OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: TERRY STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., Petitioners v. RAMON MARTINEZ-VILLAREAL

CASE NO: 97-300

PLACE: Washington, D.C.

DATE: Wednesday, February 25, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRY STEWART, DIRECTOR, :

ARIZONA DEPARTMENT OF :

CORRECTIONS, ET AL., :

Petitioners :

v. : No. 97-300

RAMON MARTINEZ-VILLAREAL :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, February 25, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:12 a.m.

APPEARANCES:

BRUCE M. FERG, ESQ., Assistant Attorney General of Arizona, Tucson, Arizona; on behalf of the Petitioners.

DENISE I. YOUNG, ESQ., Tucson, Arizona; on behalf of the Respondent.



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P R O C E E D I N G S

(11:12 a.m.)

CHIEF JUSTICE REHNQUIST: We'll go on to Number 97-300, Terry Stewart v. Ramon Martinez-Villareal.

Mr. Ferg, you may proceed whenever you're ready.

ORAL ARGUMENT OF BRUCE M. FERG

ON BEHALF OF THE PETITIONERS

MR. FERG: Mr. Chief Justice, and may it please the Court:

It has been said that the principles which guide this Court's habeas corpus jurisprudence are finality, federalism, and fairness. In 1996, Congress conducted its own assessment of those principles and recalibrated the instrument of statutory habeas corpus in the Antiterrorism and Effective Death Penalty Act, so now there is a fourth principle which might be called fidelity which must be applied here, by which I mean that this Court, as the supervisor of the lower Federal court system, must ensure that the lower courts are faithfully applying the plain meaning and clear intent of that act.

It is critical to read this statute on its own terms, because we sometimes find that we have in effect new wine in old bottles, the same concepts but with new meaning and, therefore, we have to read the statute very, very carefully to understand what exactly it is that



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Congress was doing.

QUESTION: Well, do you think that Congress may have been trying to tighten up the court's abuse of the writ standards in passing AEDPA?

MR. FERG: Yes, Your Honor. As a matter of fact, as I pointed out, the way 2244 has been modified simply expunges the concept of abuse of the writ, so that we now have in effect some very clear designations of what is a successive petition and this kind of amorphous concept --

QUESTION: Before we had AEDPA, did courts, do you think, apply abuse of the writ standards to Ford claims at all?

MR. FERG: No, Your Honor.

QUESTION: I don't think they did. A Ford claim is a little different, since it seems to arise later after the conviction and the sentence and relate to a defendant's mental condition at the time of a scheduled execution, so it wasn't the kind of application that triggered abuse of the writ analysis before AEDPA, was it?

MR. FERG: Well, yes and no. The lower courts did not address that, but this Court in Woodard v. Hutchins did deal with a contention that the individual was currently insane as he was approaching execution.

QUESTION: Mm-hmm.



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MR. FERG: And it was indicated by five justices here that that was, in fact, a contention that was subject to abuse of the writ analysis, and so even before AEDPA there had been the indication that in fact that kind of a claim might well be --

QUESTION: What do you think we do post-AEDPA with claims that really arise later, such as claims arising out of the establishment of good time credits or something of that sort? What do we do? Do we say that that's a successive application for habeas if the thing couldn't even have been raised until good time credits were denied?

MR. FERG: It may well be. The reason for that --

QUESTION: Is that the position you take, that AEDPA goes that far and that it extends to even those things that could not have arisen before --

MR. FERG: Yes, Your Honor.

QUESTION: -- the claim was made?

MR. FERG: Because of the plain language of that second exception --

QUESTION: Uh-huh.

MR. FERG: -- which says that if it is a matter which you could not have brought the facts forward before, nonetheless, if it does not go to guilt-innocence

determinations, then it's excluded.

QUESTION: How about a Rose v. Lundy problem? An applicant comes in with several claims on Federal habeas and the district court says, well, you didn't exhaust in State court some of these. I'm going to dismiss everything and send you back.

Now, if a second habeas is then filed, you would say AEDPA bars that there?

MR. FERG: We have to distinguish your hypothetical as one where the entire petition was dismissed.

QUESTION: Mm-hmm, yes.

MR. FERG: And our position is in that situation it is in effect not an application which is meaningful.

However, this case was a situation where there was a first petition, where 30 claims were adjudicated on the merits or preclusion basis to the end, and therefore what we're suggesting is that although 2254 has also been modified, particularly so that it is no longer necessary as under Rose to mandatorily dismiss, but the effect for a case where there has been an application where there has been progress to an adjudication of some of those claims on the merits --

QUESTION: Was the Ford claim made in the petitioner's first petition?



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MR. FERG: It was, and found not ripe.

QUESTION: And the Federal court said no, we can't deal with this now.

MR. FERG: That's correct.

QUESTION: But we'll deal with it later.

MR. FERG: That was the anticipation, yes.

QUESTION: Are you saying that that determination should have been appealed, i.e., he should have said yes, it is ripe?

MR. FERG: Well, as a matter of fact that question was raised in the Ninth Circuit and they agreed that that particular claim was properly dismissed as being premature, because there was no warrant for execution. It was years before the likelihood of an execution actually taking place.

QUESTION: So what more could he have done?

MR. FERG: Under pre-AEDPA he did what he could, and I want to emphasize that this is not a situation where the State somehow inveigled him, or mouse-trapped him. We certainly didn't know 3 years in advance that AEDPA was going to be passed.

The law was changed as this case progressed, and so in effect Congress said this no longer is the kind of claim which ought to be heard in Federal district courts, much like they came back in 1868 and said, we are going to



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withdraw habeas appellate jurisdiction from this Court, and no more than Mr. McCardle had a justiciable interest after that, so Mr. Martinez Villareal no longer has an interest that can be presented at least in district --

QUESTION: In view of your answer about exhaustion, failure to exhaust, so it's dismissed, and then it comes back after AEDPA, and you said effectively that would not be a successive petition, suppose the Ford claim were the only claim brought up in the first habeas, and the district court says, it's not ripe, you get a competency hearing in the State court -- it's so close to exhaustion.

So your original answer was, but this person had other claims that were adjudicated.

MR. FERG: Right.

QUESTION: Suppose it had been only the Ford claim.

MR. FERG: If it were exclusively the Ford claim and it had been dismissed at that point, then we would not consider that a successive application, because there had been no determination on any merits issue.

QUESTION: Well, except that -- yes, there was a decision.

You say, well, it may not be successive. It sure is second, because there was a first one and this is

a second one, so it seems to me that if we're going to read the statute in that sort of -- taking the terminology on its face, I don't see why your answer hasn't got to be the opposite of what you gave.

MR. FERG: Because we are giving meaning to every word in the statute, including application. What does it mean to have a meaningful application? It's got to be something that the courts can rule on.

For example, there are cases out of the Seventh Circuit which say, if this petition is dismissed for lack of a filing fee, or failure to submit the proper affidavits and so forth, then we're not going to treat it as successive and that's appropriate, because in effect the court is saying, this is a nothing. We're not going to do anything with it.

But in this case, we had years of litigation, evidentiary hearings, and determination of 30 issues.

QUESTION: But suppose --

QUESTION: You think the case we just heard was a nothing, because that also involved sort of a ripeness question, which is the same kind of a question as a -- as the timeliness of the challenge to a competency hearing.

MR. FERG: Well --

QUESTION: I wouldn't call that case a nothing. I mean, there was a lot of argument about whether, indeed,

it was timely or not.

MR. FERG: Well, sometimes there is much ado about nothing.

(Laughter.)

MR. FERG: In this particular situation, though, all that the State did was point out what the district court probably would have noticed on its own, which is that if you do not have a ripe issue you do not have Article III justiciability.

You've got to have a cause that the court can deal with and if there simply isn't, at that point, a meaningful possibility that you are going to be executed, you don't have something that you can present at that --

QUESTION: Let me ask you another question. Do you think that a so-called Ford claim, somebody who says, I'm not mentally competent to be executed, could be raised under section 1983 rather than habeas?

MR. FERG: No, ma'am, I don't believe it can, because --

QUESTION: Why not?

MR. FERG: Congress, which, of course, is the author of both of these remedial schemes, if you will, has, I think, made it clear that everything to do with capital punishment and capital sentences is to be litigated by way of habeas.



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For example, in 21 U.S.C. 848(q), where they talk about the funding statute and it says, this is the way that you do it, you fund lawyers to bring sections under 2254 and 2255 for all kinds of things, including competency determinations.

QUESTION: Well, except this person is not before the courts arguing that he is being held in violation of Federal law. He just says, I can't be executed without a determination of my mental capacity.

MR. FERG: Well, what this Court indicated in Gomez v. U.S. District Court is that section 1983 is not a device to circumvent rules against successive petitions. In that case it was a McCleskey type of situation, but because 1983 --

QUESTION: I don't know that it's a circumvention. I'm trying to find out if traditional habeas relief fits this type of claim.

MR. FERG: Well, to the extent that Congress has indicated this is the way it should go, particularly by the addition of Chapter 154 --

QUESTION: We've used habeas for all sorts of matters relating to the propriety of execution, haven't we, whether it's cruel and unusual punishment, whether certain procedures have to be used, and that doesn't relate to the detention of the individual.



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MR. FERG: That's correct.

QUESTION: I sort of favor using habeas for what it ought to be used for, but I think we crossed that bridge a long time ago.

MR. FERG: Well, in effect I would suggest that this Court has determined this question already.

QUESTION: But if that's so -- if that's so, then isn't what's before the Court not -- he's not challenging his underlying conviction, and he's not challenging the sentence he got.

He's challenging now in the Federal court something different, which is the competency adjudication in the State court. That's a different target. I don't see how that's successive of anything that was focusing on the conviction and the sentence instead of the competency determination.

MR. FERG: The application is successive because it is the second time he has come to the court.

QUESTION: But you've already told me that you don't take that so formally that in dealing with the dismissed case because of exhaustion for -- that technically that's a second -- it's the second time he's filed.

I don't understand why those two would be different, if you say, and he has never before attacked



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the determination that was just made in the Arizona State court that he is competent, that was just made last week. Why isn't that not successive?

MR. FERG: It is successive because it goes ultimately to that very same sentence that was imposed upon him in the first place, and therefore he is coming a second time to in effect get a Federal court to say, you cannot execute this person.

QUESTION: Is there any reason to think that Congress wanted the result that Justice Ginsburg is discussing?

I mean, is there any reason to think that Congress somehow wanted to take this unusual set of claims that arise only, and can by their very nature arise only well after the trial itself, that have nothing to do with the trial, that have nothing to do with the appeals -- it would be a claim, for example, saying we're going to torture someone to death, or I mean, you know, some frightful thing, think of some awful thing, and it could never have arisen before.

I mean, is there any reason Congress would have wanted to bar habeas totally from such a claim? I can't think of one, and if there is none, and no evidence they wanted to, can't you just read a claim not to include that kind of claim?

MR. FERG: Okay, two answers to that. First of all, my reading of the legislative history does not show that they specifically looked at the narrow issue of competency for execution, but what they did do is, in drafting their exceptions, made it very clear that it was not to do with any issue of sentencing but only of built-innocence, and as far as the torture, breaking on the wheel, that is what direct search is for. You're always --

QUESTION: I thought your answer was going to be simply section 2244(b)(2)(B), which makes it very clear that the mere fact that something couldn't have been raised earlier, because the factual predicate did not exist, is not alone enough. I mean, that makes it very clear that that's not enough.

MR. FERG: Exactly. That says --

QUESTION: In addition to that, the fact -- those new facts have to show that the defendant was innocent of the underlying offense.

MR. FERG: That's essentially what I was trying to get at, that this is the plain meaning of the statute.

QUESTION: If you're trying to get at that, I was talking about a claim that not only couldn't have been raised earlier, but one that had nothing to do with the trial or the appeal process.



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It had nothing to do with the trial itself. It had nothing to do with the jury, that it's totally beside the point whether a jury would or would not have thought the person was innocent.

In other words, all those things in (b)(2) just have nothing to do with this kind of thing.

MR. FERG: If it is something which relates to the determination of guilt or innocence, yes, then that would be permissible, assuming that, again, there were some newly discovered facts.

QUESTION: May I ask -- maybe I'm going to pose the same kind of question that's been posed before, but let me pose it in a slightly different way. I'm going to start with an assumption which I think you do not share, and that is that even you do not read second and successive in a literal way, and I realize you think you do, but I start with the premise that you don't.

MR. FERG: Okay.

QUESTION: If that's what I assume to begin with, then I'm faced with the following kind of question:

Why would Congress have wanted to draw a distinction between the jurisdiction of a court to entertain a competency claim based upon what seems to be the totally capricious circumstance that it was or was not joined in the first instance with some other claims?



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This seems to me a very difficult question when one accepts, as I think we both do, the premise that the claim does have to be ripe, and you can't come in the week after conviction, when you don't know when you're going to be executed and say, well, I'm not competent to be executed.

If we do not start with the premise that the terms literally mean what they mean and have got to be applied in that way right down the line, why would it not be sensible to say, Congress surely would not have intended to cover this rather -- or to mandate this rather capricious distinction and hence throw this fellow out of the Federal court? What's the answer to that?

MR. FERG: Well, I would suggest that it would not be capricious at all, because in effect what we're finding here is that t he individual is going to have virtually the same kind of review that he would have had without AEDPA, because competency is a factual matter, and for example in Demosthenes v. Baal and Maggio v. Fulford this Court made very clear that, even without AEDPA, there's a factual issue which the courts, the Federal courts must defer to, and so this Court on --

QUESTION: Well, that doesn't go to the jurisdiction of the Federal court ultimately to entertain the claim.



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MR. FERG: What I'm saying, though, is that it is consistent to say that this is an appropriate way to limit the kinds of issues that are going to come in front of the district court, which doesn't drastically --

QUESTION: But it doesn't -- I have the same question as Justice Souter. You have two cases. One case, all he does is bring a competency -- a claim that he's incompetent to be executed.

MR. FERG: Right.

QUESTION: That's all he brings, and the State comes rushing in and says, premature, and it's dismissed. It's premature, not ripe. Case number 1.

Case number 2, different defendant, he's got 30 claims, and he adds the competency claim.

Why should those cases come out differently? In case number 1 you're going to be able to hear the claim later. Case number 2, you're not. That just makes no sense.

And I think that was the substance of Justice Souter's question, and I don't think you've answered it.

MR. FERG: Well, I think the bottom line is it's a choice that Congress is entitled to make, that we are dealing with a statute -- this is where the entitlement comes from, that it is a statute which Congress can say, we will allow the courts to hear certain types of claims,



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just as this Court said, we're not going to let you hear Fourth Amendment claims any more.

QUESTION: well, if Congress had said that in any direct way, you'd be well on the road to your argument, but you're basically saying -- in fact, you said literally a few moments ago, this is just like McCardle.

It's not like McCardle. There was no question about what Congress was intending to do and literally clearly did do in the statute that was at issue there.

Here, we -- if we accept your position we are saying that for all practical purposes, in any case in which there's more than one possible claim on habeas, Congress has, without ever expressing directly the question of this subject matter jurisdiction point, indirectly ruled out the subject of competency claims for Federal courts.

This isn't straightforward like McCardle. It's exactly the opposite, and it would attribute to Congress either a very strange inadvertence, since Ford claims are well-known, or a rather underhanded way of doing business, which we just don't -- we don't attribute that to Congress. That isn't the way we assume they work.

MR. FERG: Well, I have to disagree with you on that, because this Court has repeatedly made clear, for example in Moralis v. TVA -- excuse me, TWA, legislative



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history need not confirm details of changes in the law before we interpret it according to its plain meaning, and there are other cases which show you don't have to find that Congress --

QUESTION: Well --

MR. FERG: -- looked at the nitty gritty of every possibility --

QUESTION: -- we're back to plain meaning again, and I think the -- as I said, I realize that you and I do not agree entirely on that, but if we don't think that a simple, literal plain meaning analysis is going to be applicable here because of exactly the case that you concede would be allowed as a second shot, then I think the question is more pointed than, or more difficult than you're admitting.

QUESTION: May I ask you before you close to -- first, if I understand, your theory is this is a second -- a successive application.

MR. FERG: That's correct.

QUESTION: What is your theory on why we have jurisdiction, given the plain language of the statute that says the grant or denial of a successive application shall not be appealable and shall not the subject of a petition for rehearing or writ of certiorari?

MR. FERG: Because of the very specific manner

in which the Ninth Circuit ruled, it seems to take it out of the ambit of that preclusion. The language of the --

QUESTION: Well -- it's -- under your view, it is a second, successive, right -- second or successive application.

MR. FERG: Yes, sir.

QUESTION: And it was granted -- the court of appeals said it shall be granted by the district court, they shall entertain it.

MR. FERG: But it said that we're allowing you to do this because we're not going to find it was --

QUESTION: Well, they say -- but you say they were wrong on that.

MR. FERG: Exactly.

QUESTION: I mean, you can't say they're both right and wrong. If your theory is they were wrong, and having accepted -- if we agree with you on that proposition, how do we have jurisdiction to hear the case?

MR. FERG: Two answers. First of all, there are the cases which I cited, including McNary v. the Asian Refugees Center and Robison v. Johnson, which indicate that when you're talking about not a specific determination under a statutory scheme, but the validity and construction of a scheme as a whole, that it's not subject to those kinds of limitations on review, that



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we're not looking at this point about the propriety of them saying, this is an okay successive petition because they said, this is not even a successive petition.

QUESTION: Well, I know that's -- but I'm taking you at your word, not them --

MR. FERG: Right.

QUESTION: -- because you're saying they're wrong.

MR. FERG: And the second point is that, because -- first of all, those cases would indicate that statutory cert is appropriate to review the overall construction of the statute, but secondly, as I pointed out, and why we brought a combined petition in the first place, is that the issues in this case are of such importance that they warrant review under the extraordinary writ if somehow they don't fall under the statutory writ.

QUESTION: Well, I guess we permit such inconsistent pleading, if you want to call it that, all the time when we reverse a court of appeals which has decided a case that the petitioner claims -- for which the petitioner claims there was no jurisdiction.

For instance, if the petitioner says there's no standing, he comes here and says, this Court doesn't have any jurisdiction, and neither did the lower court.

QUESTION: Yes, but we never do that by adopting both of the inconsistencies. We take one or the other when we do it, we rule. We don't take them both.

MR. FERG: Well, again, that is why we presented it in both lights. Our --

QUESTION: May I ask again about the distinction between the one who brings just the Ford claim, which you say that's okay. He hasn't had a first petition, effectively.

Would a person who combines them might have this in mind, or the lawyer: my client is incompetent. I want to make sure that ultimately the Federal court hears that.

But if I don't bring it up along with these others, I may be caught in a procedural default when I come back, so I have to put it in with the other 22. I really don't have a choice to leave it out.

So you're saying, well, if you want the Ford claim to survive, you have to forfeit all those other claims.

That -- the distinction between the one who brings the Ford claim alone --

MR. FERG: Yes.

QUESTION: -- as being okay, but the one who combines it with others is not being okay, is a little hard for me to grasp, and I was thinking that well, maybe

wouldn't any sensible lawyer say, he's got some good claims. I don't want to sacrifice them.

MR. FERG: Well, again I think part of the answer is that at stage he doesn't have a claim that he can present anyway. It is simply not justiciable at that stage.

QUESTION: Yes, but then he wants to be able to come back.

MR. FERG: And Congress has now said that the appropriate means of dealing with that is through the kind of Ford evidentiary hearing that we had in the superior court in Arizona, plus Arizona supreme court review, plus cert to this Court, much like the pattern that has followed for Federal prisoners.

Federal prisoners only have one bite at post conviction relief through their own system. All that Congress has done here is said, okay, in these kinds of claims you have exactly that same situation. You go through your State post conviction relief to the U.S. supreme court and that's the end of it, and are cut off in these kinds of cases from taking a second route through the Federal courts.

QUESTION: General Ferg, can I clarify one thing. I just wasn't 100-percent sure of your answer. Supposing -- forget the Ford claims for a moment. Just a



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mixed -- a petition making four claims, two of which were exhausted, two were not exhausted, and the district court dismisses on the ground there wasn't complete exhaustion, then if he comes back later, is that a first or a second habeas in your view?

MR. FERG: If the whole thing is dismissed out so there's no action, no adjudication, then that would not be a successive application.

QUESTION: In your -- okay.

QUESTION: I take it your position would entail this strategy on the part of careful lawyers. Let's assume they have five serious habeas claims going to the validity of the conviction and they also anticipate that there's going to be at the end of the road a competency claim.

In order not to be thrown out on the competency claim they will save their five until the eve of execution when their competency claim will be ripe, and yet that will be at the furthest possible remove from the time of trial so that if they also happen to be right on the issues going to conviction it will be more difficult then to go back and retry the case. That would be a strange policy for Congress to want to promote, wouldn't it?

MR. FERG: Indeed it would, and --

QUESTION: But isn't that the policy that the

careful lawyer who wants to avoid your argument, and -- particularly if it's successful, is in fact going to take.

QUESTION: He'd be barred by the statute of limitations, wouldn't he?

MR. FERG: He might well be barred that way and also, as the Ninth Circuit pointed out, that when you come in you get the automatic stay the first time around for those other nonmental issues, then you've automatically rendered the issue nonripe again, and so what we're actually doing is saying, we want to get the mental competency issue done in an expeditious manner.

QUESTION: No, but that's the point, it can't be done at all unless it is done in relation to competency at time of execution.

MR. FERG: Right.

QUESTION: And if somebody comes in before an execution date is imminent, then that's why it's not ripe, and you don't -- I mean, you don't want to promote nonripe claims.

I mean, it's simply irrelevant to litigate early when the execution is going to be later.

MR. FERG: That's correct. It is an issue which reasonably cannot -- or legally cannot be raised at that point at all, and you're left to the very specific avenue of State --



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QUESTION: Right, but that then undercuts the point that Congress wanted these things litigated early. Congress doesn't want these things litigated at a time when they're irrelevant.

MR. FERG: Well --

QUESTION: But it's your position they're -- they would be left to the State procedure, but what if the State decided they won't have a procedure, which I suppose they could do under your view?

MR. FERG: Well, that very denial would itself be grounds, I would suggest, to come before this Court.

For example, there's an old case called File v. Duffy, where it was claimed that the custodian was not looking into the competency of the individual, and so it was brought through the California supreme courts and to this Court by way of mandamus on the basis that denial of any kind of review was itself a constitutional --

QUESTION: Yes, it would be, but that claim wouldn't be ripe at any time. There would be no chance to raise it as I see it.

MR. FERG: At that point it would be ripe --

QUESTION: Yes.

MR. FERG: -- because the execution would be imminent.

I'll reserve the rest of my time.



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QUESTION: Very well, Mr. Ferg.

Ms. Young, we'll hear from you.

ORAL ARGUMENT OF DENISE I. YOUNG

ON BEHALF OF THE RESPONDENT

MS. YOUNG: Mr. Chief Justice, and may it please the Court:

I think it's very important, what we've just heard here today from the State of Arizona. They agree that second or successive in 2244(b) cannot be read to mean any numerically second petition is out. That's just what Mr. Ferg told us.

So what that means is now we've got to construe the statute, and that's what we have been asking this Court to do, and that's exactly what the court of appeals did below.

The next thing that Mr. Ferg told us today is that we can agree that a claim that can't be presented is not presentable, does not fall within 2244(b), that that type of claim will not be considered a second or successive when that petitioner comes back to this Court, comes back to the district court in a numerically second petition.

That's exactly what we have here. This is a claim that the State of Arizona said in the lower court at the time of the first petition was not presentable. They

told the district court that there was no case or controversy, no jurisdictionally sufficient case to have that litigated.

QUESTION: Because it was premature it would have to be decided closer to the time of execution?

MS. YOUNG: That's exactly right, Your Honor, and that's what the court decided and it dismissed it without prejudice and everybody knew that, at the time of that dismissal, if Mr. Martinez-Villareal were to lose, ultimately -- remember, at that time he had won on an ineffective claim at sentencing, which the court of appeals later reversed on a procedural default, but everybody knew at that time that Mr. Martinez-Villareal would be back if, in fact, he didn't prevail in the court of appeals to litigate this very claim that everybody agreed he could litigate at the proper time.

Now, what the court of appeals did in construing this language agreed that this type of claim does not fall within second or successive.

QUESTION: Was AEDPA in effect at the time of the first raising of this claim in the district court?

MS. YOUNG: No, it was not, Your Honor but, as Justice O'Connor mentioned, all the courts had held at that time, before AEDPA, that Ford claims were not subject to abuse, and that they were routinely raised for the

first time in second or successive petitions.

This is a case where you have a petitioner's counsel who's making sure that all diligent conduct is --

QUESTION: But you don't make any claim that AEDPA shouldn't apply to this case, I take it?

MS. YOUNG: It has -- what -- our position is that this case doesn't fall within 2244(b). It --

QUESTION: But you have not argued here or below that the statute that Congress passed in the form of AEDPA does not apply to your case?

MS. YOUNG: Yes.

QUESTION: You say --

MS. YOUNG: We do --

QUESTION: -- that it is not a successive petition under AEDPA.

MS. YOUNG: That's right. That's exactly right, and so we do not fall within the 2244(b) because what 2244(b) is looking at are claims that had been presented. Our claim was one that was never presentable.

QUESTION: And you're --

QUESTION: It seems to me your argument rests upon the premise that it's unreasonable and therefore presumably not the intent of 2244 that a claim which could only be raised later should be barred, even if it comes up in what could in some senses be called a second

application.

I find it difficult to square that premise with the text of 2244(b), which in (b)(2)(B) obviously envisions situations in which, even though you couldn't have raised the claim before, the claim is barred. It makes only one exception to that, and that is if the claim couldn't be raised before and also is a claim that would establish the innocence of the underlying offense.

I don't know any other way to read that provision than as clearly affirming Congress doesn't care about certain claims that can only be raised now but nonetheless Congress says, even so, unless they go to the innocence, go away.

MS. YOUNG: There's two answers to that. First of all, in order to get to (b)(2) you've got to start off with -- to get to (b)(2)(ii) I guess is what you're talking about you have to start off with (ii) and look to see what they're talking about, and they're talking about --

QUESTION: Would you be precise as to which statutory section?

MS. YOUNG: I'm sorry. 2244(b)(2)(B) -- I'm talking about 2244(b)(2), and then --

QUESTION: It's on page 3 of the red --

QUESTION: Page 3 of the red brief.



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MS. YOUNG: Yes.

QUESTION: Of the red brief, okay.

MS. YOUNG: And it starts out a claim -- or, I'm sorry. I need to go to -- yes. A claim presented. That's right, (b)(2), a claim presented in a second or successive application under 22 -- that was not presented -- we have a claim that was not presentable, so that's number 1.

Then number 2, getting to your question, is what they were looking at here was facts that had not been discovered before. We have a claim that was legally impossible to have brought before --

QUESTION: Well, I --

MS. YOUNG: -- not facts.

QUESTION: You're mistaking my point. I mean, my point is not that -- you know, that it technically applies to you. My point is simply that it shows the willingness of Congress to contemplate a situation in which a claim could not possibly have been brought any sooner but which nevertheless the Federal court is supposed to reject.

I mean, I'm not saying that this text necessarily applies to this case. I'm just saying that it shows a mentality on the part of Congress which your premise contradicts. You're saying Congress couldn't have

intended something that couldn't have been brought up until now to be -- you know, to be rejected, yet that provision clearly envisions some situations where that will happen.

MS. YOUNG: And that situation, it seems to me, that Congress envisioned was a petitioner, the same petitioner coming back and attacking the same judgment. That's what Congress was looking at, was going after in these cases.

They wanted to stop relitigation by same petitioners attacking the same judgment and, as this Court said in Felker, we're going to approve this restriction for those kinds of successive, truly successive petitions. That's what that's looking at. This isn't a successive petition.

We are going to restrict that, and that will be a modified res judicata.

QUESTION: Well, I do think it's significant, and don't you think it's significant that this whole new legislation does not mention the magic word successive, you know, which had been the buzz word for our prior jurisprudence. It seems to me they're trying to get away from it.

MS. YOUNG: They do mention successive, Your Honor.



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QUESTION: I mean --

QUESTION: Abusive.

QUESTION: -- abuse of the writ, and our whole prior case law concerning that. The cases you're referring to are all done under that. It tries to get away from that and it just says second or successive.

MS. YOUNG: I believe this Court looked at that in Felker and said this is a modification on the abuse of the writ doctrine, so I think this is -- I agree, it goes far beyond what the abuse of the writ doctrine was before under McCleskey, which was --

QUESTION: No, but you have -- may I interrupt you just with this question, because I'm going astray here.

Haven't you also argued in effect that we distinguish between abusive petitions and successive petitions under the old rule, and you're saying -- I thought you were saying that under the old rule there was at least facially an argument that a Ford claim would be successive, but it wasn't treated as successive by the lower courts and, in fact, your opposing counsel agree on that point, at least.

So I thought your argument was, they're using the same term -- when they say second or successive they're using the same term that was used before and

because that term did not, under the old law, comprehend a Ford claim, you don't have to read it and, indeed, shouldn't read it to comprehend a Ford claim here. Isn't --

MS. YOUNG: Yes. Yes.

QUESTION: Okay.

MS. YOUNG: That's true, and the --

QUESTION: Of course, it doesn't have to be a successive petition. It only has to be a second petition. It does say second or successive petition.

MS. YOUNG: Yes. As that language is understood in the abuse of the writ doctrine, that's a term of art.

QUESTION: Oh, you think second or successive means second, comma, that is to say, comma, successive?

MS. YOUNG: I --

QUESTION: Second or in other words successive?

MS. YOUNG: I think it means that it was a claim that was presentable in a prior petition. That's the -- the term of art has been in the abuse of the writ doctrine, second or successive, all along. That's not new.

QUESTION: So you read the statute as if it read, a claim presented in a second or successive application, paren, assuming it was then presentable, close paren?

MS. YOUNG: I believe that's read into it by saying, a claim presented, which by its terms doesn't include a claim that was never presentable.

QUESTION: Presentable doesn't work, because you could easily have new evidence discovered related to the trial, you know, and it wasn't discovered until November, and by that time the person has filed 13 petitions, and clearly that falls within (b)(2).

You know, that's the kind of --

MS. YOUNG: That would --

QUESTION: -- thing you can do only under certain circumstances, yet it wasn't presentable earlier because you never had the new evidence earlier, or the Brady material early, so it must have to do with the nature of the word claim.

It must mean to include certain kinds of claims but not mean those kinds of claims that, by their very nature, having nothing to do with the trial or the process, could only have arisen later.

MS. YOUNG: Yes.

QUESTION: In principle. But what's the form of words that captures what I just said?

MS. YOUNG: Again, the best that I can do, Your Honor, is to say that what they were talking about here when they were -- when they use those words, a claim

presented, is that it was something that the -- that could have been presented. It was that the --

QUESTION: You'd say in principle or something.

MS. YOUNG: That -- pardon?

QUESTION: The kind of claim that was in principle presentable earlier but not the kind -- even though this one couldn't have been, a Brady claim is the kind that in principle could be --

MS. YOUNG: Yes, and --

QUESTION: -- presented earlier.

MS. YOUNG: Yes.

QUESTION: A Ford claim is not the kind that in principle could have been presented earlier.

MS. YOUNG: Yes, that's right.

QUESTION: So then you say it's not a claim, or that it's not successive? I thought your argument would be that it's not successive because successive obviously is a comparative term, successive in comparison to what --

MS. YOUNG: Yes.

QUESTION: -- in -- compared to a claim that could have been presented.

MS. YOUNG: Well, in here what we're looking at is second or successive to what, and we have a completely different judgment. Our judgment is a -- is the first judgment that we are now challenging, the judgment of the

Arizona supreme court that Mr. Martinez-Villareal is to be executed while he is incompetent. That is our challenge, and that --

QUESTION: And what makes you even in a better position, I suppose, than the person who brings a first petition and says -- in the Federal court and says, go away, you haven't exhausted, comes back with a number 2, but it's not successive because there was no adjudication of the first one, but still that is going to -- that is going to the original conviction and sentence.

Here you say, not only are we the same as the exhaustion person, but we have a new target. We're not really aiming at the conviction, original conviction at all.

MS. YOUNG: That's exactly right. That is exactly right. We are -- the Ninth Circuit below analyzed our case to those exhaustion cases, but you're right, we're better than those exhaustion cases, because this is an entirely different judgment and in those cases they were attacking the same judgment.

QUESTION: Well, can you tell me, won't there be cases -- maybe this case as well -- in which the evidence of the incompetency, the symptoms, the clinical manifestations of the mental disturbance were apparent as of the time of the first petition?

MS. YOUNG: Yes.

QUESTION: They might not have been as aggravated, but they were apparent ones.

Aren't we going to have a number of cases in which the contention is, is that this could have been litigated when the first claims were -- when the other claims were litigated early, early on?

MS. YOUNG: I think that that's going to have to be something that the district court, which is something typical that district courts do, will need to decide, but that's right, there are those type of cases where the evidence would be so apparent that counsel is under an obligation to raise that, and the mental illness is such that's not going to change.

QUESTION: So you acknowledge that there will be then some litigation over whether or not this particular competence claim should have been brought earlier.

MS. YOUNG: I think that's true. I think that kind of delay, if, in fact, there is -- if, in fact, there's a question that this claim should have been brought earlier and we could have ended all of the litigation, if all we're talking about is whether this person is too incompetent to be executed --

QUESTION: Now I'm beginning to lose you, because I thought that the problem here is that you



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couldn't bring it up earlier because it wouldn't be ripe until the date of execution is set.

MS. YOUNG: I --

QUESTION: Because there's always hope that somebody will, maybe through a miracle, be cured.

MS. YOUNG: And that's right. I'm sorry, Your Honor, I don't mean to be confusing, but what I'm saying is, I think there are some circumstances where, if the attorney raises the claim in the first petition, the district court can then take a look at it and say, I've looked at what you've brought me and this petitioner is clearly incompetent, he's clearly very mentally ill, and he's never going to get any better, I don't see any reason to delay this.

The other situation where it could come up where it would no longer be premature would be the situation if a petitioner came in with various claims besides his incompetency to be executed under a warrant of execution and the district court said, I don't find any of your other claims meritorious.

QUESTION: Well, what if it were a claim, not for lack of competency, but that the Arizona clemency proceeding which he had applied to denied him due process in some way, would that, too, be raisable at this point?

It's really -- it's not an attack on the

judgment. You're --

MS. YOUNG: I would think that would probably be a better claim to be raised in a 1983 than in a 2254, the clemency attack.

QUESTION: You don't think -- you think it could be raised in 1983 rather than habeas?

MS. YOUNG: Yes, I would think so, because that's what their -- they would be attack -- I guess you could go under either a 2241 or a 1983.

QUESTION: Well, that -- now, that's supposed to be impossible, I thought.

MS. YOUNG: Oh.

QUESTION: That you couldn't -- you could not do both.

MS. YOUNG: I have -- I am not sure. It just -- it strikes me, the way that you were describing it, that that would probably be a claim that would be brought under 1983 rather than under 22 -- rather than under habeas.

Now, as we've been talking about there's two different reasons for the correctness of the court of appeals decision below, and one is that this is not a second or successive petition because there was no first one challenging the same judgment, and the constitutional violation, as the State of Arizona said in the first proceeding, had not occurred and didn't occur until the

execution warrant issued, and that is the separate judgment.

The other grounds on which the court of appeals was correct as well, however, was that this was a claim that was dismissed without prejudice, and at that point everybody knew that Mr. Martinez-Villareal was going to come back and, as we've talked about, those claims are -- this claim was -- is analogous to the exhaustion claims where there is some impediment to a determination and here is absolutely nothing in any of the congressional history that supports Congress' intent to not allow a petitioner to bring at the first opportunity to have this claim litigated.

There's nothing that says that Congress intended to stop that. In fact, what Congress was getting at, as we talked about, was relitigation, but they were wanting to ensure that every petitioner had one bite at the apple. Those are the key phrases when you go through all of the legislative history that you see, and so we also --

QUESTION: Again, that is simply not compatible with 2244(b)(2)(B).

MS. YOUNG: And I --

QUESTION: In some cases under (b)(2)(B) you're not going to have a first bite at the apple.

MS. YOUNG: If you're attacking the same

judgment and it's -- again, I think what they are trying to get at there is, they are concerned about delay, and what they're telling lawyers, you better take a look at this. We are encouraging you, you better get out there, you better investigate, you better bring all your facts to us and discover all your claims the first time.

QUESTION: Well, it --

QUESTION: It doesn't have it. It says under (b)(2), even if you have been diligent and there are some things that only come up later and you couldn't have brought it earlier, nonetheless we're not always going to let you come in here. Sometimes we're not even going to give you that first bite.

MS. YOUNG: And I will say I think that some -- some -- but it's not this case, but I think the case that may be in front of you at some point, that you're going to have to decide whether that's constitutional.

QUESTION: Well, but it makes it hard for you to argue that Congress always wanted people to have one bite in Federal court. It clearly excludes the first bite in Federal court in some situations.

Now, whether that's constitutional or not is a different issue, but I think your positing of this congressional everybody-gets-one-bite intention is simply contrary to the text of the statute.



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MS. YOUNG: That's true on the same judgment, and as I said, it's --

QUESTION: Well, I'm not sure it's even true there. Isn't what they've done is just make that a lot harder bite to make? I mean, they haven't totally excluded the claim if the applicant can prove actual innocence and a new law, or newly discovered facts. He's not -- he gets the one shot at it.

MS. YOUNG: That's right, and that's why it's still -- the abuse of the writ is still in here, but it's very, very restricted. You need --

QUESTION: It may be a claim that doesn't go to --

MS. YOUNG: -- you have to meet these conditions.

QUESTION: It doesn't go to innocence at all. It may be a claim that goes to the manner of punishment. It may be the claim that goes to many other things.

MS. YOUNG: That's -- this Court, of course, hasn't decided whether it includes a claim that goes to punishment or not under Sawyer v. Whitley and the miscarriage of justice --

QUESTION: I'm not sure it's helpful to say it's an attack on a different judgment. A State habeas court could, for the third time, reject ineffective assistance



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of counsel claim. We wouldn't say, oh, this is a new judgment.

MS. YOUNG: No, because --

QUESTION: And so I don't think that gets us very far.

MS. YOUNG: Well, that's because, Your Honor, that judgment is still attacking the judgment of guilt and the sentence. That's not what we are attacking. We are not attacking -- in your hypothetical that's what it would be. You're saying that there's an ineffective claim being raised for the third time by the -- in State post conviction, for example.

Well, that constitutional violation is again attacking the same judgment of conviction and sentence. That's not what we're attacking here at all. We are attacking the judgment of the Arizona supreme court that they are to execute -- they're going to take Mr. Martinez-Villareal out of his cell and execute him on this date while he's incompetent.

QUESTION: Well, that's not a new judgment. That's just an order that the earlier judgment of the trial court imposing the death penalty be enforced.

MS. YOUNG: It's a new constitutional -- the constitutional violation, that's when it occurs for the first time, is based on that order, based on that

judgment. That's when the constitutional violation arises, and that --

QUESTION: Well, maybe this is the kind of claim that should be raised in a section 1983 action, not habeas at all.

MS. YOUNG: Well, Ford disagrees with that. This Court in Ford found that habeas was the proper place to raise it, and there's no question in my mind that there is custody here when there is an order that's going to take someone from their cell over to another place and execute them. They are being held in custody in violation of the Eighth Amendment.

QUESTION: Well, but you're not asking that he be released from custody, just that he not be executed.

MS. YOUNG: That's true, and it's there -- pardon?

QUESTION: Temporarily.

MS. YOUNG: And that's very similar, Your Honor, to the challenges made to death sentences in cases all the time. You're not asking that the petitioner be released from custody. You're asking that the death sentence be set aside. That's no different than this case.

The other point I also --

QUESTION: I think it is, because you're not asking that the penalty be changed, just that it be

postponed.

MS. YOUNG: Yes, that's true. Yes, that's absolutely true, there is that distinction, but again, custody arises as a result of this new violation to execute him at that point, and it seems to me very analogous to those cases.

The other point I wanted to make, and it's -- would -- it's a point that would allow this Court to decide this case on the most narrowest of grounds, and that's waiver based on the State's action in this case, in which they were the ones who asked for multiple proceedings, in which they were the ones who asked that the district court, who told the district court and assured the district court and the Ninth Circuit that they --

QUESTION: Well, Ms. Young, ordinarily we grant certiorari to decide what we regard as an important question of law, often because of a split between courts of appeals. If we decided this case on the basis of waiver, we'd decide just this -- it would just be error correction in this case.

MS. YOUNG: Yes. I was just offering you the opportunity that if you -- if --

QUESTION: If that's correct, perhaps we never should have granted certiorari.



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MS. YOUNG: And I agree with that. I couldn't agree with that more.

QUESTION: Well, I'm sure it's still available to you to argue that even if we disagree with you on the important question that we took the case to decide, we should remand to let the court of appeals consider whether a waiver would produce the same result. I presume that's what you would urge upon us.

MS. YOUNG: Yes. We -- I -- but again, I believe this Court, if you are going to reach this case and decide this case, it should affirm the court of --

QUESTION: Ms. Young, may I ask you another hypothetical about your definition of presentable and presented and so forth and so on?

MS. YOUNG: Yes.

QUESTION: Suppose a person on death row who has never filed any habeas corpus petition files one that contains nothing but an exhausted Ford claim and the district court says, there's merit to the claim, quash this death warrant, postpone the execution, and they do that, and with no change in facts whatsoever the same man comes back -- they issue a new death warrant 10 days later. Could -- and without any change in physical condition or mental condition. Could the man come back without filing a successive habeas?

MS. YOUNG: Now, in the first -- I'm sorry, I need to -- in the first --

QUESTION: He won the first time.

MS. YOUNG: He won it, can he come back in the second one?

QUESTION: Can he come back 30 days later if they try to execute him without any change in his condition?

MS. YOUNG: Oh, without any change in his condition?

QUESTION: Yes.

MS. YOUNG: And raise claims other than his competency?

QUESTION: No, raise the same claim.

MS. YOUNG: Well, I assume he could come back and try, but he certainly would have a huge burden to overcome, because -- oh -- oh, without any change.

QUESTION: Yes.

MS. YOUNG: I'm sorry. I misunderstood you.

QUESTION: In other words, he would have won on --

MS. YOUNG: Yes.

QUESTION: It's clear he would win on the merits.

MS. YOUNG: So they found him incompetent --

QUESTION: But he can't establish innocence. He can't meet the -- would that be a claim that was -- that was presentable, too.

MS. YOUNG: Yes, he could --

QUESTION: He presented it and he won.

MS. YOUNG: He could come back, because again there would have been a new judgment, the execution warrant saying that now we're going to go execute you, and as we've been talking about, it's that piece of paper that would allow him to come back in and not be a second or successive --

QUESTION: Well, I know, but --

QUESTION: I agree with Justice Kennedy's point. I -- to say you're attacking the warrant rather than the judgment, it seems like something out of the 1800's, really.

MS. YOUNG: It is something sort of out of the 1800's. It's kind of an executive detention sort of thing, and that's right, but that is what we're challenging, because that's when the constitutional violation arises, when the State seeks to execute somebody who is incompetent.

QUESTION: In Justice Stevens' case, would it be fair to say that he doesn't have to bring a new habeas petition at all, all he needs to do is bring a petition to



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enforce the judgment that he already has, since that judgment covers what the State now proposes to do? Could he do that?

MS. YOUNG: Yes, he could.

Now, some States have laws that say that if someone -- for example, as Arizona, if someone is found incompetent to be executed they're taken to a mental hospital and in 30 days their competency is reassessed, so if they had their competency reassessed and they say, now he's competent, we're going forward, those -- that is a situation where, under Justice Stevens' hypothetical, that person could come back in and challenge it and say --

QUESTION: Well, but wouldn't you take the position that in that circumstance the State has the burden to come in, to come forward and vacate the judgment that the court had already -- and ask for a vacation of the judgment that the court had already rendered and until it did that, you wouldn't bring new habeas.

MS. YOUNG: No.

QUESTION: You'd just say, enforce what we've got.

MS. YOUNG: That's right, yes. If there's still a stay of execution in force then the State wouldn't have -- would -- well, I wouldn't think the State would have any authority to go forward and issue a new warrant



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if that was still in force.

I was unclear whether the stay of execution was still in force, but yes, if you have a judgment of incompetency that would make complete sense to me.

QUESTION: Are you going to stand by your argument that this Court has no jurisdiction, the one that you made last instead of first?

First you tell us it's not second or successive within the meaning of the act for that purpose, but then for purposes of our review you say it is. That's how I read your --

MS. YOUNG: Well, Your Honor, what we -- what we are saying at this -- that (b)(3)(E) is getting at is telling this -- is Congress telling this Court that they don't want you messing around with the authorization decisions no matter what the result is, that those are proceedings that they don't want to have delay from. They want to expedite the proceedings whether they -- the court decides that --

QUESTION: If we're getting to the purpose of Congress, I thought it was your theory that this was not a successive --

MS. YOUNG: It is.

QUESTION: Therefore, we have ordinary certiorari jurisdiction under your view.



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MS. YOUNG: Yes. That --

QUESTION: Only if you say -- go the other way do we not have jurisdiction.

MS. YOUNG: That's -- that's true, but I'm also offering you another way of looking at that statute, which is that any gatekeeper decision, which is what this was -- it was a gatekeeper decision saying, you didn't need to come here, by the way, that any gatekeeper decision, Congress is saying that this Court does not have cert jurisdiction over.

But you're right, as well, though, if you don't decide that, if you don't construe the statute in that way, then that's right. There would -- you would have cert jurisdiction.

QUESTION: Well, it seems to me that both for the merits issue and the jurisdictional issue the first thing we've got to decide is whether it's a second or successive petition within the meaning of the act.

MS. YOUNG: It --

QUESTION: And you just take the position it isn't, he takes the position it is.

MS. YOUNG: Except that I believe that this statute can be read, the jurisdictional portion of the statute can be read to say it covers any authorization decision made by the court of appeals, that this Court is

to stay out of that, because they want to expedite the procedure.

It doesn't mean you're not going to get to hear that claim eventually. You are. You could get review later.

QUESTION: I don't know why you make that argument, because if you're right on the other argument you're going to win on the merits, too.

MS. YOUNG: Then I will stick with the argument that you have just -- that's fine. I will -- I'm just telling you that's another way of taking a look at it.

Thank you.

QUESTION: Thank you, Ms. Young.

Mr. Ferg, you have a minute remaining.

REBUTTAL ARGUMENT OF BRUCE M. FERG

ON BEHALF OF THE PETITIONERS

MR. FERG: Very briefly, Your Honor, as Ms. Young's argument conceded and as -- similar to what her brief was, this case hinges to some degree on whether or not successive in the current statute has the same meaning, the same term of art that it was before, and I want to show you that it does not.

In Kuhlman v. Wilson, going back all the way to Sanders, this Court said that a successive petition raises grounds identical to those raised and rejected on the

merits in a prior application.

Here, we look at 2244(b)(2) that says that a claim presented in a second or successive habeas corpus application that was not presented, therefore it is plain that Congress was using second or successive in a form and meaning entirely different from this term of art that you had in Kuhlman v. Wilson.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ferg.

The case is submitted.

(Whereupon, at 12:12 p.m., the case in the above-entitled matter was submitted.)



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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

TERRY STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., Petitioners v. RAMON MARTINEZ-VILLAREAL
CASE NO: 97-300

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)