IN THE UNITED STATES DISTRICT COURT
FOR MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT GLEN COE,	)	
	)	
Petitioner,	)	
	)	Case No. 3:92-0180
v.	)	(Senior Judge Nixon)
	)	
RICKY BELL, Warden,	)	
	)	
Respondent.	)	

SUPPLEMENTAL BRIEF

Pursuant to this Court's order (Doc. No. 447) requiring the parties to brief four additional issues, the respondent submits the following supplemental brief.

1. Following the entry of the final judgment and the exhaustion of the federal appellate review process, this Court is without jurisdiction to grant Coe leave to amend his original habeas petition to include claims on the constituttionality of electrocution and present incompetency to be executed.

Rule 15, Fed.R.Civ.P., governs amended and supplemental pleadings. Rule 15(a) provides:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an

> amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Although this rule vests the district court with discretion to grant leave to amend when "justice so requires," the exercise of this discretion is not unlimited. *See generally* Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1489, pp. 692-700 (1990). And a district court's jurisdiction in this regard is severely limited once an appeal is taken.

It is well-settled that "[o]nce an appeal has been taken from the judgment, the district court no longer has jurisdiction over the case and cannot reopen the judgment to allow an amendment to be made." *Id.*, p. 697. After the appeal is concluded, there appear to be only three exceptions to this rule: where the court of appeals determines that the district court impliedly tried the case on a theory not set forth in the pleadings, it may permit a conforming amendment, *id.*, p. 698; where the court of appeals decides that the district court abused its discretion in refusing to allow an amendment (or did not give a party a sufficient opportunity to cure defects in a pleading), it may remand the case with directions to allow an amendment, *O'Quinn v. Manuel*, 773 F.2d 605, 610 n. 8 (5th Cir. 1985); or where the court of appeals has remanded the case for further proceedings not inconsistent with its opinion, amendment may be permitted if such action is not inconsistent with the appellate court's judgment, *Jones v. St. Paul Fire & Marine Ins. Co.*, 108 F.2d 123, 125 (5th Cir. 1939).

If the appellate court's judgment neither specifically permits amendment on remand nor impliedly permits amendment by its remand for further proceedings not inconsistent with the opinion, the district court is without jurisdiction to allow amendment. In *United States Fidelity & Guaranty Co. v. Perkins*, 388 F.2d 771 (10th Cir. 1968), U.S.F. & G. had previously appealed a district court's order dismissing its complaint. The court of appeals had affirmed the dismissal on February 10, 1967, and its mandate issued thereafter. On February 27, U.S.F. & G. moved the district court for leave to amend under Rule 15, Fed.R.Civ.P. The district court denied leave to amend. The court of appeals affirmed, noting that to allow such amendments after appeal

> would serve to encourage frivolous appeals and leave the appellate judgment to serve as little more than an educational sounding board. Here, appellant moved to amend its pleading on February 27 at which time jurisdiction in the case rested solely in this court. When this court's mandate issued without specific leave to amend, the judgment of dismissal became final. Rule 15 motions were not entertainable, and the trial court properly recognized the imperative of the mandate.

388 F.2d at 772-773 (citations omitted).

Similarly, in *Marcum v. Dahl*, 535 F.Supp. 48 (W.D. Okla. 1981), following the court of appeals' affirmance of the district court's final judgment dismissing the plaintiff's complaint, the defendants moved the district court for an award of attorneys' fees and expenses incurred on appeal. The district court denied the motion, stating:

> This Judgment [of the court of appeals] does not provide for appellate attorney fees and expenses nor does it direct this

> Court to ascertain and award the same. An award of attorneys' fees and expenses by this Court as requested by the Motion under consideration would be an amendment to or alteration of the Judgment of the Court of Appeals and not the Judgment of this Court. Only the Court of Appeals may amend or alter its Judgment. This Court does not enjoy this privilege.

535 F.Supp. at 49.

In *DuBuit v. Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1975), the district court awarded attorneys' fees after affirmance by the court of appeals, where the judgment of the court of appeals was silent on the issue. In reversing the district court, the court of appeals left no doubt about the district court's lack of jurisdiction:

> Further jurisdiction of the district court, if any, was dependent upon the terms of the appellate mandate, and when we affirmed the final judgment this put an end to the litigation and the district court had no authority to reopen the case for the consideration of attorney fees or any other purpose.

540 F.2d at 693, citing *Durant v. Essex Company*, 101 U.S. 555 (1879)("After the appeal had been taken, the power of the court below over its own decree was gone. All it could do after that was to obey [the Supreme Court's] mandate when it was sent down.")

In this case, the November 16, 1998, judgment of the court of appeals reads:

> . . . it is ORDERED that the judgment of the district court as to the grant of habeas corpus relief is REVERSED. IT IS FURTHER ORDERED that the judgment insofar as it denied relief is AFFIRMED. Therefore, the award to petitioner Robert Glen Coe of habeas corpus relief is

REVERSED.[1]

This judgment does not specifically permit any amendments to the petition; nor does it remand the case for any further proceedings. If the Sixth Circuit's intent were not clear from the judgment itself, the court of appeals' opinion affirming this Court's denial of Coe's leave to amend the petition to include, *inter alia*, a claim that execution by electrocution is unconstitutional, *Coe v. Bell*, 161 F.3d 320, 341-342 (6th Cir. 1998), makes the court of appeals' intent abundantly clear. *See, e.g., In the Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1337 (9th Cir. 1984)(where party had specifically requested court of appeals to direct lower court to allow amendment of pleadings, and court of appeals denied the petition, court of appeals' intent was clear).[2]

The court of appeals' judgment in this case put an end to the litigation. There is nothing left for this Court to do but execute the mandate of the court of appeals. Therefore, following this Court's final judgment and the exhaustion of the federal appellate review process, this Court does not now have jurisdiction to grant petitioner

[1]Following the denial of a petition for rehearing and suggestion for a rehearing en banc, the mandate in this case issued on October 12, 1999.

[2]Coe's reliance on *The Dartmouth Review v. Dartmouth College*, 889 F.2d 13 (1st Cir. 1989), and *Jarvis v. Regan*, 833 F.2d 149 (9th Cir. 1987), for the proposition that this Court may now grant him leave to amend, is misplaced. *The Dartmouth Review* merely recognized a *court of appeals'* authority to allow an amendment of the complaint following appeal. 889 F.2d at 22-23. (The court of appeals refused.) *Jarvis* merely discussed a district court's authority to grant leave to amend after judgment but *before appeal*. 883 F.2d at 154-155. Neither supports the proposition that a district court possesses any authority to allow an amendment *after appeal* absent express or implied permission from the court of appeals.

leave to amend his original habeas petition to include his electrocution and *Ford* claims or any other claim.

2. Coe's request for reconsideration of his challenge to the constitutionality of electrocution as a method of execution is barred as a second or successive habeas petition.

This Court also lacks jurisdiction to reconsider Coe's claim that electrocution constitutes cruel and unusual punishment because his request for such reconsideration is a second or successive habeas petition. 28 U.S.C. § 2244(b)(1), provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Pursuant to 28 U.S.C. § 2244(b)(3), this Court is without jurisdiction to entertain Coe's request until and unless the Court of Appeals for the Sixth Circuit grants him permission to present this claim to the district court a second time. *In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997), *cert. denied*, 521 U.S. 1130 (1997).

Coe previously presented his constitutionality of electrocution claim when he moved this Court for leave to amend his petition to include such a claim. The Court denied his motion, deeming the claim frivolous. Accordingly, the clear provisions of 28 U.S.C. § 2244(b)(1) would require its dismissal. *Felker v. Turpin*, 101 F.3d 95, 97 (11th Cir. 1996), *cert. denied*, 519 U.S. 989 (1996). *See also Wainwright v. Norris*, 121 F.3d 339, 340 (8th Cir. 1997)(claim need only have been presented to Court, not adjudicated, to be barred as second or successive application). Even if it could be said that Coe did not

"present" the claim earlier, he has already litigated a §2254 petition to finality. By presenting a "new" claim now, he is making a second or successive application under §2254. But such an application is plainly barred under §2254(b)(2) unless he can satisfy the requirements of §2254(b)(2)(A) or (B). He cannot do so. His electrocution claim is not a new rule of constitutional law under (A); nor can it be said that the factual predicate for the claim could not have been discovered through due diligence *and* that the facts surrounding that claim establish his innocence of the murder, under (B).

Coe, however, seeks to avoid the proscriptions of the AEDPA by couching his renewed claim as a request for reconsideration of the Court's earlier decision. Regardless of the method by which he seeks to raise the issue, though, Coe again looks to present a challenge to the legality of his sentence -- the same challenge that was previously presented and rejected by this Court. Such a challenge is properly construed as a petition for habeas corpus, subject to the rules regulating second or successive habeas petitions. *In re Sapp*, *supra*, at 462, 464. In *Sapp*, the Court of Appeals for the Sixth Circuit considered a convicted murderer's filing of 42 U.S.C. § 1983 action, in which he similarly claimed that his impending execution by electrocution constituted cruel and unusual punishment. A federal habeas petition previously filed by the prisoner had been denied, and the denial affirmed on appeal.[5] Applying the rules under 28 U.S.C. § 2244(b)(3) regulating second or successive habeas petitions, the Court of Appeals held

[5]Although not material to the court's decision, the prior habeas petition did not include the constitutionality of electrocution claim. *See McQueen v. Scroggy*, 99 F.3d 1302, 1334 (6th Cir. 1996).

that the district court "[had] no jurisdiction to consider the case." *Id.*, at 464. In so holding, and following the "clear holding" of the United States Supreme Court in *Gomez v. District Court*, 503 U.S. 653 (1992), the court stated: "[A] challenge to a method of execution, whatever denominated (Rule 60(b), ... § 1983, or otherwise) is to be treated as a habeas petition." *Id.* at 464. *See also Williams v. Hopkins*, 130 F.3d 333, 336 (8th Cir. 1997), *cert. denied*, 522 U.S. 1010 (1997), *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997), *cert. denied*, 520 U.S. 1203 (1997) and *Felker v. Turpin*, *supra*, 101 F.3d, at 96 (§1983 claim that electrocution constitutes cruel and unusual punishment is "functional equivalent" of a second habeas petition subject to the rules restricting successive petitions).

In addition, agreement exists among the appellate courts that post-judgment motions for relief in the district court are second or successive applications for the purposes of the AEDPA. *Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997). "Otherwise, the statute would be ineffectual." *Id.* Here, as in *Burris*, "[i]nstead of meeting the requirements of § 2244(b), [Coe] would restyle his request as a motion for reconsideration in the initial collateral attack and proceed as if the AEDPA did not exist." *Id.* This he is not entitled to do. *See Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 556 (1998) and *Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996)(motions for relief from judgment cannot be used to circumvent restraints on successive habeas petitions); *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th

Cir. 1996)(Rule 60(b)motion to amend habeas petition is practical equivalent of successive habeas petition). *See also United States v. Rich*, 141 F.3d 550, 553 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1156 (1999)(motion for reconsideration of denial of first §2255 motion treated as successive §2255 motion subject to statutory restrictions). The two cases relied upon by Coe for the proposition that a court may grant leave to amend, post-judgment, *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 23 (1st Cir. 1989); *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987), are inapposite, as they do not involve habeas corpus petitions and, thus, do not implicate 28 U.S.C. § 2244(b).

Coe's request for reconsideration of his attack on the constitutionality of electrocution is the functional equivalent of a second or successive habeas petition. Following denial of his previous motion for leave to amend, and appeal and affirmance of that decision, he now looks to obtain the "second bite of the apple" that enactment of the AEDPA was designed to prohibit. Pursuant to 28 U.S.C. § 2244(b)(3), this Court has no jurisdiction to consider his request.

3. Coe's *Ford* claim is barred as a second or successive habeas petition.

Should the petitioner seek to raise a *Ford* claim now that his habeas petition has been litigated to its conclusion, it is barred as a successive petition under the plain language of the statutes. 28 U.S.C. §2244(b)(2) now provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by 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.

A *Ford* claim advanced by Coe would meet none of the exceptions set out in the statute. First, *Ford* was decided in 1986. Accordingly, it is not "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Such a claim would not meet the first exception.

The second exception also cannot provide petitioner with relief. As petitioner has repeatedly pointed out, there has been evidence of his alleged mental impairments for years preceding the commission of the murder which led to this death sentence. In his habeas petition as amended in 1994 and 1996, he challenged trial counsel's failure to adequately present an insanity defense. This Court determined that his claim was without merit based upon a review of the trial record and the psychological testimony and reports offered during the evidentiary hearing. Accordingly, it cannot be said that the factual predicate for a *Ford* claim is newly arisen, since the factual predicate--Coe's alleged mental illness--has been of record for many years.

The final factor is also inapplicable. Even if petitioner has a valid *Ford* claim, it

obviously does not establish his innocence of the murder of Cary Medlin.

The only United States Supreme Court case to address the applicability of 28 U.S.C.§2244(b) to *Ford* claims is *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998).[4] In *Martinez-Villareal*, the petitioner had filed three habeas petitions which were dismissed for failure to exhaust State remedies. He then filed a fourth petition which included a *Ford* claim. The district court dismissed the *Ford* claim as premature but granted the writ on other grounds. The Ninth Circuit reversed the grant of the writ, but explained that "[o]ur instruction to enter judgment denying the petition is not intended to affect any later litigation of [the competency to be executed] question." *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1309 n.1 (9th Cir. 1996). When Martinez-Villareal attempted to raise his *Ford* claim in a subsequent proceeding, the district court denied relief under 28 U.S.C. §2244.

The Ninth Circuit reversed the holding of the district court, finding that the "gatekeeping" procedures did not apply to the *Ford* claim in that instance. Their holding, however, was based upon the fact that Martinez-Villarealhad presented his *Ford* claim, albeit prematurely, in his initial petition. The court extended its holding in *In re Turner*, 101 F.3d 1323 (9th Cir. 1996)(petitions refiled after dismissal for lack of

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[4]The Supreme Court recently granted review in *Slack v. McDaniel*, _US_, 119S.Ct.1025 (1999), on whether in the case where a first petition is dismissed for failure to exhaust state remedies, remedies are then exhausted, and a second petition containing additional claims is filed, those additional claims constitute a second or successive petition. Of course, Slack is readily distinguishable from Coe's situation since Coe's first petition was not dismissed on procedural grounds but rather was decided on the merits.

exhaustion are not barred by §2244) to encompass *Ford* claims stating,

> Under our holding, a competency claim *must* be raised in a first habeas petition, whereupon it also *must* be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution *and the state court considers* the now-ripe competency claim, a federal court may hear that claim -- and only that claim -- *because it was originally dismissed as premature* and therefore falls outside of the rubric of "second or successive" petitions.

Martinez-Villareal v. Stewart, 118 F.3d 628, 634 (9th Cir. 1997)(emphasis added).

On appeal, the United States Supreme Court likewise relied upon the fact that Martinez-Villareal had raised his *Ford* claim as a part of his previous habeas petition. The Supreme Court analogized Martinez-Villareal's claim to the situation where a habeas petition is dismissed for failure to exhaust, then filed again when exhaustion is satisfied. As the Court noted, "None of our cases expounding this doctrine has ever suggested that a prisoner. . .[by returning to federal court in this instance] was by such action filing a successive petition." *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1622. Recognizing that a *Ford* claim is dismissed as "premature" rather than for lack of exhaustion, the Court stated that "in both situations, the habeas petitioner does not receive an adjudication of his claim." *Id.*

The discussion and holding in *Martinez-Villareal*, in both the Ninth Circuit and the Supreme Court opinions, indicate that it was limited to the situation where a *Ford* claim was presented in the initial petition, dismissed as premature, then subsequently

presented when ripe. In fact, the Supreme Court specifically noted that it was *not* deciding the scenario presented in this case, where petitioner failed to assert a *Ford* claim in his original habeas petition and seeks to raise it for the first time in a successive proceeding. *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1622 n *.

Three Circuit Courts have addressed the present situation where a *Ford* claim is raised for the first time *after* an initial habeas petition has been filed and disposed of on the merits: *In re: Medina*, 109 F.3d 1556 (11th Cir. 1997), *cert. denied, sub nom Medina v. Singletary*, 520 U.S. 1151 (1997); *In re: Davis*, 121 F.3d 952 (5th Cir. 1997); and *Nguyen v. Gibson*, 162 F.3d 600 (10th Cir. 1998). In all three cases, the courts found that the petitioners' *Ford* claims were barred by 28 U.S.C. §2244(b). Although *Medina* and *Davis* were decided prior to the Supreme Court's decision in *Martinez-Villareal*, *Nguyen* was a subsequent decision.

In *Medina*, the Eleventh Circuit, applying the clear language of the statute, found that the *Ford* claim did not fall within the exceptions of §2244(b). *Medina*, 109 F.3d at 1564-65. The court further considered the question of whether such a bar would impermissibly deny a petitioner federal review of a *Ford* claim[5], and held that it would not, given the writ of certiorari and the possibility of seeking habeas relief through an original writ with the Supreme Court as discussed in question four, *infra*. *Medina*, 109

[5]The court began its analysis with the observation that, "It 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." *Medina*, 109 F.3d at 1564.

F.3d at 1564.

The Fifth Circuit likewise applied the plain meaning of §2244(b) to deny relief in *Davis*. The court discussed the Ninth Circuit's *Martinez-Villareal* opinion and found that it provided no relief for the petitioner in *Davis* because he had *not* included a *Ford* claim in his original habeas petition. Although Davis conceded that he could not satisfy §2244(b)(2)(B), he argued that his case did fall under §2244(b)(A), arguing that *Ford* should be considered "a 'new rule of constitutional law' because it is applicable for the 'first time' only when both the execution date is imminent and the petitioner is incompetent. [Davis stated] also that Ford was 'previously unavailable' to him because a Ford claim is premature until both an execution date is set and the applicant is incompetent." *Davis*, 121 F.2d at 955. The Fifth Circuit rejected that position, stating that a 1986 decision is not a new rule of constitutional law, and that while the *factual* basis of the claim may not have been previously available, the *legal* basis had been available since 1986. *Id.*

In *Nguyen*, the Tenth Circuit likewise distinguished the holding of *Martinez-Villareal* based on Nguyen's failure to raise a *Ford* claim in his first habeas petition. The court specifically pointed to the footnote in the opinion where the Supreme Court declined to address the scenario where no *Ford* claim was raised in the initial petition. *Nguyen*, 162 F.3d at 601. As did the Eleventh Circuit, the Tenth Circuit noted that federal review, if required, was available through certiorari or an original petition in the

Supreme Court. *Nguyen*, 162 F.3d at 602.

Thus, the only circuit courts of appeals to address the applicability of §2244(b)(2) to the present scenario have ruled adversely to petitioner.[6] As petitioner did not include a *Ford* claim in his first habeas petition, and since it has been disposed of on the merits, he is now barred by the prohibition of 28 U.S.C. §2244(b)(2) from bringing a *Ford* claim in this Court.

4. 28 U.S.C. §2254, not §2241, governs *Ford* claims; but because of the failure to exhaust state remedies and the §2254(b)(2) bar to second or successive petitions, Coe cannot now present his *Ford* claim to this Court.

In his dissenting opinion in *Stewart v. Martinez-Villareal*, 523 U.S. 637, ____, 118 S.Ct. 1618, 1625, n. 3 (1998), Justice Thomas pointed out the difficulty of considering *Ford* claims in the habeas context since a *Ford* claim does not challenge either the prisoner's underlying conviction or the legality of the sentence. But, the majority in *Martinez-Villareal* implicitly recognized a *Ford* claim as a §2254 claim, and federal courts have consistently examined *Ford* claims solely in the §2254 context. *See, e.g., Stewart*,

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[6] *But see Poland v. Stewart*, 41 F.Supp.2d 1037 (D. Arizona 1999)(holding that the reasoning of *Martinez-Villareal* would require an exception to §2244(b)(2) under the present circumstance). Respondent notes, however, that in *Poland*, the district court pointed to the fact that, according to the doctor whose affidavit supported the *Ford* claim, the factual basis for the claim had not arisen at the time of the first habeas petition. In this instance, as noted *supra*, petitioner's mental health has been an issue since before this murder was committed. In fact, in his Motion to Reconsider December 10, 1999 Order requiring supplemental Response and/or Supplemental Response to Motion to Set Execution Date filed in the Tennessee Supreme Court, petitioner relies upon findings from 1981 through 1996 in support of his *Ford* claim. [See copy attached] Although he attaches a 1999 letter from Dr. John Griffin which states that petitioner "suffers from a severe mental illness," that letter is based upon Dr. Griffin's review of records in 1994 and 1996, and a one and one quarter hour examination of petitioner conducted in 1994.

supra; *In re Davis*, 123 F.3d 952 (5th Cir. 1997); *Nguyen v. Gibson*, 162 F.3d 600 (10th Cir. 1998).

Whatever independent jurisdiction 28 U.S.C. §2241 may confer upon federal courts in other contexts, the United States Supreme Court made it clear in *Felker v. Turpin*, 518 U.S. 651, 662 (1996), that the authority "to grant habeas relief to state prisoners is limited by §2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to the judgment of a state court.'" Nothing in the language of *Felker* or the construction of Title 28 of the United States Code suggests that this limitation of §2241 by §2254 in habeas cases filed by state prisoners is confined to the United States Supreme Court and not applicable to the lower federal courts. In fact, *Ford* itself involved a §2254 claim. *See Ford v. Wainwright*, 477 U.S. 399 (1986); *In re Davis*, 123 F.3d 952, 955 (5th Cir. 1997).

Although dealing with a separate claim, the decision in *Greenawalt v. Stewart*, 105 F.3d 1287 (9th Cir. 1997), *cert. denied* 519 U.S. 1103 (1997), is instructive. Greenawalt had completed his state and federal court review. He then filed a habeas petition pursuant to 28 U.S.C. §2241, challenging the constitutionality of lethal injection as a method of execution. The United States Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the petition, finding that petitioner was clearly attempting to avoid the successive petition limitations on §2254 claims by filing his under §2241. *Id.* Since *Felker, supra*, had instructed that the authority of federal courts

to grant habeas relief to state prisoners under §2241 was limited by §2254, the petitioner's attempt to dodge the requirements of §2244(b) had to fail. His notice of appeal from the district court's didmissal was treated as an application for an order authorizing consideration of a successive petition pursuant to §2244(b)(3)(A), which was denied because he could not meet the criteria of §2244(b)(2). The same considerations apply to apeitioner's exhausted *Ford* claim.

Since petitioner's *Ford* claim is governed by §2254, the claim is subject to the statute's exhaustion requirement, just as any other habeas claim. 28 U.S.C. §2254(b)(1)(A). Accordingly, petitioner's *Ford* claim cannot yet be considered by any federal court because he has not followed Tennessee's procedures for litigating *Ford* claims.

Once petitioner has exhausted his state *Ford* remedies, he may attempt to present his *Ford* claim pursuant to 28 U.S.C. §2254. But, as explained in the response to this Court's third question, petitioner's *Ford* claim will be barred by the prohibitions against second or successive petitions, just as Greenawalt's lethal injection claim was barred. *Greenawalt, supra*, 105 F.3d at 1287-1288; 28 U.S.C. §2254 (b)(2).

Therefore, Coe's sole avenue for seeking relief in the federal courts on a properly exhausted *Ford* claim would be through an original habeas action in the United States Supreme Court pursuant to §2254. The United States Courts of Appeals for the Fifth, Tenth, and Eleventh Circuits have reached this conclusion. *In re Davis*, 121 F.3d 952,

956 (5th Cir. 1997); *In re Medina*, 109 F.3d 1556, 1564-1565 (11th Cir. 1997), *cert. denied*, 520 U.S. 1151 (1997); *Nguyen v. Gibson*, 162 F.3d 600, 602 (10th Cir. 1998).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been submitted via First-Class mail, postage prepaid, to Henry A. Martin, Esquire, and Paul R. Bottei, Esquire, Federal Public Defender's Office, 810 Broadway, Suite 200, Nashville, Tennessee 37203, and James H. Walker, Esquire, 601 Woodland Street, Nashville, Tennessee 37206, on this the 20th day of December, 1999.

Michael E. Moore

~~GLENN R. PRUDEN~~
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