

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT GLEN COE,
Petitioner/Respondent,

v.

RICKY BELL, Warden,
Respondent/Movant.

MOTION TO STAY AND/OR VACATE ORDER OF
DISTRICT COURT STAYING EXECUTION OF ROBERT GLEN COE'S
DEATH SENTENCE

Warden Ricky Bell respectfully moves this Court pursuant to F.R.A.P. 8(a) to stay and/or to vacate the March 22, 2000, order of the Honorable Aleta Trauger, Judge of the United States District Court for the Middle District of Tennessee, staying the March 22, 2000, execution of Robert Glen Coe's death sentence. The district court granted "a brief stay" of the execution pending disposition of Coe's petition for a writ of habeas corpus raising an Eighth Amendment claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), alleging present incompetency to be executed, and related claims regarding the Tennessee

courts' determination of that issue. (Copy of order attached) Application for relief under F.R.A.P. 8(a) is being made in this Court because, due to the timing of the district court's order, moving first in the district court would be impracticable. See F.R.A.P. 8(a)(2)(A)(i).

This Court has recognized that a last-minute stay of execution prejudices the State in a way not correctable by appeal. *In re Parker*, 49 F.3d 204, 208 (6th Cir. 1995). Therefore, even when a district court properly grants a stay, it should not be unlimited, or of a duration controlled by the prisoner:

Instead, "[i]n a capital case the grant of a stay of execution ultimately to a state by a federal court imposes on that court the concomitant 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 issues presented in the case."

Id., quoting *In re Blodgett*, 502 U.S. 236, 240 (1992). Otherwise, the state is prevented from exercising its sovereign power to enforce the criminal law – an interest of great weight. *In re Parker*, *supra*. Thus, 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, 463 (6th Cir. 1997). The district court's order granting a stay is devoid of any finding that there is a strong and significant likelihood of success on the merits. Indeed, such a showing cannot be made.

An examination of Coe's *Ford* claim and its related procedural challenges to the state courts' determination of that claim should not detain any court long. Even a cursory

review of the state court record demonstrates that Coe received a full and fair hearing on his *Ford* claim in both the trial court and the state supreme court. The state courts' adjudication of the *Ford* claim on the merits did not result in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." See 28 U.S.C. § 2254(d)(1). Both the trial court and the Tennessee Supreme Court applied the test approved in *Ford v. Wainwright*, 477 U.S. 599, 627, (Powell, J., concurring). Whether the prisoner lacks the mental capacity to understand the fact of his impending execution and the reason for it.

All of the procedural requirements mandated by *Ford* were scrupulously complied with.

Nor did the state courts' adjudication result in "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(2). Every expert who testified at the competency hearing testified that Coe understood the fact of his execution and the reason for it, and, accordingly, the decision of the state courts that Coe is competent to be executed was obviously a reasonable determination of the facts in light of the evidence.

As set forth in more particularity in the state's answer to Coe's habeas corpus petition and the response to Coe's motion for an evidentiary hearing, copies of which are attached, Coe clearly is not entitled to habeas corpus relief on his *Ford* claim and its related procedural claims. Thus, he cannot show a "strong and significant likelihood of success on the merits" of his petition.

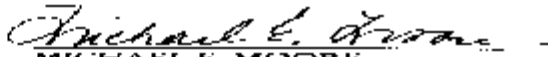
Finally, the stay entered by the district court is especially prejudicial to Tennessee when the extensive history of the review of Coe's 1981 conviction and sentence is considered. During the past 19 years, Coe has litigated a direct appeal, three separate state post-conviction cases, a federal habeas corpus case, and a state court challenge to his competency to be executed. Fifty-six judges have reviewed the case. Such a lengthy and extensive history is a compelling reason for denying Coe's application for a stay. See, e.g., *Coleman v. Thompson*, 504 U.S. 188 (1992) (denying stay and noting 12 prior appeals spanning 11 years); *Coyne v. Lucas*, 463 U.S. 1237 (1983) (denying stay, emphasizing review by 26 judges spanning seven years) (Burger, C.J., concurring); *Alabama v. Evans*, 461 U.S. 230 (1983) (vacating stay and noting review by 27 judges spanning six years) (Burger, C.J., concurring); *In re Sapp*, supra, 118 F.3d at 463 (petitioner sentenced to death, not lifetime imprisonment).

The district court's order purports to "briefly stay" the execution. The length of this "brief" stay is not stated in the order. However, it is evident from the district court's order in another proceeding involving Coe that a stay of at least five days is intended. See *Coe v. Hoff*, No. 3:03-cv-00464, 2003 WL 2283737 (M.D. Tenn. 8/14/03) (copy available at <http://www.coeclaims.com>). In this habeas case, the district court's stay constitutes an abuse of discretion.

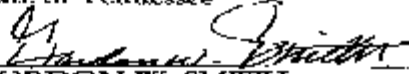
CONCLUSION

For the reasons stated, the order staying the execution of Robert Glen Cole's death sentence should be vacated.

Respectfully submitted,



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