

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT GLEN COE)

Petitioner-Appellant)

v.)

RICKY BELL, Warden)

Respondent-Appellee)

No. _____

EXECUTION DATE:

MARCH 23, 2000

1:00 AM

MOTION FOR STAY OF EXECUTION

STATE OF TENN
ATTORNEY GENERAL

MAR 20 2000

CRIMINAL JUSTICE DIV.

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INTRODUCTION

Robert Coe is a severely mentally ill man, who has been diagnosed with numerous psychiatric disorders, institutionalized for mental illness, and treated with dozens of psychiatric medications over the years. He seeks to have the federal courts review his newly-ripe Eighth Amendment claims that he is incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). He faces losing federal review of his serious claims if new restrictions on habeas review are interpreted as barring his claims - even though he could not have raised them earlier.

Whether his newly-ripe claims of incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986) may be first raised in a "second in time" federal habeas petition is an issue which neither the Supreme Court nor this Court has resolved, and a thorny issue which has divided the judges of the lower federal courts. This case also presents unresolved questions whether *Ford* claims are properly raised under 28 U.S.C. §2241 (as opposed to §2254); whether the AEDPA's gatekeeping provisions (28 U.S.C. §2244) impose impermissible retroactive effects upon his *Ford* claims; whether application of §2244 is unconstitutional as applied to *Ford* claims; and whether the Eighth Amendment itself or §2241 provide residual bases for federal jurisdiction over *Ford* claims. Resolution of these issues is critical not only to the disposition of this case, but also

for all future *Ford* claims to come before this Court.

In addition, Robert Coe's case presents a first petition for relief, and he is entitled to a stay for the District Court to rule on the merits of his petition. Lonchar v. Thomas, 517 U.S. 314 (1995).

This Court should grant a stay of execution to resolve the complex recurring issues presented here, and afterwards to remand the case to the District Court for full consideration of Robert Coe's *Ford* claims in accordance with this Court's conclusions about these questions.

JURISDICTION

This Court has jurisdiction to enter a stay of execution pursuant to 28 U.S.C. §1651 and 2251.

1.

STATEMENT OF FACTS RELEVANT TO PETITIONER'S CONSTITUTIONAL CLAIMS

Petitioner Robert Coe has sought to raise in the federal courts claims that he is not competent to be executed under the Eighth Amendment and *Ford v. Wainwright*, 477 U.S. 399 (1986). He has exhausted his claim of incompetency to be executed in the state courts of Tennessee, having presented evidence of his incompetency to the Tennessee courts, and having appealed his case to the Tennessee Supreme Court.

2.

During state court proceedings, he established not only his history of mental illness, but provided testimony to a reasonable degree of medical certainty that he is not competent to be executed. Robert Coe suffers from multiple severe mental diseases. He has been diagnosed as psychotic, schizophrenic, schizoid, possibly retarded, and in need of long-term psychiatric care. He has suffered hallucinations, and delusions, and has tried to commit suicide on numerous occasions. He hears voices rambling. It is beyond dispute that he has suffers brain damage which affects his cognitive functioning.

Recently, Dr. William Kenner, M.D., has concluded that Robert suffers dissociative identity disorder (DID) which renders him incompetent to be executed. The combination of stress from the impending execution and Robert's mental illnesses will cause dissociation and render him incompetent. Similarly, Dr. James Merikangas, M.D., on the faculty of Yale University Medical School, has diagnosed Robert as a schizophrenic who is incompetent to be executed. Robert believes that after an execution, he will go to live with his wife and child. He does not understand what it means to die. In sum, Robert Coe's claims of incompetency to be executed under *Ford* are substantial.

II.
A STAY IS WARRANTED
BECAUSE OF THE SUBSTANTIAL ISSUES PRESENTED
AND ROBERT COE'S ENTITLEMENT TO HABEAS REVIEW
OF HIS FORD CLAIMS

Despite the substantial nature of his *Ford* claims, Robert Coe risks being executed because the state contends that his newly-ripe *Ford* claims cannot be heard on federal habeas review. An application of new 28 U.S.C. §2244 to preclude his claims as a "second" petition - even though they were not ripe until after he completed his initial habeas review of his conviction and sentence - would create a grave injustice.

This Court, however, and the United States Supreme Court have yet to consider the application of §2244 to *Ford* claims under the circumstances presented here, viz. whether presentation of a newly-ripe claim in a second-in-time petition constitutes a "first" or "second" petition for purposes of federal habeas review and 28 U.S.C. §2244. As the United States District Court has noted: "The Sixth Circuit has not ruled on the issue presently before this court as to whether a habeas corpus application that clearly follows in time the filing of one or more previous habeas petitions and raises for the first time a Ford claim should be deemed a 'second or successive' application." Mar. 18, 2000 Memorandum, p. 10. Neither has the Supreme Court: "[I]n Stewart v. Martinez-Villareal, [523 U.S. 637 (1998)] the

Supreme Court left open the precise question before this court today. . . ." District Court Mar. 18, 2000 Memorandum, p. 12.

Nevertheless, as the District Court has noted, there is no meaningful distinction between Martinez-Villareal and Robert Coe's case, which weighs in favor of his receiving review of his *Ford* claims, just as in Martinez-Villareal:

There appears to be no true distinction between the factual context of Martinez-Villareal and this case. As the Supreme Court readily acknowledged, where a petitioner raises a *Ford* claim in his original petition, the claim would not have been ripe for review and most likely would have been dismissed as premature. See Martinez-Villareal, 523 U.S. at 644-645; Van Tran, 6 S.W.3d at 267. Thus, the mere fact that a petitioner fails to raise his *Ford* claim in his initial petition should not be dispositive.

District Court Mar. 18, 2000 Memorandum, p. 13, n.18.

However, this Court has yet to resolve not only that issue, but other issues presented by this case, which are jurisdictionally and substantively complex. Still unresolved is whether *Ford* claims may be presented under 28 U.S.C. §2241 as challenges to the execution of sentence, as opposed to challenges to the conviction or sentence countenanced by 28 U.S.C. §2254. As of yet, "[N]o court has yet held that §2241 gives any federal court authority to hear a *Ford* claim." District Court Mar. 18, 2000 Memorandum, p. 14. Nevertheless, the District Court has concluded that "A court could hold for the first time, as Petitioner urges, that a challenge to

one's competency to be executed is a challenge to the manner in which the sentence is being executed and, thus, §2241 is an appropriate jurisdictional basis for that claim. A court could also decide that, in the event that Petitioner is barred from bringing this claim due to the requirements of §2244(b), §2241 would be an appropriate jurisdictional basis. But the court that must make either of these determinations must be the appellate court, not this court." District Court Mar. 18, 2000 Memorandum, pp. 15-16.

Also unresolved is the question whether application of new 28 U.S.C. §2244 to *Ford* claims imposes impermissible retroactive effects upon a petitioner raising a *Ford* claim in a second-in-time petition, and whether barring a claim under §2244 constitutes a violation of due process, or results in an unconstitutional suspension of the writ of habeas corpus.

As Robert Coe has demonstrated in his accompanying memorandum of law, he is indeed entitled to review of his *Ford* claims, and the matter should be remanded to the District Court for the consideration of his petition. These issues are not only significant because Robert Coe's life depends upon their resolution, but they are significant because, left unresolved, the lower courts in this circuit lack necessary guidance for resolving these often-recurring issues in capital cases.

Accordingly, a stay should issue to allow deliberative consideration of these

substantial, complex issues. Afterwards, this Court should remand the case to the District Court for full consideration of Robert Coe's *Ford* claims on the merits. See e.g., Martinez-Villareal v. Stewart, 118 F.3d 625 (9th Cir. 1997) (granting stay of execution to consider application of Antiterrorism Act's provisions to *Ford* claims).

III A STAY IS WARRANTED BECAUSE THIS IS A FIRST REQUEST FOR HABEAS CORPUS RELIEF

The United States Supreme Court has made clear that when considering an initial petition for writ of habeas corpus, the United States District Court must issue a stay of execution if necessary to allow consideration of the petition on the merits:

[W]hen a district court is faced with a request for a stay in a first federal habeas case: If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot.

Lonchar v. Thomas, 517 U.S. 314, 320, 116 S.Ct. 1293, 1297 (1996) (emphasis supplied). Compare Barfoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383 (1983) (on appeal of first habeas petition, where petitioner has obtained certificate of probable cause to appeal, petitioner entitled to review of merits of petition: to allow consideration of merits of appeal, court of appeals should grant stay to prevent case from becoming moot).

It is clear that a *Ford* claim in Tennessee only becomes ripe once execution becomes imminent. "In Tennessee, execution is imminent only when a prisoner sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the prisoner's conviction and sentence and this Court has set an execution date" Van Tran v. State, 6 S.W.3d 257, 267 (Tenn. 1999). See also Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618 (1998) (*Ford* claim properly dismissed as premature until initial federal habeas proceedings concluded); Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993) (issue of sanity properly presented as execution approaches). Therefore, as Robert Coe has emphasized, his petition is a first petition, and he is entitled to a stay of execution pending the resolution of his petition on the merits by the District Court.

That Robert Coe's present petition is a first petition is fully consistent with the holdings of the United States Supreme Court and other lower courts: Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618 (1998) (allowing litigation of *Ford* claim once it became ripe); Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986) (addressing on merits claim of incompetency to be executed raised for first time in habeas *after* resolution in federal habeas of claims relating to conviction and sentence); Polard v. Stewart, 41 F.Supp.2d 1037 (D.Ariz. 1999) (following initial litigation of habeas petition challenging conviction and sentence, District Court

recognized that the petitioner was entitled to habeas review of his *Ford* claim in a separate petition under the Supreme Court's *Martinez-Villareal* exception to "successive" petitions).

Thus, because Robert Coe's *Ford* claims are a first petition for writ of habeas corpus, Lonchar mandates a stay of execution: "If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." Lonchar v. Thomas, 517 U.S. at 320, 116 S.Ct. at 1297 (emphasis supplied).

Indeed, when faced with a newly-ripe *Ford* claim which the federal courts have yet to address fully on the merits, a stay is required. As the Ninth Circuit has recognized in similar circumstances, once a *Ford* claim becomes ripe and relief is requested in federal court, it is a first petition for relief, and *Lonchar* mandates a stay. In the case of Horace Kelly, the court stated:

Kelly's claim of present incompetence to be executed became ripe and exhausted only in 1998. Under *Stewart v. Martinez-Villareal*, ___ U.S. ___, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), Kelly's presentation of the *Ford* claim to the district court is a first petition . . . and under *Lonchar*, Kelly is therefore entitled to a stay. . . .

Calderon v. United States District Court, 163 F.3d 539, 536 (9th Cir. 1998). In fact, once a petitioner raises his *Ford* claim for the first time in federal court: "A delay in . . . execution is inevitable" to allow federal consideration of such claims on initial

habeas review. Id. See also Poland v. Stewart, Nos. CIV-90-1822-PHX-SPK, CIV 98-1891-PHX-SPK (D.Ariz. Oct. 20, 1998)(order granting stay of execution to allow merits consideration of *Ford* claims which fell under *Martinez-Villareal* exception to successive petitions; citing *Lonchar* for proposition that district court is obligated to address merits of first petition and must issue a stay to prevent the case from becoming moot)(Attached as Exhibit 2 to District Court Motion For Stay Of Execution), motion to vacate stay denied *Stewart v. Poland*, 525 U.S. 956, 119 S.Ct. 390 (1993).

CONCLUSION

WHEREFORE, this Court should grant a stay of execution, order further briefing as necessary, conclude that Robert Coe's claims are not barred by 28 U.S.C. §2244, and remand the case to the District Court for proper consideration of the merits of his *Ford* claims.