UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT GLEN COE,	)	
	)	
Petitioner,	)	
	)	**Case No. 3:00-0239**
v.	)	**Judge Trauger**
	)	
RICKY BELL, Warden,	)	
	)	
Respondent.	)	

MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AND TO DENY STAY FOR LACK OF JURISDICTION

On 16 March 2000, petitioner filed a petition for writ of habeas under 28 U.S.C. § 2241 (§ 2254 in the alternative). The petition raises Eighth and Fourteenth Amendment claims under *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), alleging present incompetence to be executed and challenges the legality of the procedures followed in the state courts' adjudication of his *Ford* claim.[1] For the reasons that follow, this petition should be dismissed for lack of jurisdiction, and his motion requesting this Court to stay his pending execution, set for 23 March 2000, should be denied.

FACTS

Robert Glen Coe was sentenced to death after a Tennessee jury

[1]Coe also alleges that his execution would violate the Common Law. This fails to state a cognizable basis for federal habeas relief. Relief may only be granted to a state prisoner if he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C.§ 2241(c)(3) and § 2254(a).

found him guilty of the first degree murder of eight-year-old Cary Ann Medlin. In *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), *cert. denied*, ___ U.S. ___, 120 S.Ct. 110, 145 L.Ed.2d 93 (1999), *reh'g. denied*, ___ U.S. ___, 120 S.Ct. 567, 145 L.Ed.2d 442 (1999), the Court of Appeals reversed this court's grant of habeas corpus relief. The procedural history, evidence, and facts of the case are presented more fully in the opinions of the Tennessee Supreme Court on direct appeal, *State v. Coe*, 655 S.W.2d 903 (Tenn. 1983), and the opinions of the Court of Criminal Appeals on Coe's first, second, and third post-conviction petitions. *Coe v. State*, 1986 WL 14453 (Tenn. Crim. App., Dec. 23, 1986); *Coe v. State,* 1991 WL 2873 (Tenn. Crim. App., Jan. 16, 1991); *Coe v. State*, 1997 WL 88917 (Tenn. Crim. App., Mar. 4, 1997).

Following Coe's unsuccessful federal habeas corpus litigation, the Tennessee Supreme Court, on 15 December 1999, ordered that the death sentence be carried out on 23 March 2000. Coe then mounted a four-pronged assault designed to postpone the scheduled execution. First, he moved to reopen his previous state post-conviction proceedings. However, the trial court denied the motion, the Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied his application for permission to appeal. On 15 March 2000, Coe moved the Tennessee Supreme Court to stay his execution so that he might file a petition for writ of certiorari in the United States Supreme Court. The Court denied his request

the same day.

Second, Coe moved this Court to reopen his original federal habeas petition to address unresolved claims, to reconsider its denial of a prior motion to amend the petition, and to permit a new amendment to include a *Ford* claim of present incompetency to be executed. The Court denied relief, but opined that "a petitioner in Coe's position" could present the *Ford* claim in a new petition under 28 U.S.C. § 2241 to avoid the second or successive petition bar in 28 U.S.C. § 2244(b)(2).

Third, Coe brought a *Ford* claim in state court. Following an exhaustive evidentiary hearing, the trial judge found Coe competent to be executed. On 6 March 2000, the Tennessee Supreme Court affirmed the trial court's judgment, ordered that the execution be carried out as provided by the Court's December 15, 1999, order, and issued its mandate immediately. *Coe v. State*, 2000 WL 246425 (Tenn., Mar. 6, 2000). On 10 March 2000, Coe moved the Tennessee Supreme Court to vacate its mandate and stay his execution so that he might file a petition for writ of certiorari in the United States Supreme Court. Both requests were denied the same day.

Finally, on 16 March 2000, Coe filed with this Court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (§ 2254 in the alternative), raising his *Ford* claim. The same day,

he also filed a motion to stay his execution pending disposition of the petition.[2]

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER THIS HABEAS PETITION AND TO ENTER A STAY ABSENT AN ORDER FROM THE COURT OF APPEALS AUTHORIZING THE PETITION'S CONSIDERATION.

Coe has presented his *Ford* claim in a petition under 28 U.S.C. § 2241 and, in the alternative, under 28 U.S.C. § 2254. However, § 2241 is not an available vehicle for litigation of a *Ford* claim in federal court. A *Ford* claim may only be litigated in federal court under 28 U.S.C. § 2254. If brought under 28 U.S.C. § 2254, Coe's *Ford* claim constitutes a "second or successive habeas corpus application under section 2254," requiring permission from the Court of Appeals. Coe has not sought permission from that Court to file a second or successive petition; nor can he satisfy the requirements for obtaining permission. Therefore, there is no proceeding sufficient to invoke the jurisdiction of this Court. Consequently, this court lacks jurisdiction to enter a stay.

A. Coe's *Ford* claim cannot be brought in a petition under 28 U.S.C. § 2241.

Coe is indisputably "a person in custody pursuant to the judgment of a state court" within the meaning of 28 U.S.C. § 2254. Whatever independent jurisdiction 28 U.S.C. § 2241 may confer upon

[2]A motion requesting pauper status and for an evidentiary hearing were filed as well. Respondent does not contest petitioner's pauper status. A response in opposition to the motion for an evidentiary hearing and an answer to the habeas petition are being filed contemporaneously with this pleading.

federal courts in other contexts (*see, e.g., United States v. Jalili*, 925 F.2d 889, 893 (6th Cir. 1991) (holding that federal prisoner's attack on Bureau of Prison's designation of facility in which prisoner was to serve his sentence properly cognizable in a § 2241(a) habeas petition)), the Supreme Court made it clear in *Felker v. Turpin*, 518 U.S. 651, 662 (1996), that the authority "to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to the judgment of a state court.'" Nothing in the language of *Felker* or the construction of Title 28 of the United States Code suggests that this limitation of § 2241 by § 2254 in habeas cases filed by state prisoners is confined to the United States Supreme Court and not applicable to the lower federal courts. In fact, *Ford* itself involved a § 2254 claim. *See Ford v. Wainwright*, 477 U.S. 399 (1986); *In re Davis,* 123 F.3d 952, 955 (5th Cir. 1997). Thus, § 2241 is not an available vehicle for litigation of a *Ford* claim in federal court.

B. <u>Coe's *Ford* claim, if brought under 28 U.S.C. § 2254, constitutes a "second or successive habeas corpus application under section 2254," requiring permission from this Court.</u>

28 U.S.C. § 2244(b) now provides, in pertinent part:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or

> successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless —
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

The pleading filed in this Court is undeniably a second attempt by Coe to obtain habeas relief. Coe did not present a *Ford* claim in his first federal habeas petition, which was adjudicated on the merits. Therefore, § 2244(b)(2) plainly applies. And every court of appeals addressing this procedural scenario, *i.e.,* where a *Ford* claim is raised for the first time *after* an initial habeas petition has been filed and disposed of on the merits, has so

held.[3] *See In re: Medina*, 109 F.3d 1556 (11th Cir. 1997), *cert. denied, sub nom. Medina v. Singletary*, 520 U.S. 1151 (1997); *In re: Davis,* 121 F.3d 952 (5th Cir. 1997); and *Nguyen v. Gibson*, 162 F.3d 600 (10th Cir. 1998). In all three cases, the courts found that the petitioners' *Ford* claims were barred by 28 U.S.C. § 2244(b).

In *Medina*, the Eleventh Circuit, applying the clear language of the statute, found that the *Ford* claim did not fall within the exceptions of § 2244(b). *Medina*, 109 F.3d at 1564-65. The court further considered the question of whether such a bar would impermissibly deny a petitioner federal review of a *Ford* claim[4] and held that it would not, given the writ of certiorari and the possibility of seeking habeas relief through an original writ with the Supreme Court. *Medina*, 109 F.3d at 1564.

The Fifth Circuit likewise applied the plain meaning of §2244(b) to deny relief in *Davis.* Although Davis conceded that he could not satisfy § 2244(b)(2)(B), he argued that his case did fall

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[3]The only Supreme Court case to address the applicability of 28 U.S.C. § 2244(b) to *Ford* claims -- *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998) -- is not controlling because it is factually distinguishable. In that case, the petitioner raised a *Ford* claim in his first federal habeas petition considered on the merits. The district court dismissed the *Ford* claim as premature. The Supreme Court held that the petitioner's subsequent reassertion of his *Ford* claim would not be treated as a second or successive habeas application because in fact "[t]here was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe." *Id*. at 1621. But the Court specifically noted that it was *not* deciding the issue presented by this case -- whether a federal habeas court should treat a *Ford* claim, asserted for the first time after a previous denial of federal habeas relief, as a second or successive application. *Id*. at 1622 n.*; *see also In re Davis, supra*, 121 F.3d at 955; *Nguyen v. Gibson, supra*, 162 F.3d at 601 (both distinguishing *Stewart* in circumstances similar to this case).

[4]The court began its analysis with the observation that "[i]t is not any more apparent to us that *Ford* guarantees a federal court determination of the issue it addresses than that any other decision does." *Medina*, 109 F.3d at 1564.

under § 2244(b)(A), arguing that *Ford* should be considered "a 'new rule of constitutional law' because it is applicable for the 'first time' only when both the execution date is imminent and the petitioner is incompetent. [Davis stated] also that Ford was 'previously unavailable' to him because a Ford claim is premature until both an execution date is set and the applicant is incompetent." *Davis*, 121 F.2d at 955. The Fifth Circuit rejected that position, stating that a 1986 decision is not a new rule of constitutional law, and that while the *factual* basis of the claim may not have been previously available, the *legal* basis had been available since 1986. *Id.*

In *Nguyen*, the Tenth Circuit, as did the Eleventh Circuit, noted that federal review, if required, was available through certiorari or an original petition in the Supreme Court. *Nguyen*, 162 F.3d at 602.

Thus, the only courts of appeals to address the applicability of § 2244(b)(2) to the present scenario have ruled adversely to petitioner. As petitioner did not include a *Ford* claim in his first habeas petition, and since that petition has been disposed of on the merits, he is now barred by the prohibition of 28 U.S.C. § 2244(b)(2) from bringing a *Ford* claim in this Court unless he is permitted to do so by the Sixth Circuit.

C. The "Law of the Case Doctrine" does not preclude this petition from being a second or successive habeas petition.

In a memorandum filed 14 February 2000, in *Coe v. Bell,* No. 3:92-0180, Judge Nixon opined that the filing of a *Ford* claim would not constitute a second or successive petition. That portion of his order is not law of the case, nor is it binding on this Court for three reasons. First, the order is not final, the time for appeal not having expired since Judge Nixon's order denying Respondent's Motion to Alter or Amend was entered 25 February 2000. *See* F.R.A.P.4(a)(4)(A)(iv).

Second, the language regarding successive petitions is *dicta:* "Although respondent is correct that the court's opinion does not resolve a live controversy, it does . . . properly consider in *dicta* an issue placed before the court by the parties." (Order of 25 February) When a court's prior holding is *dicta,* it is not law of the case, and the issue may be properly reconsidered. *Tenn. Products & Chemical Corp. v. United Mine Workers,* 481 F.2d 742, 747 (6th Cir. 1973).

Third, application of the law of the case doctrine is discretionary where a case is transferred to a coordinate judge. *Bowling v. Pfizer,* 132 F.3d 1147, 1150 (6th Cir. 1998). Since, for the reasons set out in this memorandum, Judge Nixon's determination was erroneous, this Court should exercise its discretion and decline to apply the law of the case doctrine.

D. Coe has not sought permission from the Court of Appeals to file a second or successive petition; nor can he satisfy the requirements for obtaining permission.

Coe has not sought permission from the Court of Appeals to file a second or successive petition. Therefore, this Court's consideration of his habeas petition and the granting of a stay pending determination of the merits of his *Ford* claim would be illegal. Furthermore, Coe cannot satisfy the requirements for obtaining permission from the Court of Appeals. As noted above, § 2244(b)(2) now provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

A *Ford* claim advanced by Coe meets neither of the exceptions set out in the statute.

First, *Ford* was decided in 1986. Accordingly, it is not "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Such a claim would not meet exception (A). *See In re Medina, supra*, 109 F.3d at 1564; *In re Davis, supra,* 121 F.3d at 955-956; *Nguyen v. Gibson, supra*, 162 F.3d at 601.

Exception (B) also cannot provide him with relief. As petitioner has repeatedly pointed out, there has been evidence of his alleged mental impairments for years preceding the commission of the murder which led to this death sentence. In his habeas petition as amended in 1994 and 1996, he challenged trial counsel's failure to adequately present an insanity defense. This Court determined that his claim was without merit based upon a review of the trial record and the psychological testimony and reports offered during the evidentiary hearing. Accordingly, it cannot be said that the factual predicate for a *Ford* claim is newly arisen, since the factual predicate -- Coe's alleged mental illness -- has been of record for many years. And even if petitioner has a valid *Ford* claim, it obviously does not establish his innocence of the murder of Cary Ann Medlin. *See In re Medina, supra*, 109 F.3d at 1564-1565; *Nguyen v. Gibson, supra,* 162 F.3d at 601.

E. <u>Without jurisdiction to entertain Coe's underlying claim, this court lacks jurisdiction to enter a stay.</u>

This Court lacks jurisdiction to entertain Coe's *Ford* claim

under either 28 U.S.C. §§ 2241 or 2254. Without such jurisdiction to entertain the claim itself, this court lacks jurisdiction to grant a stay. *In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997); *In re Parker*, 49 F.3d 204, 208 (6th Cir. 1995).

II. COE IS CLEARLY NOT ENTITLED TO HABEAS CORPUS RELIEF ON HIS *FORD* CLAIM.

Even if Coe's petition is not a "second or successive habeas corpus application under section 2254," Coe clearly is not entitled to habeas corpus relief on his *Ford* claim. 28 U.S.C. § 2254(d) now provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted 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; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As pointed out above, Coe has litigated his *Ford* claim on the merits in the state courts.[5] Following an exhaustive evidentiary hearing, the state trial court concluded that Coe was competent to

[5]The record of those proceedings has been filed contemporaneously with the Court.

be executed. And after a thorough review of the record and briefs, the Tennessee Supreme Court affirmed the trial court's judgment. Both courts' findings of fact are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1). 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." 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. 399, 422 (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." 28 U.S.C. § 2254(d)(2). Every expert who testified at the competency hearing testified that Coe understands 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. The Tennessee Supreme Court found that:

> The evidence in this record fully supports the trial court's finding that the appellant is

> competent. Dr. Merikangas admitted that the appellant was aware of his impending execution and of the reason for the execution, but he attempted to draw a distinction between "understanding" and "awareness," a distinction which, as we have just concluded, does not exist. While Dr. Kenner opined that the appellant will become incompetent as his execution approaches, Dr. Kenner admitted that the appellant had been competent during his last interview. Dr. Matthews, Dr. Martell, and Dr. Walker all testified that the appellant had the mental capacity to understand the fact of his impending execution and the reason for it, and Dr. Meltzer's report was consistent with their testimony. Moreover, the appellant's conduct both before and during the hearing is further support of the trial court's finding of competency. The appellant has already chosen a method of execution. He has indicated that he would like to be allowed to donate his organs. He has indicated that, if offered, he will refuse to accept any sedatives prior to his execution because he "think[s] there might be a God, and I've got enough to deal with him, without being drunk on Valium." Comments made by the appellant during the competency hearing, and set out in the trial court's order which is attached hereto as an appendix [App.*], indicated that the appellant understands his current legal proceedings. While he maintains that he is innocent, the record clearly reflects that the appellant knows that he was sentenced to death for murdering a young girl. The appellant's comments asserting his innocence and contending that the purpose of his execution is to prevent the truth from coming out actually demonstrate that he understands the fact of his impending execution and the reason for it.

Coe v. State, 2000 WL 246425 *25-26. Because the record fully supports the conclusion of the state courts, even if Coe's petition is not a "second or successive habeas application under section

2254," he is clearly not entitled to habeas corpus relief on his *Ford* claim.

III. A STAY OF EXECUTION WOULD PREJUDICE TENNESSEE IN A WAY NOT CORRECTABLE BY APPEAL.

The Sixth Circuit has stated that a stay under these circumstances prejudices the State in a way not correctable on appeal. *In re Parker, supra*, 49 F.3d at 208. Beyond holding that the prejudice caused by a stay is incurable, the Court held the existence of such prejudice to be self-evident:

> Clearly the stay creates prejudice. That is, memories fade and evidence dissipates. This creates a burden on the state in the event of a retrial. (Citation omitted). Courts have also recognized that the delay itself impinges on the sovereignty of the state. *Id.* at 208. (Emphasis added).

Such obvious and incurable prejudice to the government requires that no stay be granted in this case. *See Delo v. Stokes*, 495 U.S. 320 (1990)(per curiam)(The concurring opinion of Justice Kennedy, in which Chief Justice Rehnquist and Justice Scalia joined, expressed concern that the Eighth Circuit had taken over 24 *hours* to grant the State's motion to vacate the stay.)

The "hydraulic pressure" caused by a last-minute stay application is "a tactic unworthy of our profession". *Evans v. Bennett*, 440 U.S. 1301 (1979) (Rehnquist, C.J., in chambers). Successive and eleventh-hour filings such as Coe's weigh against, not for, the granting of a stay. *Woodard v. Hutchins*, 464 U.S. 377

(1984)(Powell, J., concurring); *Gomez v. District Court, supra*, 503 U.S. 653 (1992).

A stay entered by this 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); *Gray 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 of litigation about death).

IV. COE CANNOT DEMONSTRATE A STRONG AND SIGNIFICANT LIKELIHOOD OF SUCCESS ON THE MERITS.

In *In re Sapp, supra*, the Sixth Circuit vacated a last-minute stay by a district court, noting:

> When we are considering a very belated claim, raised at the last minute to prevent execution, after many earlier opportunities to raise the issue were foregone, the significant and irreparable harm of execution is balanced by an equally significant and irreparable harm to the legal process, a harm not fully repairable by action after appeal. *In Re Parker*, 49 F.3d 204, 208 (6th Cir. 1995). Thus, what is necessary to support a stay is a strong and significant likelihood of success on the merits, which simply does not exist in this case.

118 F.3d at 465. The same is true in this case. Coe's claim is barred by lack of jurisdiction and successiveness. Furthermore, as demonstrated above, he is clearly not entitled to habeas relief on his *Ford* claim in any event. Under these circumstances, Coe cannot demonstrate "a strong and significant likelihood of success on the merits."

CONCLUSION

For the reasons stated, this Court should dismiss Coe's petition for writ of habeas corpus for lack of jurisdiction to consider it and deny his request for a stay of his execution set for 23 March 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded to via hand delivery to Henry A. Martin, Esq. and Paul Bottei, Esq., Federal Public Defender's Office, 810 Broadway, Suite 200, Nashville, Tennessee 37203 and James H. Walker, Esq., 601 Woodland Street, Nashville, Tennessee 37206 on this the ____ day of March, 2000.

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