UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAR 22 2000

Nos. 00-5323 and 00-5326

LEONARD GREEN, Clerk

ROBERT GLEN COE,	)	
Petitioner-Appellant,	)	
v.	)	ORDER[1]
RICKY BELL, Warden,	)	
Respondent-Appellee.	)	

BEFORE: BOGGS, NORRIS and MOORE, Circuit Judges.

The respondent warden has filed a motion asking the court to stay and/or vacate the March 22, 2000 order of the district court which stayed the scheduled March 23, 2000 execution of Robert Glen Coe's death sentence. The petitioner has filed a response opposing the motion.

Upon consideration it is hereby ORDERED that the motion be, and it hereby is, DENIED.

BOGGS, Circuit Judge, dissenting. I would grant the motion to vacate the stay of execution entered by Judge Trauger.

As I indicated, briefly, in dissenting from our decision yesterday to permit the consideration of this second habeas petition, Coe should not be allowed to circumvent the normal application of the rules governing second or successive habeas petitions. Three of our sister circuits have so held, as I discuss at more length below.

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[1] This order has been issued in its present form in light of the constraints of time. The Court may revise the order in due course.

Although Judge Trauger has shown an admirable commitment to a prompt resolution of the matter before her, the course of events in Nashville shows exactly the likely result of permitting men and rules around the rules. Coe has already filed yet another proceeding, challenging the procedures governing the last hour of execution (Case No. 3:00-0246 in the district court). The status or nature of this filing is unclear at this time, but the district court has set a schedule merely for the briefing of this issue that extends into next week. No schedule at all has been set (as of this writing) for the consideration of the one filing whose consideration we have authorized, the incompetency (*Ford v. Wainwright*) claim itself (Case No. 3:00-0239 in the district court).

I believe the stay should be vacated because our allowing the *Ford* claim to proceed was an error, and that decision cannot effectively be challenged once it has resulted in the stay. The stay should also be lifted because Coe's petition does not present the kind of "strong and significant likelihood of success on the merits" that is needed to justify a last-minute stay. *In re Sapp*, 118 F.3d 460, 465 (6th Cir. 1997).

Coe has had ample due process on his original habeas petition, which was before Judge Nixon from 1992 to 1998. His mental condition was well-known to his lawyers during all of that time. Coe admits in his filings before this court that he has suffered from mental illness since 1975, that he was diagnosed as mentally ill in the mid-1970's, and that he has suffered from, and been treated for, mental illness during his incarceration. *See, e.g.*, Petition for Writ of Habeas Corpus/Complaint for Relief Under *Ford v. Wainwright*, at 3, 10, 35. This evidence, combined with Coe's previous claim that he was denied effective assistance of counsel because his trial attorney failed to present an insanity defense, suggests that Coe and his attorneys were aware of his mental illness and not only could have, but should have, raised a *Ford* claim in Coe's first habeas petition.

The Tennessee proceedings revealed that, with one exception, the major components of his current claim of incompetence have been in place for many years. That one additional contention, based on the examination of Dr. Kenner, is that even if Coe was competent to stand trial, has been competent ever since, and is now competent to be executed under *Ford*, he *will become* incompetent because of the stress of actually facing execution, presumable at some uncertain time subsequent to the "last sequence" warning and prior to the actual battle.

Under similar circumstances, three circuits have held that a new petition raising such a claim is second or successive and must be considered under AEDPA. *See Nguyen v. Gibson*, 162 F.3d 600 (10th Cir. 1998); *In re Davis*, 121 F.3d 952 (5th Cir. 1997); *In re Medina*, 109 F.3d 1556 (11th Cir. 1997). Indeed, they have indicated that such a claim cannot meet the AEDPA standards for allowing a second or successive petition, as it clearly is not based on new law (*Ford* was decided in 1986), and does not raise a claim of actual innocence. To me, these cases are correct on their own merits: Allowing a *Ford* claim at the last minute is exactly the kind of endrun around the habeas system that AEDPA and the previous doctrine of abuse of the writ were designed to prevent. The Supreme Court in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), allowed a *Ford* claim to proceed where it had been raised in the original habeas petition, though dismissed without prejudice as premature, and then reinstated in the district court as execution neared. Under those circumstances, at least all parties concerned had notice of the claim, and could make their own strategic decisions as to when and how to try to litigate it.

The *Martinez* Court, however, specifically did not address the question of how to deal with the situation we now face, a petition raising the *Ford* issue that is filed at the last minute. *Martinez-Villareal*, 523 U.S. at 645, n.7.

My analysis would be to look at the second petition under the standards of abuse of the writ. While I agree with the three circuits noted above purely on the merits of their ruling on AEDPA, in our circuit there is an additional wrinkle. Because Coe's original habeas petition was filed pre-AEDPA, there is a question as to whether AEDPA should apply to the second petition, or whether the pre-AEDPA "abuse of the writ" standard should apply. *See In re Hayward*, 177 F.3d 925 (6th Cir. 1999); *In re Nunnally*, 132 F.3d 1133 (6th Cir. 1997). Even though those two cases apply to federal prisoners who had filed petitions previously under 28 U.S.C. 2255, and Coe is a state prisoner whose previous petition was filed under 28 U.S.C. 2254, (and I believe there may be grounds for treating those two sections differently), I will apply the pre-AEDPA analysis.

Fundamentally, a second or successive petition is an abuse of the writ unless there is cause for the failure to raise the claim previously and prejudice from failure to do so. As noted above, all of the basic facts necessary to Coe's claims have long been known, and *Ford* had been the law since before his habeas was filed. The fact that the claim *might* have been dismissed as premature does not excuse his failure to raise it. A foresighted prosecution might have been willing to litigate that claim at the same time, precisely in order to forestall the type of tactics now being employed.

In addition, Coe must make a colorable showing of prejudice, or demonstrate that the failure to consider his petition will result in a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298 (1995); *Dupuy v. Cain*, 201 F.3d 382, 385 (5th Cir. 2000); *Woods v. Whitley*, 933 F.2d 321, 324 (5th Cir. 1991). The standard for establishing prejudice is the same in ineffective assistance, procedural default, and successive habeas cases -- the petitioner must demonstrate a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland v. Washington*, 466 U.S. 668, 695 (1984); *see Kyles v. Zant*, 499 U.S. 457, 494 (1991).

(adopting the cause and prejudice test applied in procedural default cases to successive habeas petitions).

Coe cannot make such a showing. All that *Ford* requires is due process, including judicial involvement and review, adequate to insure that one being executed know that he will die and why. *See Ford*, 477 U.S. at 422, 423–27 (Powell, J., concurring). Tennessee has provided such process in ample measure. The State Supreme Court's opinion is fully persuasive on this point. *See Coe v. State*, 2000 WL 246424 (Tenn. Mar. 6, 2000). In particular, the decision makes clear that petitioner's understanding of his situation is exquisite, including his comments that indicate at least a partially accurate forecast of the course of his case. *See* 2000 WL 246423 at *10 (stating to the trial judge, *inter alia*: "Hey, don't worry about it. Judge Nixon is going to overturn anything that punk says. . . . [Y]ou know the federal court's going to overturn your ass. . . . [n]o matter what you rule . . . ."). Under these circumstances, there is no "reasonable probability" of Coe establishing his claim. Thus, permitting consideration of this last-minute petition would be an abuse of the writ, and therefore barred even under the *Navarro-Sanchez* interpretation of AEDPA.

I fear that the court's decision to stay Coe's execution pending resolution of the habeas claim will mean that every death-sentenced prisoner, having already been permitted three full round trips to the United States Supreme Court, will now be entitled to a fourth. Such a prisoner will not bring a *Ford* claim in state court until an execution date is set. Adequate state process will, as here, probably bring a decision only shortly before execution is scheduled (here, 17 days). With time for preparation and strategic planning, a federal habeas petition will be filed, as here, only within a week or so of execution.

I stated yesterday:

> Petitioner has had his day in state court. His petition for certiorari from that decision is before the United States Supreme Court (No. 99-8011, filed March 17, 2000). I believe that such process is adequate to protect his rights under *Ford*, and we should not allow a suspension of the normal rules governing late-filed habeas petitions in order to countenance such actions.

The Supreme Court today denied that petition for certiorari, which provided Coe with yet another opportunity for review, should his claims have had any merit. I do not think petitioner's claim shows a strong likelihood of success on the merits. I therefore dissent from our denial of the motion to vacate the stay of execution.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk