UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-5323/5327/5328/5329

FILED

MAR 21 2000

LEONARD GREEN, Clerk

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| ROBERT GLEN COE, | ) | |
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| *Petitioner/Appellant,* | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| RICKY BELL, WARDEN, | ) | |
| | ) | |
| *Respondent/Appellee.* | ) | |

**BEFORE: BOGGS, NORRIS,** and **MOORE,** Circuit Judges.

**PER CURIAM.**[1] This case concerns Robert Glen Coe, a Tennessee death-sentenced prisoner, whose execution is scheduled for 1 a.m. CST on March 23, 2000. Coe filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee on March 15, claiming that his execution would violate the Eighth Amendment to the United States Constitution, as interpreted by *Ford v. Wainwright*, 477 U.S. 399 (1986), because Tennessee would be executing a person incompetent to be executed. He acknowledges that this matter had been litigated in the Tennessee courts, including an extensive trial hearing and an appeal to the Tennessee Supreme Court, leading to a 4–1 decision on March 6, rejecting his claims and directing that his execution proceed. *Coe v. State*, 2000 WL 246425 (Tenn. Mar. 6, 2000).

This petition was assigned to Judge Aleta Trauger, who issued an order on March 18, transferring the case to this court, in order to determine, pursuant to its gatekeeping function under

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[1] This opinion and dissent have been issued in their present form in light of the constraints of time. Either or both may be revised by the Court in due course.

AEDPA, 28 U.S.C. § 2244 et seq., whether this petition was a second or successive petition that would be barred from consideration either under the terms of AEDPA, or under our court's rulings in *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997) and *In re Sonshine*, 132 F.3d 1133 (6th Cir. 1997), because it would have constituted an abuse of the writ.

In the meantime, District Judge John Nixon had before him the remains of our original decision denying all of Coe's original habeas corpus claims, on which the Supreme Court had denied certiorari on October 4, 1999, and our mandate had issued October 12, 1999.

Petitioner had suggested in the district court that the case could be reopened to allow the filing of additional claims, including the *Ford* claim, and allegedly for a ruling on certain claims that Coe claimed had not been ruled on. Judge Nixon denied all of these requests, and dismissed the habeas petition, holding that his only remaining role was to carry out the court's mandate that denied all of Coe's habeas petition. This order was entered on January 19, 2000 and reentered, after a motion to alter or amend was denied, on February 29, 2000.

However, on March 20, Judge Nixon issued a stay, purportedly pursuant to Fed. R. App. P. 8(a)(1), staying Coe's execution until this Circuit could decide Coe's appeal from Judge Nixon's order refusing to reopen the habeas case. The State of Tennessee has moved to vacate this stay of execution.

I

We grant the State's motion to vacate Judge Nixon's stay of execution.

Judge Nixon was indubitably correct in ruling that he was not at liberty to ignore this court's mandate in *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), which disposed of all the issues raised in Coe's

habeas petition. However, despite the propriety of his orders, entered January 19 and February 29, 2000, refusing to reopen Coe's original habeas corpus proceedings, Judge Nixon chose on Monday, March 20 to stay Coe's March 23 execution purportedly to allow this court to hear Coe's challenge to the January and February orders. In the March 20 order, Judge Nixon cites Federal Rule of Appellate Procedure 8(a)(1) as authority for granting Coe's motion for a stay of execution. However, Rule 8(a)(1), which permits a district court to stay only the effect of its own orders pending appeal, does not authorize the order at issue here because the stay of execution suspends proceedings authorized by the Tennessee Supreme Court, not the federal district court. *See* Fed. R. App. P. 8(a)(1) (stating only that a party "must ordinarily move first in the district court for . . . a stay of the judgment or order of the district court pending appeal"). If Judge Nixon had issued an order to execute Coe, rather than an order refusing to reconsider Coe's original habeas petition, the district court's authority under Rule 8(a)(1) to suspend the effect of its own orders pending appeal might validate the challenged stay. However, because the order being appealed does not mandate Coe's execution, and does not raise statutory or constitutional claims sufficient to justify suspending the state court's order of execution, the district court did not have authority to issue the March 20 order staying execution of Coe's sentence.

In addition to the fact that FRAP 8(a) does not authorize the stay at issue here, Judge Nixon's decision to enter the March 20 order is at odds with his conclusion in the January and February orders that our opinion rejecting Coe's habeas claims resolved all issues raised by Coe's original petition. In light of this court's clear mandate to dismiss Coe's habeas petition, Judge Nixon

correctly concluded that he was not at liberty to reopen Coe's habeas proceeding by allowing the post-appeal addition of new claims.

Under the logic of his stay order, however, even if a court of appeals reverses a district court's grant of habeas corpus, the district court is free to decide what the appellate court's mandate means and, even after it properly decides that the mandate means what is says and the case is dismissed, it can stay execution while the petitioner appeals the district court's order implementing the mandate back to the appellate court. This is not the law, and this reasoning allows for an infinite regress by allowing district courts to stay execution of sentences pending appeals of their own orders even when such orders were entered pursuant to an appellate court's mandate and serve to prevent petitioners from circumventing the rules governing consideration of successive habeas claims.

Only 28 U.S.C. § 2251 authorizes district courts to issue a stay of execution, and then only when a habeas corpus proceeding is currently pending before the district court. In this case, there is no habeas corpus petition pending before Judge Nixon – Coe's petition was considered and rejected by a panel of this court – and the issuance of a stay was therefore improper.[2] *See* 28 U.S.C. § 2251 (1996); *Parker*, 49 F.3d at 204, 207 (6th Cir. 1995) (discussing the circumstances under which

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[2] Construing the March 20 order as an injunction pending appeal pursuant to FRAP 8(a)(3) would not validate the stay. To the extent that it constitutes an injunction, Judge Nixon's ruling is an abuse of discretion because there is no proceeding currently before him to which the injunction could legitimately apply. Construed as an injunction, the March 20 order would enjoin the Tennessee Supreme Court from proceeding with Coe's execution, a course of action with which the district court may not interfere outside the context of a current and meritorious habeas corpus proceeding. *See In re Sapp*, 118 F.3d 460 (6th Cir. 1997).

a district court may issue a stay of execution pursuant to § 2251 when a habeas proceeding is currently pending before the court).

Even if the district court had authority pursuant to FRAP 8 to issue the March 20 order, Coe did not meet his burden of showing the "strong and significant likelihood of success on the merits" necessary to obtain a stay of execution under Sixth Circuit law. *In re Sapp*, 118 F.3d 460, 465 (6th Cir. 1997). The district court did not explain its conclusion that Coe had a "reasonable likelihood" of succeeding on the merits of his appeal, and it is well established in this circuit that, absent compelling evidence of the petitioner's likelihood of success on the merits, eleventh-hour stays are disfavored because they are particularly likely to prejudice the public interest in "seeing . . . judgments carried out in a timely and orderly manner." *In re Parker*, 49 F.3d 204, 208 (6th Cir. 1995); *see also McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (emphasizing that "[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system").

Because FRAP 8(a)(1) does not authorize district courts to stay orders of execution entered by state courts, and because there is no habeas corpus proceeding currently before Judge Nixon that would provide a basis for staying enforcement of the state court's sentencing mandate, the district court's March 20 order staying Coe's execution is vacated.

II

We hold that the district court has jurisdiction to consider the habeas petition challenging the state court's determination that Coe's execution would not violate *Ford*. Under the unique circumstances of this case, where any prior attempt to raise the *Ford* issue would almost certainly have been dismissed as premature, it would not be an abuse of the writ to permit the district court

to consider it. *See In re Hanserd; Stewart v. Martinez-Villereal*, 118 S. Ct. 1618 (1998); *see also Nguyen v. Gibson*, 162 F.3d 600, 601 (1998) (Briscoe, J., dissenting).

We express no opinion on the merits of the petition, and direct Judge Trauger to treat it with such expedition as may be appropriate, in light of the interests of both the petitioner and the State.

**BOGGS, Circuit Judge**, dissenting in part and concurring in part. I concur in the court's order vacating Judge Nixon's stay of execution. However, I dissent from the portions of the order allowing Coe's last-minute and successive habeas petition to go forward, attacking the extensive state process he was afforded in compliance with the Supreme Court's decision in *Ford v. Wainwright*. We potentially open a huge window for the extensive litigation in every death penalty case of last-minute claims that have been available, in any reasonable sense, for a long time.

It is true that the district court is not obliged to take any particular length of time to deal with such a petition nor to issue a stay of execution while considering it. See *Schornhorst v. Anderson*, 77 F. Supp. 2d 944 (S.D. Ind. 1999). But such avenues will be open, and may have great appeal to some. Petitioner has had his day in state court. His petition for certiorari from that decision is before the United States Supreme Court (No. 99-8681, 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.