NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 00-5419

FILED

APR - 4 2000

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT GLEN COE,	)	
	)	
Petitioner-Appellant,	)	**ON APPEAL FROM THE**
	)	UNITED STATES DISTRICT
v.	)	COURT FOR THE MIDDLE
	)	DISTRICT OF TENNESSEE
RICKY BELL, Warden,	)	
	)	
Respondent-Appellee.	)	**ORDER**

Before: BOGGS, NORRIS, and MOORE, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. Under 28 U.S.C. § 2251, a federal court "before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding." The Supreme Court has set forth guidelines for evaluating a stay of execution of the death penalty pending the appeal of a habeas corpus application. In accordance with 28 U.S.C. § 2253(c), the habeas applicant must obtain a certificate of appealability upon "'a substantial showing of the denial of a constitutional right.'" *See Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (stating that "a court of appeals is not required to address an appeal that fails to meet the certificate of probable cause standard of 'a 'substantial showing of the denial of a federal right.'") (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). A habeas applicant "must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal." *Barefoot*, 463 U.S. at 893. Accordingly, if

this court is not able to evaluate the habeas application on the merits before the scheduled execution, it must issue a stay pending the appeal "to prevent the case from becoming moot." *Id.* at 893-94; *see also Lonchar*, 517 U.S. at 320.[1]

In the present case, the district court denied Robert Glen Coe's habeas corpus application on March 29, 2000. On April 1, 2000, Coe filed in the district court a motion for a certificate of appealability, which was granted as to all issues on the same date. Coe then filed a notice of appeal to this court on April 1, 2000. On the evening of April 3, 2000, this court received Coe's brief in support of his appeal of the district court's denial of habeas relief and the state of Tennessee's response. We began receiving these documents, which totaled over 100 pages, via facsimile transmission, at 7:05 p.m. and were still receiving them up until 8:45 p.m. Coe's execution is scheduled for 1:00 a.m. on April 5, 2000. In granting Coe a certificate of appealability, the district court concluded that Coe has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c). This court then is obligated to decide the merits of Coe's appeal, which raises a number of different issues. Because it would be impossible to evaluate fully the merits of these claims before the scheduled April 5, 2000 execution, this court must issue a stay of execution to prevent Coe's appeal from becoming moot. The Supreme Court has stated, "[i]n a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the

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[1] In *Gomez v. United States District Court for the Northern District of California*, 503 U.S. 653, 654 (1992), the Supreme Court stated that "[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." The Court has limited its holding in *Gomez* to second or successive habeas applications. *See Lonchar*, 517 U.S. at 321. Because this court has previously concluded that Coe's habeas application raising his claim of incompetence to be executed pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986), is not a second or successive application, the *Gomez* holding is not applicable in this case.

issues presented in the case." *In re Blodgett*, 502 U.S. 236, 240 (1992); *see In re Parker*, 49 F.3d 204, 208 (6th Cir. 1995).

Accordingly, this court orders that Coe's execution be stayed pending our review of Coe's appeal. We will conduct an expedited review of Coe's appeal. We direct the district court judge immediately to transmit the district court record to this court. We further direct the parties to designate within 48 hours of the issuance of this stay order any particular portions of the record that they believe would be helpful for our review.

BOGGS, Circuit Judge, dissenting. Robert Glen Coe has moved for a stay of execution pending appeal to this court from the district court's denial, on March 29, 2000, of his petition for a writ of habeas corpus. His petition was not a true first habeas petition, but a successive one which we nevertheless permitted to be heard by the district court, because "[u]nder the unique circumstances" of this claim, under *Ford v. Wainwright*, 477 U.S. 399 (1986), that he is incompetent to be executed, "it would not be an abuse of the writ" to allow its filing. Coe also appeals from the decision of the district court that his claim is meritless, and argues that we should grant his motion for a stay in order to allow for consideration of his appeal. At this point, Coe's execution is scheduled for 1 AM CDT, April 5, 2000, less than twenty-four hours hence. A majority of this court has granted a stay of execution, pending further consideration of this appeal.

Were this an appeal from the dismissal of a first habeas petition, a stay would be required. *See Barefoot v. Estelle*, 463 U.S. 880 (1983). But it is not. We therefore should weigh the merits of granting a stay under the four-part equitable balancing test set out in *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (citing *Frisch's Restaurant, Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1263; *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985).

The four factors to be weighed are: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Ibid.* We also noted in *Griepentrog* that "[t]hese factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Ibid.*

We have no difficulty in finding that the second of the above factors, prejudice to Coe absent a stay, argues in favor of Coe's motion. We equally have no difficulty in finding that the fourth factor, the public interest, argues against it, unless Coe can show a likelihood of success on the merits. Could he do so, justice would clearly require that a stay be granted. But if not, justice calls for the sentence passed by the State of Tennessee, and affirmed through more than fifteen years of appeals, to be carried out. The public interest lies in a proper result under the Constitution and the laws of the United States and the State of Tennessee.

We therefore should look to the likelihood of success on the merits. The panel has been favored, in advance, with the filings in the district court below, and with Judge Trauger's thorough and persuasive opinion dismissing Coe's petition. We are thus well conversant with the substantive points argued by Coe, the responses of the state, and the district court's decision.

From an abundance of caution, and anticipating that the motion for a stay might be impending, we directed the parties to file by 6 PM on April 3, 2000, memoranda relevant to the merits of the appeal. A review of all of these documents makes it clear that Coe's appeal does not have a significant likelihood of success on the merits.

This case is a paradigmatic example of what a Supreme Court Justice has called, without favor, "the hydraulic pressure" of last-minute death penalty filings designed to invoke the limited jurisdiction

of the federal courts over criminal proceedings in state courts. *See Evans v. Bennett*, 440 U.S. 1301, 1307 (Rehnquist, Circuit Justice 1979).

Judge Trauger acted on Coe's habeas petition with commendable dispatch, and issued a ruling on March 29, three days before Coe's counsel filed a notice of appeal, five days before a motion for a stay was filed, and seven days before the date ultimately set for Coe's execution.

Even then, the actual merits of the appeal that might justify an exercise of discretion to stay the proceedings were not forthcoming until directed by this court. The late date of the filings was almost wholly within the control of Coe's counsel. By failing to raise competency in the first habeas; by delaying in filing the second habeas; by delaying in filing a notice of appeal and then delaying in filing a motion for a stay of execution; and by failing to file any material directed toward the merits of this appeal until instructed to do so by this court, Coe's counsel have created the need for delay to which the majority subscribes.

The assumption of Coe's counsel was that once a petition had reached federal district court, even on a collateral *Ford* claim, execution was impossible until, at a minimum, all appeals from that claim were exhausted. Thus, as foreseen in my dissents from last week's proceedings, Coe's counsel have succeeded brilliantly in obtaining at least an additional several weeks of delay after nearly two decades of proceedings. The majority's opinion appears to mean that any time a *Ford*-type claim is filed in district court, whether under AEDPA permission, pre-AEDPA surmounting of the "abuse of the writ" standard, or a determination that no permission is needed, petitioner will be entitled to automatic stays of execution under the same standards as *Barefoot* applies to true first habeas petitions. I disagree. We have instead stated that "what is necessary to support a stay is a strong and significant likelihood of

success on the merits . . . ." *In re Sapp*, 118 F.3d 460, 465. I am satisfied that this appeal does not meet that standard.

I have examined each claim raised in Coe's filing, and see no likelihood that he can demonstrate that Judge Trauger erred or that the Tennessee courts violated his constitutional rights. Without feeling the necessity to rehearse reasoning as to each claim, I will note two points.

Petitioner makes a great deal of the claim that Judge Colton was biased because of "death threats" made against him, and even goes so far as to accuse Judge Colton of improperly concealing, during the competency hearing, the fact that such threats had been made. This claim is apparently based on a newspaper story subsequent to the hearing in which Judge Colton is quoted as saying that security had been strengthened in the courthouse during the hearing because "[w]e got about 10 calls . . . [t]hey were going to harm him, they were going to harm me." *See, e.g., Associated Press Newswires, Feb. 8, 2000, 01:34:00, in Westlaw, Allnewsplus database*

In addition to the fact that there is no evidence or indication as to who made the calls and whether they were made for tactical advantage, Coe's counsel do not mention that we do have on the record one very explicit set of death threats – those made against Judge Colton, in open court, by the prisoner himself: "I will beat your goddamn brains out punk" (Tr. 504) and "I'll have some of my kin folks over there to kill your whole goddamned family" (Tr. 566), threats that were made without any apparent attempt at dissuasion by the very counsel with whom he had been calmly conferring earlier. To countenance this claim would be to permit petitioners in Coe's situation to choose or recuse their own judge in every instance.

Another of Petitioner's claims is that Judge Trauger and the Tennessee courts "used the wrong standard" in judging his *Ford* claim by not ruling on his future competency at the moment of execution.

This statement betrays the brilliance of the agenda set by counsel. If the ultimate question is competency at the moment of execution, based on evidence at the time, an execution can never take place. Any review by a federal court of state proceedings will always be a day late, as the state court cannot have had all the evidence that will be available at a later point. And any last-minute appeal to federal court due to changed conditions would have to be sent back to state court because the claims would not have been exhausted. Thus, the infinite regress that is set in motion by the first permission of a successive habeas would continue to work its magic. But this attempt to use *Ford* to undermine itself is sophistical. I do not see that such a claim has a significant likelihood of success.

Neither *Ford* nor *Barefoot* commands the result obtained by Petitioner here. Both the Tennessee judicial system and a federal district court have ruled that Coe is competent to be executed and that he has received all that the Constitution requires in the making of that determination. For a reviewing court to stay the carrying out of the ruling of those courts, more is required than simple access of counsel to a fax machine. This court's granting of a stay under such circumstances should not be automatic. Where a consideration of the decision below and such documents as counsel cares to file do not indicate a significant, let alone strong likelihood of success, this court should not intervene.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk