims, even those unavailable at the time of a first petition, are subject to the AEDPA's “second or successive” limitation.⁶⁷ In *In re Medina*, the Eleventh Circuit reasoned that the Supreme Court's decision in *Ford* created a right not to be executed while incompetent but did not necessarily create a right to review of competency in federal court.⁶⁸

The *Medina* court found no reason to treat Ford claims differently from other constitutional claims that may be barred by “procedural default rules or second application provisions.”⁶⁹ It noted that the Supreme Court had “already settled the constitutionality of the AEDPA amendments” limiting habeas review.⁷⁰ However, the facts of *Felker v. Turpin*,⁷¹ the precedent advanced by the court to support this contention, differ from those of *Medina* in one crucial respect: the successive petition in *Felker*, unlike that in *Medina*, did not challenge the validity of the petitioner's execution *per se*; it challenged only the validity of his conviction and sentencing.⁷²

This difference goes to the heart of the Ford distinction. *Felker*, like most habeas petitioners, alleged that constitutional violations had already *67 occurred. By contrast, a Ford petitioner alleges that a constitutional violation that will occur if the execution is carried out. In *Felker*-type claims—that is to say, in most habeas claims—the relevant events have already occurred and the

relevant evidence already exists at the conclusion of direct review. Thus, although some of these claims will inevitably fall victim to procedural bars, it is at least theoretically possible that each can be heard if the petitioner observes the necessary formalities.

Strict application of the AEDPA to Ford claims, however, renders it impossible for the defendant to bring some claims (i.e., those arising or ripening more than a year after the conclusion of post-conviction review or at any time after a first habeas petition has been adjudicated on the merits). This is so because the facts relevant to a Ford claim--the prisoner's competence or lack thereof-- need not come into existence within a year and/or before a first habeas claim has been resolved, and because the prerequisite to a Ford claim--the setting of an execution date⁷³--similarly need not occur until the habeas deadlines have passed.

Thus, while the Eleventh Circuit is correct that the mere operation of procedural bars to preclude some constitutional claims does not necessarily amount to a constitutional violation, its reasoning does not resolve, or even recognize, the special problems of Ford petitioners. Perhaps some Ford claims will always go unheard for procedural reasons (as a result, for example, of the heightened pleading requirements that states may impose on Ford claims),⁷⁴ but the AEDPA's restrictions make unheard Ford claims a virtual certainty.

The Eleventh Circuit's justification for its strict application of the AEDPA, that a constitutional right does not entitle the holder to a federal hearing on an alleged violation of that right, is contradicted by several Supreme Court precedents, including Ford itself. For example, the Court first held in *Townsend v. Sain* that:

State prisoners are entitled to relief on federal habeas ***68** corpus . . . upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the federal Constitution. Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, . . . must never be totally foreclosed.⁷⁵

And in *Ford*, the Court stated that “[i]n a habeas corpus proceeding, ‘a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.’”⁷⁶ Thus, it appears that, contrary to the assertions of the Fifth and Eleventh Circuits, all Ford claimants are constitutionally entitled to evidentiary hearings on their claims of incompetence to be executed. How, then, can the Ford right be reconciled with the AEDPA's restrictions on access to federal habeas corpus?

IV. SOLUTIONS TO THE PROBLEM OF THE FORD PETITIONER

The Ninth, Fifth, and Eleventh Circuits, the only circuits to have addressed the question squarely, have failed to propose a workable, coherent, and constitutional approach to the interpretation of the AEDPA as applied to Ford claims. This section will explore several possible solutions to the Ford/AEDPA conflict and conclude that one of these not only eliminates the Ford preclusion problem but also finds support in Supreme Court jurisprudence.

A. Exemption of Ford Claims from the AEDPA's One-Year Limitation

One major problem that the AEDPA poses for Ford petitioners arises from the confluence of the statute's one-year deadline for filing a first habeas petition with the common law imminence requirement for Ford claims. Despite the common law rule that a Ford claim is unripe, and thus cannot be heard, until an execution date has been set, the AEDPA does not ***69** provide for tolling of, or exemption from, its one-year rule for unripe Ford claims not raised in a first petition. Thus, it is possible that the prescribed year will elapse before a Ford claim ever ripens, precluding the claim altogether.

Mere exemption of Ford claims from the one-year rule will not, however, solve this problem. If all claims, including Ford claims, must be brought together in one petition (as mandated by the “second or successive” limitation), and if all non-Ford claims must be brought within one year of conclusion of direct review, then the one-year restriction will effectively apply to Ford claims regardless of any purported exemption. Such a perverse result could be avoided by exempting all habeas claims from the AEDPA's one-year limitation. However, this would constitute a radical revision of the statute. A basic canon of statutory interpretation provides that a statute should be read in accordance with the legislative intent of the Congress that enacted

it.⁷⁷ It is reasonable to conclude that by enacting a provision imposing a one-year statute of limitations on habeas claims, Congress intended that that provision be applied to at least some such claims. Therefore, a wholesale exemption amounting to an invalidation of the AEDPA's one-year statute of limitations is to be avoided if at all possible.

Moreover, it is not obvious that the statute of limitations provision is problematic for other habeas claims, and, indeed, it may well be effective (as applied to non-Ford claims) in reducing prisoners' ability to file "petition after petition . . . delaying endlessly the carrying out of sentences handed down by judges or juries."⁷⁸ After all, as discussed above,⁷⁹ most habeas claims are based upon events that already have occurred and evidence that already exists at the conclusion of direct review. A restriction on the time available after direct review within which petitioners can raise non-Ford habeas claims, therefore, need not in itself preclude any of them.

Finally, even if the exemption of all habeas claims from the AEDPA's one-year requirement were a permissible judicial action, the remaining habeas requirements would still give rise to grave difficulties for Ford petitioners. The AEDPA's "second or successive" provision mandates that ***70** all claims be brought in a single petition.⁸⁰ The imminence rule requires that petitioners wait until execution has been scheduled before raising their Ford claims. Taken together, these rules encourage--practically speaking, require--prisoners who are or may become incompetent to postpone their first petitions until their execution dates have been set, because failure to do so results in waiver of otherwise colorable Ford claims.

This incentive to delay the initial filing of habeas petitions is problematic for several reasons. The most obvious of these is the potential for the type of abuse that motivated Congress to enact the AEDPA: manipulation by prisoners seeking only to prolong their lives through judicial maneuvering.⁸¹ Another is that because prisoners may become incompetent after incarceration, it behooves death row inmates to push back their first habeas petitions to reap the benefits of the AEDPA's imminence rule. The resulting widespread postponement of filings will result in a continuous flood of last-minute petitions. The deleterious effects of this phenomenon have been noted by Chief Justice Rehnquist: "The last-minute nature of so many of the proceedings in both the state courts and the Federal courts leaves one with little sense that the legal process has run an orderly course, whether a stay is granted or . . . denied."⁸²

There is another practical problem with delays intended to preserve Ford claims: they may be damaging to other habeas claims. The imminence requirement makes sense for claims of incompetence to be executed because, as discussed above,⁸³ the relevant facts and events are those arising at or near the time of execution. This requirement is not imposed upon other types of habeas claims because there is no reason to delay consideration of existing evidence relevant to the challenge. In fact, it is in the interest of both the petitioner and the government for such claims to be considered as early as possible, because with the passage of time, witnesses may die and evidence may be lost or deteriorate in quality.⁸⁴ A habeas regime that forces petitioners to postpone some claims to preserve ***71** others disserves the prisoners it is meant to protect.

Under the current system, a mechanism exists by which some unripe Ford claims may be preserved for later review: practitioners can resort to making "placeholder" Ford claims in first habeas petitions.⁸⁵ These unripe Ford claims are raised, despite the certainty that they will be dismissed, so that they will be preserved until they are ripe for review.⁸⁶ Capital litigants have adopted this practice in response to the Supreme Court's ruling in *Martinez-Villareal* that subsequent petitions raising Ford claims that were dismissed as unripe in first habeas proceedings are not successive under the meaning of § 2244(b).⁸⁷

There are two major problems with "placeholder" Ford claims. First, the AEDPA was intended to reduce the filing of futile and repetitive habeas petitions.⁸⁸ The effect of "placeholder" claims would be just the opposite, requiring a petitioner to file not one but two petitions (or, at the very least, to raise a futile claim in a first petition, only to re-raise it in a subsequent petition) to secure review of a single claim. "This type of needless litigation cannot possibly be what the framers of AEDPA hoped to accomplish."⁸⁹

The second problem is even more serious than the first. Placeholder claims may be raised only by prisoners who are incompetent at the time of their first habeas petitions. As with the Ninth Circuit's *Martinez-Villareal* rationale,⁹⁰ the purported cure may be worse than the disease, because it decreases the visibility of the problem (by allowing some Ford claimants to preserve their claims until they are ripe) without solving it (by ensuring that all Ford claims have at least a chance of being reviewed on their merits).

The placeholder method puts a premium on early incompetence, since ^{*72} the resultant claim is available only to petitioners who lose their sanity before filing their first petitions. The availability of a Ford claim should not be dependent upon procedural or temporal coincidence. Petitioners are not more deserving of review simply because they become incompetent earlier, nor are they less deserving if deemed incompetent too long after the conclusion of direct review. Thus, another method for preserving Ford claims must be found.

B. Exemption of Ford Claims from the AEDPA's "Second or Successive" Limitation

Perhaps the real culprit is the AEDPA's provision restricting second or successive petitions. If Ford claims could be reviewed for the first time whenever they became ripe, regardless of previous petitions filed, several of the problems discussed in the preceding section would disappear. Prisoners would not, for instance, need to delay raising other habeas claims to preserve unripe Ford claims. In addition, creating a narrow exception for Ford claims from one section of the statute is a more permissible judicial act than invalidating a major provision. In fact, this solution appears to fit comfortably within the Holy Trinity rule of statutory interpretation: "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."⁹¹

This narrow exception, however, does not solve the problem posed by the AEDPA's one-year requirement for prisoners who become incompetent more than a year after the conclusion of direct review. Moreover, this claimant group is likely to be a large one.⁹² As discussed above, the Ford right is not time-dependent; it accrues as soon as, and whenever, a death-row prisoner becomes incompetent. The AEDPA's one-year limitation therefore acts, independently of the "second or successive" limitation, to "allow those concededly incompetent to be executed nonetheless, solely because of procedural intricacies that effectively transform existing constitutional guarantees into unenforceable dicta."⁹³

^{*73} In addition, the one-year rule and the common law imminence requirement interact such that even prisoners already incompetent at the time of their first petitions may never be able to raise their Ford claims. A prisoner whose execution date is set a year after conclusion of direct review of his habeas claim cannot raise his newly ripe Ford claim. Though it might be possible for him to file a "placeholder" petition in order to circumvent the one-year rule, the previous discussion of such petitions suggests that doing so could increase habeas litigation, contrary to Congress's intent.⁹⁴

If, despite suggestive evidence to the contrary,⁹⁵ doubt remains that the population of prisoners who become incompetent more than a year after the conclusion of direct review is a large one, then perhaps the difficulties caused by the confluence of the one-year rule and the imminence requirement could be averted by requiring states to set execution dates within a year of the conclusion of direct review. Such a mandate would, at first glance, seem to ensure that the Ford claims of prisoners who become incompetent within one year of the conclusion of their direct appeals will ripen in time to be raised under the AEDPA.

This apparent effect, however, may prove illusory for most would-be Ford petitioners. Nothing prevents states from setting execution dates one day before the one-year deadline expires, leaving prisoners with insufficient time to file their claims.⁹⁶ In addition, hastily-set execution dates benefit neither the petitioner nor the state, since they increase the likelihood that habeas claims will be hurriedly drafted and cursorily reviewed, thereby increasing the risk of error. Even the Ford-averse Fifth Circuit has conceded that "state courts, in part at our urging, now seldom set execution dates until after the first round of appeals and habeas."⁹⁷

Application of the one-year limitation to claims of incompetence to be executed creates disturbing and seemingly insuperable obstacles to the meaningful protection of the Eighth Amendment right articulated in Ford. These obstacles persist regardless of the applicability or inapplicability of the "second or successive" limitation. Perhaps, then, the solution is to read the AEDPA's one-year and one-bite rules as excluding Ford claims entirely.

^{*74} C. Exemption of Ford Claims From Both the One-Year Limitation and the "Second or Successive" Limitation

Scaling back the AEDPA to exclude Ford claims from its one-year and "second or successive" provisions would be, in effect, a return to the imminence-only Ford scheme that existed prior to 1996. In contemplating such an action, two questions must

be addressed. First, do Ford claims present the potential for abuse that Congress intended to eliminate when it enacted the AEDPA? Second, if Ford claims do contribute to such abuse, does the imminence requirement, standing alone, impose sufficient discipline on Ford petitioners to minimize such abuse while preserving prisoners' constitutional rights?

There is little, if any, evidence that Ford claims are a source of the abuse that Congress sought to end by enacting the AEDPA. The campaign to restrict habeas petitions began in 1989, when the Ad Hoc Committee on Federal Habeas Corpus in capital cases issued a report recommending that Congress enact legislation limiting the availability of habeas review.⁹⁸ The report noted that a “disturbing aspect of the current system is that litigation of constitutional claims often comes only when prompted by the setting of an execution date”⁹⁹ This “disturbing aspect”¹⁰⁰ cannot be seen in Ford petitions, which must be held until an execution date is set. In this respect, unripe Ford claims appear similar to two types of claims, those resting on new and retroactive rules of law and those asserting new evidence of actual innocence, that Congress expressly exempted from the AEDPA's “second or successive” provision. Petitioners are effectively unable to raise any of these claims immediately upon the conclusion of post-conviction review.

In a 1990 speech advocating a legislative solution to the problem of abuse of the writ, Chief Justice William Rehnquist said not that all successive petitions should be outlawed but that “[r]easonable people have questioned whether a criminal defendant ought to have as broad a ‘second bite at the apple’ in the Federal courts as he presently does.”¹⁰¹ In narrowing that “bite,” Congress left habeas review broadly available for the currently exempted claims. It is not implausible to suppose that, had Congress specifically considered the Ford claim and the obstacles that *75 prevent petitioners from speedily raising it, this claim also would have been exempted.¹⁰²

Even assuming that Ford claims are susceptible to abuse, the imminence requirement, combined with courts' ability to require a threshold showing of incompetence before such claims are heard, imposes upon petitioners sufficient discipline to prevent large-scale problems. Whereas the AEDPA dictates a deadline after which petitions may not be filed, the imminence requirement does the converse: it establishes a date before which the petitioner may not obtain a hearing. Because the state has the power, unrestrained by federal law, to set an execution date of its own choosing, the imminence rule not only makes sense but may also be more restrictive of frivolous and repetitive petitions than the AEDPA's one-year rule. For example, if the state sets an execution date at six months from the date on which the scheduling is announced, then the petitioner has only six months within which to raise his claim.

The imminence requirement does not contain an explicit analogue to the AEDPA's “second or successive” rule, as it does for the one-year rule. Two factors, however, combine to produce essentially the same effect for Ford claims. The first is the length of time it takes to prepare and file a habeas petition. While it is theoretically possible that a prisoner may have time to raise more than one Ford claim between the date on which execution is scheduled and the date on which it is carried out, in practice it is not likely.¹⁰³ This is so particularly in light of the states' discretion in setting execution dates.

In addition, “[t]he State . . . may require a substantial threshold showing of insanity merely to trigger the hearing process.”¹⁰⁴ While the states' discretion does not, in itself, limit the number of petitions filed, it does permit states to dismiss petitions summarily if the claims asserted have no merit. The filing of repetitive petitions may impose a burden on the courts, but it is not clear that summary rejection of such petitions entails any great delay in the execution of death sentences. Congress enacted the AEDPA to prevent such delays;¹⁰⁵ because there is little or no evidence that delays may be achieved through the repeated and frivolous filing of Ford claims, and because of the grave and apparently unanticipated obstacles *76 posed by the AEDPA to legitimate Ford claims, exemption of these claims from the AEDPA's scope is a necessary and appropriate defense of the writ of habeas corpus.

V. CONSTITUTIONAL AND DOCTRINAL SUPPORT FOR THE EXEMPTION OF FORD CLAIMS FROM THE AEDPA'S HABEAS LIMITATIONS

The preceding analysis has demonstrated that by reading an exemption for Ford claims into the AEDPA, courts can carry out Congress's intent in enacting the AEDPA and restore equity and justice to the capital system. The following analysis provides further support for exempting Ford claims from the AEDPA by explaining (1) that such an exemption is constitutionally required; and (2) that it is consistent with the approaches taken by all of the circuit courts in closely analogous circumstances.

A. Procedural Due Process

The Fourteenth Amendment to the Constitution provides that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.”¹⁰⁶ The Supreme Court has repeatedly ruled that this provision confers upon each citizen the right to a hearing before his life, liberty, or property can be taken.¹⁰⁷ In the words of the Court, “[t]he fundamental requisite of due process of law is the opportunity to be heard.”¹⁰⁸ Moreover, that opportunity “must be granted at a meaningful time and in a meaningful manner.”¹⁰⁹

In *Mathews v. Eldridge*, the Court set out three criteria for courts to use in deciding what process is due: the private interest at stake; the risk of error; and the probable value of additional procedural requirements.¹¹⁰ These considerations, together with the “meaningful time and meaningful manner”¹¹¹ standard, point unerringly toward the *Herrera* imminence ^{*77} regime that governed Ford claims before the AEDPA's enactment.

The meaningful time for Ford petitioners is the moment immediately preceding execution. The circuit courts that have denied the existence of any hearing rights connected to the Ford right have failed to explain how the summary rejection of incompetence claims constitutes a “meaningful manner”¹¹² of review. Moreover, the imminence regime completely satisfies the three-part test articulated in *Mathews*. First, the prisoner's private interest in continued existence is, to say the least, an important one. Second, the risk of error is quite high in the absence of hearings on at least some Ford petitions. Finally, the additional procedural requirement that courts hold hearings to inquire into evidence of a prisoner's incompetence to be executed is a virtual prerequisite to the determination that a prisoner is entitled to a stay of execution under Ford.

In sum, the constitutional arguments recognizing capital prisoners' right to a hearing on the incompetence issue are fundamental and incontrovertible. An additional, practical source of support for the proposed exemption of Ford claims from the one-year and one-bite rules is the circuit courts' near universal practice of preserving for later review other types of federal habeas claims that cannot be brought immediately upon the conclusion of direct appeals.

B. The Exhaustion Analogy

In *Martinez-Villareal*, the Supreme Court compared Ford claims that are dismissed as unripe to habeas claims that are dismissed without prejudice for failure to exhaust state remedies.¹¹³ The Court pointed out that dismissal for failure to exhaust does not render successive a later petition raising the newly exhausted claim.¹¹⁴ Interpreting such a second petition as successive, the Court reasoned, would give rise to “implications for habeas practice [that would be] far-reaching and seemingly perverse.”¹¹⁵ Similarly, *Martinez-Villareal*'s first Ford claim, dismissed as unripe and thus never reviewed on the merits, could not count as a discrete first petition rendering any later petition successive.¹¹⁶ This exhaustion analogy supports an exemption of all Ford claims from the AEDPA's habeas limitations.

^{*78} 1) All Unripe Ford Claims are Analogous to Claims Being Exhausted in State Court

Like dismissal for failure to exhaust, dismissal of a Ford claim as unripe satisfies procedural requirements while also allowing a petitioner to return to federal court to have his constitutional claim heard on the merits. Like failure to exhaust, unripeness is unrelated to the legitimacy of the underlying claim. The Supreme Court's comparison of the two types of dismissal gave rise to the practice of filing “placeholder” Ford claims in first habeas petitions.¹¹⁷

The *Martinez-Villareal* Court declined to decide whether a petition raising a newly ripe Ford claim for the first time, and after a previous petition has been adjudicated on the merits, counts as a successive petition.¹¹⁸ However, if it would be “perverse”¹¹⁹ to preclude review on the merits of a ripe Ford claim because of a previous dismissal on technical grounds, it cannot be permissible to foreclose review because a prisoner decided not to go through the exercise in futility of raising an unripe claim. Indeed, it seems the height of perversity to require a petitioner “to expend his or her own time and that of the federal court judge by needlessly litigating a Ford claim at the wrong time.”¹²⁰

The AEDPA's one year statute of limitations does not begin to run until the conclusion of direct review and is tolled during state habeas proceedings.¹²¹ In other words, the limitation provision contains a built-in exemption for unexhausted claims, obviating the need for “placeholder” petitions to preserve those claims. Interpreting the AEDPA similarly to exempt Ford claims would eliminate the necessity of raising unripe Ford claims in first petitions and would have the added benefit of providing all incompetent capital prisoners with equal opportunities to be heard, regardless of the dates of onset of their insanity.

2) Circuits Agree in Their Interpretations of Dismissals for Failure to Exhaust

The expansion of the Martinez-Villareal comparison to encompass all Ford claims, not just those raised while unripe, would be both logical and *79 efficient. In addition, it would provide a palatable rationale for reconciling the various circuits' Ford doctrines, because the circuits already agree that dismissal for failure to exhaust does not trigger the AEDPA's “second or successive limitation”¹²² and that the AEDPA's statute of limitations is tolled while a prisoner is in the process of exhausting his state remedies.¹²³ Notably, this consensus includes the Fifth¹²⁴ and Eleventh¹²⁵ Circuits; therefore, the Martinez-Villareal analogy provides a vehicle by which those courts can reconcile their Ford jurisprudence with their other, currently contradictory, AEDPA holdings.

VI. CONCLUSION

The writ of habeas corpus is intended to safeguard the constitutional rights of prisoners.¹²⁶ In enacting the AEDPA, Congress attempted to reduce or eliminate abuse of the writ while preserving the writ for those who have legitimate need of its protection. The text of the AEDPA includes exemptions for some claims that would otherwise be unjustly foreclosed.¹²⁷ Unfortunately, Congress did not create an express exemption for claims of incompetence to be executed under Ford. This oversight has given rise to widely divergent interpretations by the federal courts, some of which effectively preclude Ford claims that are not abusive of the writ.

By reading into the AEDPA an exemption for Ford claims, courts can preserve the constitutional right that Ford represents without fear that loosening restrictions on such claims will lead to increased delays in the legitimate execution of sentences. Ford claims are sufficiently restricted and policed by the common law imminence requirement and by courts' latitude to prescribe evidentiary thresholds for hearings, obviating the need for further statutory limitations. The proposed Ford exemption finds *80 support in the Supreme Court's Martinez-Villareal holding and strikes the proper balance that Congress intended between the vindication of constitutional rights and the legitimate need for finality of death sentences.

Footnotes

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1 Ford v. Wainwright, 477 U.S. 399, 402 (1986).

2 Id. at 402-03 (internal citation omitted).

3 Id. at 405.

4 See U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

5 Ford, 477 U.S. at 409-10.

- 6 [Id. at 406](#) (citing 4 William M. Blackstone, Commentaries *24-*25).
- 7 [Ford](#), 477 U.S. at 406-08.
- 8 [Id. at 408](#).
- 9 [Id. at 410](#); see also *supra* note 4.
- 10 506 U.S. 390, 406 (1993).
- 11 Antiterrorism and Effective Death Penalty Act of 1996, [Pub. L. No. 104-132](#), 110 Stat. 1214 (codified at 28 U.S.C. § 2244-54) [hereinafter AEDPA].
- 12 Ford has never been overruled; indeed, as recently as 1998, the Court restated Ford's prohibition on the execution of the insane. See [Stewart v. Martinez-Villareal](#), 523 U.S. 637, 639 (1998).
- 13 [Herrera](#), 506 U.S. at 406; see also [Martinez-Villareal](#), 523 U.S. at 644-45 (“[R]espondent's Ford claim was dismissed as premature... because his execution was not imminent and therefore his competency to be executed could not be determined at that time.”).
- 14 [Martinez-Villareal v. Stewart](#), 118 F.3d 628, 630 n.1 (9th Cir. 1997), *aff'd*, 523 U.S. 637 (1998) (internal citation omitted).
- 15 See *id.*; [In re Davis](#), 121 F.3d 952, 953 (5th Cir. 1997); [Van Tran v. State](#), 6 S.W.3d 257 (Tenn. 1999).
- 16 See [Amaya-Ruiz v. Stewart](#), 136 F. Supp. 2d 1014, 1017 (D. Ariz. 2001); [Schornhorst v. Anderson](#), 77 F. Supp. 2d 944, 948 (S.D. Ind. 1999), citing [Martinez-Villareal](#), 523 U.S. at 643-45; [Poland v. Stewart](#), 41 F. Supp. 2d 1037, 1038 n.2 (D. Ariz. 1999) (citing [Herrera](#), 506 U.S. at 406).
- 17 [Pub. L. No. 104-32](#), 110 Stat. 1214 (1996).
- 18 [Townsend v. Davis](#), 254 F. Supp. 2d 978, 981 (W.D. Tenn. 2003).
- 19 The AEDPA provides, in pertinent part:
- (1) A claim presented [by a state prisoner] in a second or successive habeas corpus application... that was presented in a prior application shall be dismissed. (2) A claim presented [by a state prisoner] in a second or successive habeas corpus application ... 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.
- § 106(b), 110 Stat. at 1220.
- 20 See *id.*

21 The AEDPA provides, in pertinent part:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

§ 101 (d)(1).

22 See [Roberts v. Cockrell](#), 319 F.3d 690, 694-95 (5th Cir. 2003); [Redd v. McGrath](#), 343 F.3d 1077, 1080-81 (9th Cir. 2003); [Burger v. Scott](#), 317 F.3d 1133, 1138-39 (10th Cir. 2003); [Bridges v. Johnson](#), 284 F.3d 1201, 1202-03 (11th Cir. 2003); see also Regina Change, Caroline S. Platt, & Ben E. Wallerstein, [Habeas Relief for State Prisoners](#), 90 Geo. L.J. 1937, 1938 (2002) (reviewing the AEDPA's statute of limitations provisions); Ronald S. Connelly, [Habeas Relief for Federal Prisoners](#), 90 Geo. L.J. 1981, 1987 n.2688 (2002) (reviewing the AEDPA's statute of limitations provisions).

23 See [Davis](#), 121 F.3d at 955; [In re Medina](#), 109 F.3d 1556, 1564-65 (11th Cir. 1997).

24 [Martinez-Villareal](#), 118 F.3d at 634 n.7 (indeed, the Ninth Circuit actually went further in this case, suggesting that Ford claims may always be exempt from the “second or successive” limitation).

25 See [Martinez-Villareal](#), 523 U.S. at 643-44; see also Bruce Ebert, Competency to be Executed: A Proposed Instrument to Evaluate an Inmate's Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane, 25 L. & Psych. Rev. 29, 46 (2001) (noting uncertainty as to whether the Supreme Court's holding in [Martinez-Villareal](#) is fact-specific or more broadly applicable); Deborah L. Stahlkopf, A Dark Day for Habeas Corpus: Successive Petitions Under the Anti-Terrorism and Effective Death Penalty Act of 1996, 40 *Ariz. L. Rev.* 1115, 1133 (1998) (“[T]he Court limited itself to the facts of this case.”).

26 [Martinez-Villareal](#), 118 F.3d at 632.

27 *Id.* at 629-30.

28 *Id.* at 634.

29 *Id.*

30 *Id.* at 630.

31 [Martinez-Villareal](#), 118 F.3d at 630-31.

32 523 U.S. at 643-44; see also Randal S. Jeffrey, [Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues](#), 84 *Marq. L.*

Rev. 43, 53 (2000) (characterizing the Supreme Court's Martinez-Villareal ruling as “recogniz[ing] that the AEDPA's use of ‘second or successive’ is not to be read literally”).

33 See Kristen F. Grunewald, Note, *Colburn v. Texas*, 123 S. Ct. 968, 15 Cap. Def. J. 517, 519 (2003) (noting the Court's failure to provide guidance for a petitioner seeking to raise a claim under these circumstances); Lawrence A. Benner, Marshall J. Hartman, & Shelvin Singer, *Criminal Justice in the Supreme Court: A Review of United States Supreme Court Decisions at the Close of the Millennium 1998-1999*, 36 Cal. W. L. Rev. 437, 484 (2000) (noting that the Supreme Court “side stepped the issue” of whether § 2244(b) is applicable to claims of incompetence to be executed). For evidence that this question is significant, see Ryan S. Hedges, *Justices Blind: How the Rehnquist Court's Refusal to Hear a Claim for Inordinate Delay of Execution Undermines its Death Penalty Jurisprudence*, 74 S. Cal. L. Rev. 577 (2001) (suggesting that prolonged stays on death row cause inmates to become mentally ill).

34 118 F.3d at 630.

35 Id.

36 Id. (quoting *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996)).

37 See id.

38 See id. at 632.

39 See *Herrera*, 506 U.S. at 406.

40 See *Lonchar*, 517 U.S. at 320.

41 See Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 743 n.204 (2002); Philip C. Chronakis, *Cold Comfort for Change: Trends of Preclusion in Habeas Corpus Litigation*, 76 U. Det. Mercy L. Rev. 17, 31 n.85 (1998); see also Stahlkopf, *supra* note 25, at 1133-34 (asserting, incorrectly, that the Supreme Court also concluded that “the nature of [the Ford] claim is such that it can never be raised in a first petition for habeas corpus”).

42 See *Nguyen v. Gibson*, 162 F.3d 600 (10th Cir. 1998). The Nguyen dissent points up a serious potential problem posed by the Ninth Circuit's interpretation by noting that the petitioner, who failed to raise his ripe Ford claim in his first petition, may have relied upon the supposed impossibility of review of a Ford claim in a first habeas proceeding. The dissent does not, however, point out the hazards of this reliance, despite the fact that the petitioner's attempt to raise the Ford claim in a subsequent petition was rejected. *Id.* at 603 (Briscoe, J., dissenting).

43 “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const. art. I, § 9, cl. 2; *Martinez-Villareal*, 118 F.3d at 631; see also Peter Sessions, *Swift Justice? Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. Cal. L. Rev. 1513, 1530-31 (1997) (describing the Supreme Court's reliance on its original habeas jurisdiction in upholding the AEDPA's statute of limitations against a Suspension Clause challenge).

44 *Davis*, 121 F.3d at 955.

45 *Id.* at 953.

46 [Davis](#), 121 F.3d at 955-56.

47 Id.

48 See id.

49 28 U.S.C. § 2244(b)(2)(A):

A claim presented [by a state prisoner] in a second or successive habeas corpus application ... that was not presented in a prior application shall be dismissed unless... 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.

50 See [Davis](#), 121 F.3d at 956.

51 See id.

52 477 U.S. 399.

53 See [Davis](#), 121 F.3d at 956.

54 Id.

55 Id.

56 [In re Cain](#), 137 F.3d 234, 235 (5th Cir. 1998); see also [Jeffrey](#), supra note 32, at 53.

57 See [Cain](#), 137 F.3d at 236 n.2.

58 Id. The Fifth Circuit did not explain why this purported congressional intent to preclude habeas claims that are (concededly) not abusive should be respected by the courts. Cf. [Martinez-Villareal](#), 118 F.3d at 631 (suggesting that such a stringent reading of the statute is vulnerable to a Suspension Clause challenge); [Chronakis](#), supra note 41, at 32 (describing [Davis](#)'s preclusion of such claims as “an alarming triumph of form over substance”); [Sessions](#), supra note 43, at 1538 (“The proponents of the AEDPA were purportedly concerned primarily with combating terrorism and ensuring the finality of criminal convictions.”) (emphasis added).

59 See [Davis](#), 121 F.3d at 956.

60 Id.

61 Id. (citing [Medina](#), 109 F.3d at 1564).

62 See id.; see also [The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions](#), 111 Harv. L. Rev. 1578, 1582 (1998) (asserting that in upholding AEDPA's restrictions, the Supreme Court also “actively defended [its own original] jurisdiction”). But see [Chronakis](#), supra note

41, at 31 (describing the Davis court's reliance on the Supreme Court's original habeas jurisdiction and expressing doubts as to the adequacy of that jurisdiction to protect Ford claimants).

63 256 F.3d 257 (2001).

64 256 F.3d at 258-59.

65 *Id.* at 259.

66 See *id.*

67 *Medina*, 109 F.3d at 1564-65.

68 See *id.* at 1564 (“[I]t is not any more apparent to us that Ford guarantees a federal court determination of the issue it addresses than that any other decision does.”).

69 *Id.*

70 *Id.*

71 518 U.S. 651 (1996).

72 See 518 U.S. at 655-56. Felker raised claims of insufficient evidence to convict, state withholding of exculpatory evidence, ineffective counsel at sentencing, improper use by the state of hypnosis to refresh a witness's memory, and double jeopardy and collateral estoppel relating to the state's introduction of evidence of a previous crime. *Id.* Compare *Tillema v. Long*, 253 F.3d 494, 500 n.7 (9th Cir. 2001) (“[A] claim that a death-row inmate is incompetent to be executed does not challenge the validity of the judgment, but only its execution.”) (citing *Ford*, 477 U.S. at 410).

73 “[U]nlike the question of guilt or innocence, which becomes more uncertain with time for evidentiary reasons, the issue of sanity is properly considered in proximity to the execution.” *Herrera*, 506 U.S. at 406 (emphasis added). The setting of an execution date is used, for purposes of determining competence, as a proxy for the moment of actual execution, at which time it is not practicable to perform a psychiatric evaluation.

74 See, e.g., *Ford*, 477 U.S. at 417 (“It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity.”); *id.* at 426 (Powell, J., concurring) (“The State ... may require a substantial threshold showing of insanity merely to trigger the hearing process.”); see also *Coe v. Bell*, 209 F.3d 815, 818 (6th Cir. 2000) (“The trial court determined that Coe was entitled to a hearing on this [competency] issue because he had satisfied a threshold showing”).

75 372 U.S. 293, 312 (1963) (emphasis added) (citing *Frank v. Mangum*, 237 U.S. 309, 345-50 (1915) (Holmes, J., dissenting)), rev'd on other grounds, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). At least one federal court has read *Townsend* to require an evidentiary hearing when a prisoner's Ford allegations, if true, would entitle him to habeas relief. See *Walton v. Johnson*, 269 F. Supp. 2d 692, 701 (W.D. Va. 2003).

76 477 U.S. at 410 (citing *Townsend*, 372 U.S. at 312-13); see also Excerpts from Rehnquist Speech Urging Curb on Death Penalty Appeals, in N.Y. Times, May 16, 1990, at A18 (“Surely the goal [of habeas corpus] must be to allow the states

to carry out a lawful capital sentence, while at the same time assuring the capital defendant meaningful review of the lawfulness of his sentence.”) (emphasis added).

- 77 See [Martinez-Villareal](#), 118 F.3d at 632 (citing [DeBartolo Corp. v. Florida Gulf Coast Trades Council](#), 485 U.S. 568, 575 (1988)) (emphasis added and internal quotation marks omitted) (“Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the [Supreme] Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); *The Avoidance of Constitutional Questions*, supra note 62, at 1586-87.
- 78 142 Cong. Rec. H3609 (1996) (Statement of Rep. Buyer).
- 79 See supra text following note 73.
- 80 See [Pub. L. No. 104-32](#), 110 Stat. 1214 § 106(b).
- 81 See 142 Cong. Rec. H3613 (1996) (statement of Sen. Lucas) (“This bill will bring an end to the abuse of our Nation's appeals process. It will ensure this country has an effective and enforceable death penalty. It means justice will be served, and that the guilty will receive their punishment in a swift manner.”); *id.* (statement of Sen. Hyde) (“[W]e do not abolish habeas corpus We strengthen habeas corpus by forbidding its abuse.”).
- 82 Excerpts from Rehnquist Speech, supra note 76, at A18.
- 83 See supra text accompanying note 73.
- 84 See [Herrera](#), 506 U.S. at 403 (“[T]he passage of time only diminishes the reliability of criminal adjudications.”); see also [McCleskey v. Zant](#), 499 U.S. 467, 491 (1991) (“[W]hen a habeas petitioner succeeds in obtaining a new trial, the ‘erosion of memory and dispersion of witnesses that occur with the passage of time’ prejudice the government and diminish the chances of a reliable criminal adjudication.”) (internal citation omitted).
- 85 See [Stevenson](#), supra note 41, at 750; [Grunewald](#), supra note 33, at 520.
- 86 See [Stevenson](#), supra note 41, at 750:

Ironically, the conjunction of AEDPA, the Supreme Court's [Martinez-Villareal](#) decision, and the interpretation of that decision in the Fifth, Tenth, and Eleventh Circuits creates a situation in which the only recourse for a habeas corpus petitioner is to expend his or her own time and that of the federal court judge by needlessly litigating a Ford claim at the wrong time.
- 87 See *id.* (“Under the Supreme Court's holding in [Martinez-Villareal](#), a Ford claim will be preserved for later review if it is raised in the ‘first’ petition and dismissed on the ground that it is ‘premature.’”); see also [Jeffrey](#), supra note 32, at 53 (“[T]he [[Martinez-Villareal](#)] Court considered, in determining whether an application is successive, the... flexible considerations of whether the prior application was dismissed ‘for technical procedural reasons’ and whether the petitioner failed to ‘receive an adjudication of his claim.’”).
- 88 See supra text accompanying note 18.
- 89 [Stevenson](#), supra note 41, at 750.

90 See 118 F.3d at 630.

91 *Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

92 See U.S. Dep't of Justice, Capital Punishment, 2002, Bureau of Justice Statistics Bulletin at 11 (2003) ("Among prisoners executed from 1977 to 2002, the average time spent between the imposition of... sentence... and execution was more than 10 years."); see also *Russell v. Johnson*, No. 1:02CV261-JAD, 2003 WL 22208029, at *4 (N.D. Miss., May 21, 2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/cp02.htm>. ("[T]he mental health care afforded the inmates on Death Row is grossly inadequate. The isolation of Death Row, along with the inmates' pending sentences of death and the conditions at Unit 32-C, are enough to weaken even the strongest individual."); *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.").

93 Chronakis, *supra* note 41, at 32.

94 See *supra* text accompanying notes 89 and 90.

95 See *supra* note 92 and accompanying text.

96 See Sessions, *supra* note 43, at 1559-62 ("Even if one assumes that a petitioner has a dedicated attorney and can readily identify potential issues, drafting the petition still poses an arduous task ... [that] requires a substantial amount of time--often more than the one year mandated by Congress [in AEDPA].").

97 *Richardson*, 256 F.3d at 259 (emphasis added).

98 Limits on Capital Inmates' Right to Seek Collateral Relief Proposed, 45 Crim. L. Rep. 1097 (1989). The committee is usually referred to as the Powell Committee, after its chairman, Supreme Court Justice Lewis Powell.

99 Stevenson, *supra* note 41, at 724 (quoting Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. 3239, 3240 (1989)).

100 *Id.*

101 Excerpts from Rehnquist Speech, *supra* note 76, at A18.

102 This argument is similar to the Holy Trinity line of reasoning set out in Section B of this Part; see *supra* text accompanying note 93.

103 See *supra* text accompanying note 96.

104 *Ford*, 477 U.S. at 426 (Powell, J., concurring); see also *supra* note 74.

105 "[The AEDPA] makes the death penalty an effective and certain punishment by ending interminable delays and endless appeals." 142 Cong. Rec. H3617 (1996) (statement of Sen. Packard).

- 106 U.S. Const. amend. XIV, § 1.
- 107 See [Mathews v. Eldridge](#), 424 U.S. 319, 333 (1976) (citing [Wolff v. McDonnell](#), 418 U.S. 539, 557-58) (“This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.”). The Fourteenth Amendment, of course, extends the same level of protection to life that it does to property, and the execution of a death sentence certainly constitutes a “final” deprivation. See U.S. CONST. amend. XIV.
- 108 [Grannis v. Ordean](#), 234 U.S. 385, 394 (1914).
- 109 [Armstrong v. Manzo](#), 380 U.S. 545, 552 (1965); see also [Morrissey v. Brewer](#), 408 U.S. 471, 481 (1972) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”); [Cafeteria Workers v. McElroy](#), 367 U.S. 886, 895 (1961) (“‘Due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”).
- 110 424 U.S. 319, 335 (1976).
- 111 [Mathews](#), 424 U.S. at 335.
- 112 See [Mathews](#), 424 U.S. at 335.
- 113 See 523 U.S. at 644-45.
- 114 *Id.* at 644.
- 115 *Id.*
- 116 See *id.*
- 117 See [Grunewald](#), *supra* note 33, at 519-20; *supra* note 87; see also *supra* text accompanying notes 88-90 (discussing the disadvantages of placeholder claims for both petitioners and courts).
- 118 See 523 U.S. at 645.
- 119 *Id.* at 644.
- 120 [Stevenson](#), *supra* note 41, at 750.
- 121 See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 § 101; see also *supra* note 20 and accompanying text.
- 122 See [Dickinson v. Maine](#), 101 F.3d 791 (1st Cir. 1996); [Camarano v. Irvin](#), 98 F.3d 44, 47 (2d Cir. 1996); [Christy v. Horn](#), 115 F.3d 201, 208 (3d Cir. 1997); [Harvey v. Horan](#), 278 F.3d 370, 380 (4th Cir. 2002); [In re Gasery](#), 116 F.3d 1051, 1052 (5th Cir. 1997); [Brown v. O'Dea](#), 187 F.3d 572, 575 (6th Cir. 1999), vac'd and rem'd on other grounds, 530 U.S. 1257 (2000); [In re Page](#), 179 F.3d 1024, 1025 (7th Cir. 1999); [Weaver v. Bowersox](#), 241 F.3d 1024, 1029 (8th Cir. 2001); *In*

re *Turner*, 101 F.3d 1323 (9th Cir. 1996); *Petrick v. Martin*, 236 F.3d 624, 628 (10th Cir. 2001), rev'd on other grounds, 2002 WL 1023663, *101 (10th Cir. 2002); *Walker v. Crosby*, 341 F.3d 1240, 1245 n.4 (11th Cir. 2003).

123 See *supra* note 22 and accompanying text.

124 See *Gasery*, 116 F.3d at 1052; *Roberts*, 319 F.3d at 695.

125 See *Walker*, 341 F.3d at 1245 n.4; *Bridges*, 284 F.3d at 1203 n.1.

126 See *Burdine v. Johnson*, 262 F.3d 336, 350-51 (5th Cir. 2001) (Higginbotham, J., concurring) (“[T]he modern writ of habeas corpus has operated as a vital safeguard of the federal constitutional rights of persons convicted in state courts.”).

127 See AEDPA § 106(b)(2), 110 Stat. at 1220 (exempting from the “second or successive” limitation claims arising from new and retroactive rules of law and newly discovered evidence not previously discoverable).

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