IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT GLEN COE	)	
	)	
Movant	)	
	)	No. _____
v.	)	
	)	EXECUTION DATE:
RICKY BELL, Warden	)	MARCH 23, 2000
	)	1:00 AM
Respondent	)	

MOTION TO DECLARE
28 U.S.C. §2244 INAPPLICABLE TO
PETITION FOR WRIT OF HABEAS CORPUS/
REQUEST FOR RELIEF ON *FORD* CLAIMS

James H. Walker
601 Woodland Street
Nashville, Tennessee 37206
(615) 254-0202

Henry A. Martin
Federal Public Defender
Middle District of Tennessee

Paul R. Bottei
Assistant Federal Public Defender

Kelley Henry
Assistant Federal Public Defender

Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Comes the Movant, Robert Glen Coe, and respectfully moves this Court for an order declaring that 28 U.S.C. §2244 does not apply to his *Ford* claims and that he does not require prior authorization from this Court, because: (1) This is an application under 28 U.S.C. §2241; (2) His *Ford* claims are not "second or successive" claims within the meaning of 28 U.S.C. §2244; (3) Application of 28 U.S.C. §2244 to his *Ford* claims would impose impermissible retroactive effects under In Re Hanserd, 123 F.3d 922 (6th Cir. 1997); and (4) Application of 28 U.S.C. §2244 would constitute a violation of due process and would suspend the writ of habeas corpus.

I.
28 U.S.C. §2244 IS INAPPLICABLE BECAUSE THIS IS A PETITION UNDER 28 U.S.C. §2241

As an initial matter, 28 U.S.C. §2244 simply does not apply here, because the challenge to execution of the sentence is a proceeding under 28 U.S.C. §2241, to which §2244 does not apply. See Memorandum Of Law On Appeal Of Transfer Of Habeas Petition, pp. 16-18.

II.
28 U.S.C. §2244 IS INAPPLICABLE BECAUSE *FORD* CLAIMS RAISED AFTER INITIAL HABEAS PROCEEDINGS ARE NOT "SECOND OR SUCCESSIVE" WITHIN THE MEANING OF THE AEDPA

Further, Robert Coe's *Ford* claims are not "second or successive" within the

meaning of §2244, because they only became ripe recently, and could not have been presented in his earlier attack upon the conviction and sentence. This is the precise point of Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). See Memorandum Of Law, pp. 18-24.

III.
28 U.S.C. §2244 IS INAPPLICABLE BECAUSE IT WOULD CREATE IMPERMISSIBLE RETROACTIVE EFFECTS

As this Court has recognized in In Re Hanserd, 123 F.3d 922 (6th Cir. 1997), application of the gatekeeping provisions of 28 U.S.C. §2244 to a "second or successive" habeas application is impermissibly retroactive if: (1) the petitioner filed his first application for habeas relief prior to the passage of the AEDPA; and (2) the petitioner would receive relief under pre-AEDPA "abuse of the writ" standards, even though relief would not be permitted under new 28 U.S.C. §2244. That is the precise situation here.

As cogently observed by Judge Nelson in his concurrence in Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997). Judge Nelson's accurate assessment of a *Ford* claim are prescient, for it describes the *exact* situation of Robert Coe's case, if his *Ford* claims were considered a "second" petition under 28 U.S.C. §2254:

> The law as it existed prior to the [passage of the Antiterrorism] Act gave state prisoners the opportunity to present all their federal claims in federal court. They could lose the opportunity if they

> neglected to include a claim in a first petition. However, 'old' §2244(b) allowed the consideration of successive petitions containing 'new grounds' if the 'ends of justice' would be served. This opportunity was eliminated by the 1996 amendments to §2244.
>
> As we noted in our prior opinion, a petitioner could come to federal court with a 'procedurally defaulted claim if the petitioner can show cause for the procedural default and actual prejudice as a result of the alleged violations of federal law.' 80 F.3d at 1305. A showing of cause required the petitioner to demonstrate the existence of an objective factor external to the defense which hampered efforts to comply with the procedural rule. *Id.*, (citing *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986)). *The lack of ripeness of a claim of incompetence to be executed would appear to be a classic case of an external impediment to the presentation of the claim.*
>
> Thus, on April 23, 1996, a claim involving lack of competency to be executed could be considered in a successive petition filed in federal court. On April 24, 1996, and since, under the clear terms of §2244, such claims simply cannot be considered by any federal court, in spite of the fact that there was no earlier opportunity to do so.

Martinez-Villareal v. Stewart, 118 F.3d at 635 (Nelson, J., specially concurring). Judge Nelson's observations -- while made in the context of suspension of the writ of habeas corpus – are fully applicable here, for they confirm that application of the AEDPA would have retroactive effect on Robert Coe under Hansard. Robert Coe, therefore, has ample 'cause" for any failure to raise his claim earlier: the claim simply didn't exist earlier, as the Tennessee Supreme Court itself has held.

And, on the merits of his claim, Robert Coe has established his *prima facie* entitlement to relief, as he has presented substantial evidence of his incompetence to be executed, denial of full and fair process in the state courts of Tennessee, and

entitlement to an evidentiary hearing, after which he would be entitled to relief. See Memorandum Of Law On Appeal Of Transfer Of Habeas Petition, pp. 24-43. Therefore, 28 U.S.C. §2244 simply does not apply.

IV.
28 U.S.C. §2244 IS INAPPLICABLE BECAUSE APPLYING IT TO DENY HABEAS REVIEW WOULD VIOLATE DUE PROCESS AND SUSPEND THE WRIT OF HABEAS CORPUS

Finally, as explained in the accompanying Memorandum Of Law, 28 U.S.C. §2244 cannot be applied to deny habeas corpus relief, because the application of §2244 to Robert Coe's *Ford* claims violate due process. It would be a primary violation of due process for Robert Coe to be entitled to rely upon both Article III restrictions on jurisdiction precluding the raising of non-ripe claims and Fed.R.Civ.P. 11's prohibition upon presentation of factually unsupported claims, only to be denied relief because years ago he failed to raise a non-ripe claim in a petition at a time when the claim did not exist. This is fundamentally unfair.

Similarly, for the reasons stated by Judge Nelson in Martinez-Villareal, 118 F.3d 628, 635 (9th Cir. 1997)(concurring opinion) and Judge Briscoe in Nguyen v. Gibson, 162 F.3d 600, 604 (10th Cir. 1998)(Briscoe, J., dissenting), §2244 cannot apply because it would impermissibly suspend the writ of habeas corpus.