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

ROBERT GLEN COE, Petitioner,	]]]	
v.	]	No. 3:92-0180
RICKY BELL, Respondent.	]]	

ORDER

Currently pending before the Court is Petitioner's Statement in Support of This Court's Jurisdiction Over Petitioner's Initial Habeas Petition in which Petitioner asks this Court to: (1) address unresolved claims in his original habeas corpus petition concerning the effect of Brady violations on his capital sentencing hearing and the constitutionality of the reasonable doubt instructions given at the sentencing phase of his trial; (2) reconsider its denial of a prior motion to include a claim challenging the constitutionality of electrocution and to permit such an amendment at this time; and (3) permit amendment of the original habeas petition to include a claim raising the issue of Petitioner's present incompetency to be executed under Ford v. Wainright, 477 U.S. 399 (1986). (Doc. No. 434.) In addition, Petitioner has filed a Motion to Disqualify Attorney General Paul G. Summers and the Office of the Attorney General. (Doc. No. 436.)

In accordance with the reasoning set forth in the contemporaneously entered Memorandum, the Court hereby DENIES Petitioner's Statement and the Motions to Amend and to Consider Unresolved Claims included therein. Accordingly, the Court hereby DISMISSES Petitioner's Motion to Disqualify as MOOT. However, the Court FINDS that Petitioner may file a Ford claim, challenging both his competency to be executed and the adequacy of state procedures used to determine his competency to be executed, in a separate habeas corpus petition

with this Court pursuant to 28 U.S.C. § 2241, and in the alternative, pursuant to 28 U.S.C. § 2254.

It is so ORDERED.

Entered this the 14th day of January, 2000.

JOHN T. NIXON
UNITED STATES DISTRICT COURT

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ROBERT GLEN COE, Petitioner,	]]]	
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MEMORANDUM

Currently pending before the Court is Petitioner's Statement in Support of This Court's Jurisdiction Over Petitioner's Initial Habeas Petition in which Petitioner asks this Court to: (1) address unresolved claims in his original habeas corpus petition concerning the effect of Brady violations on his capital sentencing hearing and the constitutionality of the reasonable doubt instructions given at the sentencing phase of his trial; (2) reconsider its denial of a prior motion to include a claim challenging the constitutionality of electrocution and to permit such an amendment at this time; and (3) permit amendment of the original habeas petition to include a claim raising the issue of Petitioner's present incompetency to be executed under Ford v. Wainright, 477 U.S. 399 (1986). (Doc. No. 434.) In addition, Petitioner has filed a Motion to Disqualify Attorney General Paul G. Summers and the Office of the Attorney General. (Doc. No. 436.) The State has responded to Petitioner's Statement, (Doc. No. 438), and Motion to Disqualify, (Doc. No. 445).

Upon consideration of the record in this case and the parties' arguments, the Court concludes that its jurisdiction over Petitioner's habeas corpus petition is limited to executing the appellate mandate. For the reasons discussed below, the Court denies Petitioner's Statement and the Motions to Amend and to Consider Unresolved Claims included therein. Consequently, the Court dismisses Petitioner's Motion to Disqualify as moot. However, the Court finds that

Court dismisses Petitioner's Motion to Disqualify as moot. However, the Court finds that Petitioner may file a Ford claim challenging both his competency to be executed and the adequacy of state procedures determining competency in a separate habeas corpus petition with this Court.

I. BACKGROUND

In 1981, Petitioner was convicted by a jury of the aggravated rape, aggravated kidnapping, and first-degree murder of Cary Ann Medlin. Petitioner was sentenced to death based on the first-degree murder conviction, and received two sentences of life imprisonment for the aggravated rape and aggravated kidnapping convictions.

On direct appeal in June, 1983, the Tennessee Supreme Court affirmed Petitioner's convictions and sentences and denied his petition for rehearing. State v. Coe, 655 S.W.2d 903 (Tenn. 1983). Petitioner's petition for a writ of certiorari from the United States Supreme Court was similarly denied. Coe v. Tennessee, 464 U.S. 1063, 104 S.Ct. 745 (1984).

Petitioner subsequently sought post-conviction relief by filing a pro se petition in the Criminal Court for Shelby County, Tennessee. The Criminal Court denied relief in March, 1984. An appeal to the Tennessee Court of Criminal Appeals was also denied in December, 1986. Petitioner failed to timely file for permission to appeal to the Tennessee Supreme Court.

In April, 1987, Petitioner filed a pro se petition for a writ of habeas corpus with this Court which the Court dismissed without prejudice in March, 1989, for failure to exhaust state remedies.

In May, 1989, Petitioner filed a supplemental pro se petition for post-conviction relief in the Criminal Court for Shelby County. That petition was denied in November, 1989. Petitioner appealed to the Tennessee Court of Criminal Appeals and that Court affirmed the denial in January, 1991. Petitioner's application to appeal to the Tennessee Supreme Court was denied in November, 1991.

Petitioner filed a supplemental petition for writ of habeas corpus in this Court in March,

1992, subsequently amending this petition by leave of Court in May, 1995 and again in July, 1996. After conducting two separate evidentiary hearings, the District Court, by order dated December 8, 1996, partially granted the petition for a writ of habeas corpus based on constitutional errors with respect to the following aspects of Petitioner's trial: (1) the jury instructions regarding "heinous, atrocious, and cruel" aggravating factors; (2) the jury instructions regarding reasonable doubt; (3) the jury instructions regarding malice; (4) the absence of a jury instruction regarding the meaning of a non-unanimous verdict; and (5) cumulative errors resulting in a fundamentally unfair trial, which violated Petitioner's right to due process. Coe v. Bell, Order (M.D. Tenn. Dec. 8, 1996).[1] The District Court considered and denied relief on Petitioner's remaining claims.

On November 16, 1998, the Sixth Circuit reversed the decision of this Court granting a writ of habeas corpus to Petitioner. Coe v. Bell, 161 F.3d 320 (6th Cir. 1998), reh'g and sugg. for reh'g en banc denied, (Feb. 23, 1999).[2] The Sixth Circuit's mandate stated: "Based on the foregoing, we REVERSE the district court insofar as it granted *habeas corpus* relief, and AFFIRM insofar as it denied relief. Therefore, the award to Coe of *habeas corpus* relief is reversed." Id. at 355.

Petitioner subsequently petitioned the United States Supreme Court for a writ of certiorari. Pending the outcome of the Supreme Court's decision, the Sixth Circuit's mandate was stayed. (Doc. No. 423.) On October 4, 1999, the United States Supreme Court denied certiorari. Coe v. Bell, 120 S.Ct. 110 (Oct. 4, 1999), reh'g denied, 120 S.Ct. 567 (Nov. 29,

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[1] The District Court's Opinion in Coe v. Bell, Memorandum (M.D. Tenn. Dec. 8, 1996), (Doc. No. 403), and its accompanying Order, (Doc. No. 404), hereinafter will be referred to as the "1996 Opinion."

[2] The Sixth Circuit Court of Appeals' Opinion in Coe v. Bell, 161 F.3d 320 (6th Cir. 1998), and its accompanying Judgment, (Doc. No. 422), hereinafter will be referred to as the "1998 Reversal."

1999). Shortly thereafter, on October 12, 1999, the Sixth Circuit denied Petitioner's request for a further stay of the mandate issued on November 16, 1998, and ordered that the mandate be acted upon immediately by this Court. (Docs. No. 427, 428.)

On November 8, 1999, Petitioner filed a Motion for Status Conference with respect to his habeas corpus petition. (Doc. No. 430.) On November 19, 1999, this Court held a status conference[3] at which time, Petitioner moved the Court to: (1) consider constitutional claims presented by Petitioner in his initial habeas petition but not previously addressed on the merits by this Court or the Sixth Circuit; (2) grant Petitioner leave to amend his initial habeas petition to include a claim regarding his mental incompetency at the time of execution under Ford v. Wainright, 477 U.S. 399 (1986); and (3) grant Petitioner leave to amend his initial habeas petition to include a claim that electrocution constitutes cruel and unusual punishment.[4] (Nov. 19, 1999 Tr. at 5-8.) In addition, Petitioner moved this Court to disqualify Attorney General Paul G. Summers and his office, contending that the participation of Attorney General Summers and his office constituted a conflict of interest.[5] (Id. at 9.)

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[3] The transcript from the November 19, 1999 status conference hereinafter will be referred to as the "Nov. 19, 1999 Tr."

[4] The Court notes that in July 1996, it denied a prior motion by Petitioner to include this claim, (Doc. No. 161, ¶ 44), based upon its finding that the claim was frivolous. (Doc. No. 374 at 4.) Petitioner now argues that the Court should reconsider its 1996 ruling and grant him leave to amend his habeas petition to include a claim challenging the constitutionality of electrocution, in light of the Supreme Court's recent grant of certiorari in Bryan v. Moore, U.S. No. 99-6723, cert. granted, 528 U.S. ____, 1999 WL 973888 (October 26, 1999). (Doc. No. 442 at 1-4.)

[5] Petitioner filed a Motion to Disqualify Attorney General Paul G. Summers and the Office of the Attorney General on November 24, 1999. (Doc. No. 436.) The motion is based largely on the alleged appearance of impropriety arising out of General Summers' prior participation in this case as a judge of the Tennessee Court of Criminal Appeals. (Doc. No. 437 at 5-6.) Specifically, in 1983, General Summers sat on the panel which heard and denied Petitioner's direct appeal. See State v. Robert Glen Coe, CCA No. 138, 1991 WL 2873 (Tenn. Crim. App. 1991).

At the conclusion of the status conference, the Court ordered briefing and scheduled a hearing to discuss whether it has jurisdiction to consider the claims asserted by Petitioner. On November 30, 1999, a hearing was held to determine the scope of the Court's jurisdiction to consider Petitioner's claims.[4] Subsequently, upon review of the parties' arguments and briefs, the Court found it necessary to order additional briefing. (Doc. No. 447.) Pursuant to this order, the parties filed additional briefs. (See Docs. No. 451-54.) This opinion now issues.

II. LEGAL STANDARD

> As an initial matter, every appellate court judgment vests jurisdiction in the district court to carry out some further proceedings. In some cases, those further proceedings may be purely ministerial, as when a judgment for the plaintiff is reversed and the only matters that remain for the district court are to dismiss the complaint and enter the judgment in the docket. Frequently, however, the disposition of a case in the court of appeals will require the district court to undertake more significant proceedings.

Exxon Chem. Patents, Inc. v. The Lubrizol Corp., 137 F.3d 1475, 1483 (9th Cir.), cert. denied, 119 S.Ct. 181 (1998); see also Caldwell v. Puget Sound Elec. Apprenticeship & Training Trust, 824 F.2d 765, 767 (9th Cir. 1987) (finding district court had jurisdiction over the controversy and parties "because the mandate of the court of appeals, once issued, returns to the district court"); In re Thorp, 655 F.2d 997, 998 (9th Cir.1981) (filing of notice of appeal divests district court of authority to proceed further until the appellate mandate issues).

Generally, a lower court must comply strictly with the mandate of an appellate court. See Lake Pleasant Grp. v. United States, 40 Fed. Cl. 647, 653 (1998). That a lower court is "bound to carry the mandate of [an] upper court into execution and [can]not consider the questions which the mandate laid at rest -- is indisputable." Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168

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[4] The transcript from the November 30, 1999 hearing hereinafter will be referred to as "Nov. 30, 1999 Tr."

(1939); see also United States v. Houser, 804 F.2d 565, 567 (9th Cir. 1986) (noting that a trial court may not reconsider a question decided by an appellate court). Indeed, a lower court "cannot vary [an appellate decree], or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *In re* Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895); see also Feldman v. Heyman, 815 F.2d 1318, 1321 (9th Cir. 1987) (holding that absent contrary Supreme Court authority, "a district court cannot entertain, even in a matter properly before it, a petition by a party which in effect seeks to undo [the Ninth Circuit's] resolution of a matter . . ."). Moreover, should an appellate court's mandate direct a lower court to enter a specific judgment, the lower court "has no authority to do anything but execute the mandate." Blair v. Durham, 139 F.2d 260, 261 (6th Cir. 1943); see also Newhouse v. Robert's Illma Tours, Inc., 708 F.2d 436, 441-42 (9th Cir. 1983) (holding that a district court cannot decide matters beyond the scope of a remand order).

Although relief may not be granted beyond the scope of the mandate, a lower court, upon return of the mandate, may always consider and decide any matters left open by the mandate. See *In re* Sanford Fork, 160 U.S. at 256; Quern v. Jordan, 440 U.S. 332, 347 n.18 (1979) (stating that "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues"); see also Abell v. Anderson, 148 F.2d 372, 374 (6th Cir. 1945) (holding that where Supreme Court did not rule on an issue, it was "left for the consideration of the District Court upon the issues made by the pleadings"). Indeed, it is well established that a district court on remand "may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court." Jones v. Lewis, 957 F.2d 260, 262 (6th Cir. 1992); see also Conway v. Chem. Leaman Tank Lines, Inc., 644 F.2d 1059, 1062 (5th Cir. 1981) (holding that the law of the case doctrine applies only to those issues decided expressly or by necessary

implication). Moreover, "a judgment that does not specifically provide for a remand is not necessarily incompatible with further proceedings to be undertaken in the district court." Exxon Chem. Patents, 137 F.3d at 1483; see also Sprague, 307 U.S. at 168 (holding that lower court had jurisdiction to consider issue "neither before the [lower court] nor before this Court"). Rather, where an appellate court does not provide a specific remand directive, a district court may conduct further proceedings, as long as those proceedings are not "inconsistent with the mandate." Exxon Chem. Patents, 137 F.3d at 1483; see also Engel Industries, Inc. v. Lockformer Co., 166 F.3d 1379, 1383 (Fed. Cir. 1999) (holding that a judgment not providing specifically for a remand forecloses from further consideration "[o]nly the issues actually decided . . ."). However, when an appellate mandate "prescribes that a [lower] court shall proceed in accordance with the opinion of the reviewing court or . . . for the reasons given in the opinion, that opinion operates to incorporate the opinion into the mandate." Jones, 957 F.2d at 262.

Thus, in order to determine whether Petitioner is now foreclosed from raising specific arguments, it is necessary to determine precisely the issues left open by the Sixth Circuit's mandate. See Lake Pleasant, 40 Fed. Cl. at 654.

III. DISCUSSION

A. The Sixth Circuit Court of Appeals' Mandate in Coe v. Bell

In this case, it is undisputed that the Court has jurisdiction over Petitioner's habeas corpus petition now that the mandate has issued. (Nov. 30, 1999 Tr. at 5-6, 16.) Rather, the question presented to the Court is whether the scope of its jurisdiction is broad enough to permit it to undertake the action which Petitioner requests. The parties agree that the Court has jurisdiction to execute the mandate and enter a judgment dismissing the habeas petition. Indeed, Respondent argues that such ministerial tasks constitute the only action which the Court has

jurisdiction to perform. (Doc. No. 438 at 2-3.) However, Petitioner argues that the Court possesses broad jurisdiction, thus permitting it to consider claims that have not been considered and to grant Petitioner leave to amend his original habeas corpus petition. (Doc. No. 434 at 4-6.)

In this case, the Sixth Circuit's mandate in Coe v. Bell, 161 F.3d 320 (6th Cir. 1999), simply reversed and affirmed the District Court's[7] decision in part. The mandate did not remand the petition for further consideration or for further proceedings consistent with the mandate. The mandate simply states: "Based on the foregoing, we REVERSE the district court insofar as it granted *habeas corpus* relief, and AFFIRM insofar as it denied relief. Therefore, the award to Coe of *habeas corpus* relief is reversed." Id. at 355.

The Court will consider separately below whether issuance of the appellate mandate vests the Court with broad jurisdiction to (1) consider unresolved claims, and (2) grant Petitioner leave to amend his initial habeas corpus petition.

B. Petitioner's Claims Regarding the Reasonable Doubt Jury Instruction and Brady Violations at Sentencing

Petitioner asserts that there remain unresolved claims in his habeas corpus petition on which he is entitled to a ruling. (Doc. No. 434 at 1.) Petitioner contends that this Court and the Sixth Circuit did not consider the following two constitutional claims set forth in his initial habeas petition: (1) the sentencing phase jury instructions on "reasonable doubt" violated the Sixth, Eighth, and Fourteenth Amendments; and (2) the prosecution's withholding of evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), denied Petitioner due process and a fair capital sentencing hearing. (Doc. No. 434 at 2-3.) Accordingly, Petitioner requests that this

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[7] In discussing its decision in Coe v. Bell, Memorandum (M.D. Tenn. Dec. 8, 1996), this Court hereinafter shall be referred to as the "District Court."

Court consider and issue a ruling on these two claims.

With respect to the first claim regarding the sentencing phase jury instructions on reasonable doubt, Petitioner asserts that he raised this claim in Paragraph 29(a-c) of his Amendment to Petition for Writ of Habeas Corpus, (Doc. No. 161 at 1-2). (Doc. No. 434 at 3.) According to Petitioner, this Court granted relief based upon the reasonable doubt jury instruction given at the guilt phase of his trial, but failed to consider the reasonable doubt jury instruction given at the sentencing phase. Petitioner further asserts that on appeal, the Sixth Circuit also failed to consider the sentencing phase instruction. Rather, in a subsection entitled, "Guilt Phase Instructions," the Sixth Circuit reversed the District Court, citing only the guilt phase reasonable doubt instruction which formed the basis for relief in the District Court. (Id. at 4.)

With respect to the second claim regarding the effect of alleged Brady violations on Petitioner's capital sentencing hearing, Petitioner concedes that he did not raise this claim in his Petition or Amended Petition for habeas corpus. (Doc. No. 434 at 3; Nov. 30, 1999 Tr. at 7.) Nonetheless, he argues that the inclusion of this claim in his post-trial brief, (Pet'a. Proposed Findings of Fact & Concls. of Law at 1, 134), placed it properly before the District Court and Sixth Circuit for consideration. Id. According to Petitioner, neither the District Court nor the Sixth Circuit considered his claim that the prosecution's withholding of exculpatory evidence denied him a fair sentencing hearing, but rather both courts only considered the effect of such Brady violations upon the guilt phase of his trial. (Doc. No. 434 at 3.)

Given that a Petitioner is "entitled to an adjudication of all of the claims presented in his . . . application for federal habeas relief," Stewart v. Martinez- Villareal, 118 S.Ct. 1618, 1621 (1998), this Court must address whether all of those claims properly raised by Petitioner have been considered before dismissing the habeas petition from its jurisdiction. See also DeSilva v. Dileonardi, 1998 WL 864030, 172 F.3d 52 (Table) (7th Cir. 1998) (holding that where an

appellate court reverses a district court's issuance of a writ of habeas corpus but there remain unaddressed claims, such claims "remain open in the district court" for consideration).

1. Reasonable Doubt Jury Instruction Given at Sentencing Phase

Upon review of its 1996 Opinion granting Petitioner habeas relief, the Court finds Petitioner's claim regarding the sentencing phase reasonable doubt instruction to be without merit.

This Court began its discussion of Petitioner's claim by separately setting forth the jury instructions provided at both the sentencing and guilt phases of the trial. Coe v. Bell, Memorandum at 32 (M.D. Tenn. Dec. 8, 1996). The Court then set forth additional instructions given by the trial court at the sentencing phase. Id. at 33. Upon review of these instructions, the Court found they "were improper because they unconstitutionally diminished the prosecution's burden of proof with respect to Petitioner's *convictions and death sentence*." Id. (emphasis added). Based upon its finding that the language concerning "moral certainty" was ambiguous, the Court concluded "that the reasonable doubt charge with respect to Petitioner's *murder conviction and death sentence* violated due process protections by creating a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet" constitutional standards. Id. at 34 (emphasis added). Accordingly, the Court "grant[ed] the writ as to all of Petitioner's convictions and sentences." Id. at 36.

The Court finds that it thoroughly considered, and in fact granted relief upon, Petitioner's claim regarding the reasonable doubt jury instruction given at the sentencing phase of his trial in its 1996 Opinion. While the Court agrees with Petitioner that he properly amended his petition to include a claim that the jury instructions regarding reasonable doubt

"relieved the prosecution of its burden of proof at both the guilt and sentencing phases of trial,"[8] (Doc. No. 161 at ¶29), it finds the 1996 Opinion clearly considered Petitioner's claim as it relates to the sentencing phase. In addition, the Court finds that although the Sixth Circuit did not explicitly consider the reasonable doubt jury instruction given at the sentencing phase,[9] its mandate reversing the District Court "insofar as it granted *habeas corpus* relief," Coe, 161 F.3d at 355, encompassed the District Court's decision regarding the sentencing phase jury instruction. As such, this Court holds that it cannot exercise jurisdiction over a claim which it previously considered in granting relief to Petitioner, and which the Sixth Circuit impliedly considered in reversing the District Court. Petitioner has received a full and fair adjudication on the merits of his claim regarding the sentencing phase jury instruction on reasonable doubt, and this Court is without jurisdiction to further consider this claim.

2. Brady Violations Relating to the Sentencing Phase

Petitioner is correct that the District Court did not consider a claim regarding the effect of alleged Brady violations upon his capital sentencing hearing in its 1996 Opinion. Rather, the District Court considered and denied Petitioner's claim set forth in Paragraph 15 of his Amended Petition regarding alleged Brady violations as they related to his

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[8] On July 1, 1996, the District Court granted Petitioner leave to amend his habeas petition to include this claim, thus placing the claim properly before the District Court for consideration. (See Doc. No. 375.)

[9] On appeal, the Sixth Circuit considered the District Court's decision regarding the reasonable doubt jury instructions, but only as it related to those instructions given at the guilt phase of Petitioner's trial. After setting forth the reasonable doubt jury instruction given at the guilt phase, the Sixth Circuit merely noted that "[a] functionally equivalent instruction was given at the sentencing phase." Coe, 161 F.3d at 329. The Sixth Circuit then concluded its discussion by holding that "[s]ubsequent to the district court's decision," it had upheld the constitutionality of an identical instruction in Austin v. Bell, 126 F.3d 843, 846-47 (6th Cir. 1997), cert. denied, 118 S.Ct. 1547 (1998), and that because "Coe concedes this and offers no reason why we should overrule ourselves, . . . we shall not." Id. at 329.

conviction, finding that "sufficient evidence was introduced at trial to support a jury finding that Petitioner committed the crimes for which he was convicted." Coe v. Bell, memorandum at 17 (M.D. Tenn. Dec. 8, 1996). Thus, the Court must address whether it should have considered the Brady claim as it relates to Petitioner's capital sentencing hearing.

It is clear from a review of the record, and Petitioner concedes, that he never asserted in his initial habeas petition a claim regarding the effect of Brady violations upon his capital sentencing hearing. (Nov. 30, 1999 Tr. at 7.) In his Amended Petition, Petitioner only alleged that "his *conviction* was obtained by the unconstitutional failure of the prosecution to disclose to him exculpatory evidence." (Doc. No. 86 at ¶15) (emphasis added). Furthermore, after it concluded all evidentiary hearings on the habeas petition, the Court denied Petitioner leave to amend further his petition to include a claim that he was unconstitutionally denied access to exculpatory evidence demonstrating that he "did not merit the death sentence." (Docs. No. 161 at ¶39; 374 at 2; 375.) Nonetheless, Petitioner asserts that this claim was presented properly to the District Court because he included it in a post-trial brief which he asserts amended the pleadings to conform to the proof presented during the evidentiary hearings on his habeas petition pursuant to Federal Rule of Civil Procedure 15(b). (Pet's. Proposed Findings of Fact & Concls. of Law at 1, 134) (alleging that withheld evidence denied Petitioner a fair sentencing hearing).

Initially, the Court notes that it never adopted Petitioner's Proposed Findings of Fact and Conclusions of Law. Nor did it grant Petitioner leave to amend his petition to conform to evidence presented during the 1996 hearings on the habeas petition. Nonetheless, Petitioner is correct that a court must treat issues that were tried with the express or implied consent of the parties as if they were raised in the pleadings. Fed. R. Civ. P. 15(b); see also Ostano Commerzanstalt v. Telewide Sys., Inc., 880 F.2d 642, 646 (2d Cir. 1989) (stating that Fed. R. Civ. P. 15(b) is mandatory and not permissive, and issues tried but not raised in pleadings

must be treated as if pleaded); 3 Moore, Moore's Federal Practice § 15.18[1] (3d Ed. 1999). Implied consent, however, cannot be found where a party failed to object to evidence supporting a claim that allegedly was tried by implied consent, where such evidence was relevant to another properly pled issue. See Portis v. First Nat'l Bank of New Albany, 34 F.3d 325, 332 (5th Cir. 1994); see generally Moore, supra, § 15.18[1].

A review of the record in this case supports the State's position that it did not expressly consent to the trial of the Brady claim as it relates to sentencing. (See Doc. No. 438 at 5-6.) In addition, the Court finds the State did not impliedly consent to the trial of the sentencing claim. The evidence supporting Petitioner's claim regarding the effect of the alleged Brady violations upon his sentencing hearing is identical to the evidence adduced at trial in support of his properly pled claim regarding the effect of such violations on the guilt phase of his trial. In fact, Petitioner relies upon the same set of factual allegations to establish the Brady violations as they relate to both the sentencing phase claim and the guilt phase claim. (See Nov. 19, 1999 Tr. at 5; Nov. 30, 1999 Tr. at 7) (both alleging that the District Court failed to consider the effect on Petitioner's sentencing hearing of the Brady violations set forth in ¶15(a-z) of the Amended Petition, alleging Petitioner's Brady claim as it relates to his conviction). As such, the Court finds that Petitioner's Brady claim as it relates to his capital sentencing hearing was not tried by implication and thus, was not properly placed before this Court for consideration pursuant to Rule 15(b). Because the Court lacks jurisdiction to consider the Brady claim as it relates to the sentencing phase, it denies Petitioner's motion for consideration of this claim.

However, assuming *arguendo* that this Court were to find Petitioner amended the pleadings to include this claim, thus properly placing it before the Court, the Sixth Circuit's holding in Coe would preclude this Court from considering the merits of Petitioner's claim. In affirming the District Court's denial of relief on Petitioner's Brady claim as it relates to

his conviction, the Sixth Circuit held that Petitioner had failed to carry his burden of proving that the evidence allegedly withheld by the prosecution was not in fact disclosed to him, and that such evidence was under the sole control of the government or improperly kept from him. Coe, 161 F.3d at 344.[10]

A petitioner seeking to establish a due process violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), must satisfy the evidentiary burden relied upon by the Sixth Circuit regardless of whether he is claiming that the violation affected his conviction or his sentence. Under Brady, the defendant bears the burden of proving that the evidence was (1) suppressed by the prosecution; (2) favorable to the defense; and (3) material either to guilt or to punishment. 373 U.S. at 87. However, Brady does not obligate the government "to produce for [a defendant] evidence or information already known to him, or that he could have obtained from other sources by exercising reasonable diligence." Brown v. Cain, 104 F.3d 744, 750 (5th Cir. 1997), cert. denied, 520 U.S. 1195 (1997). Accordingly, in order to prevail on his Brady claim as it relates to the sentencing phase of his trial, Petitioner would be required to show that the allegedly suppressed evidence was not disclosed to him or available to him through due diligence. See, e.g., United States v. Aubin, 87 F.3d 141, 148-49 (5th Cir. 1996) (finding no Brady violation where petitioner did not show that allegedly withheld information was not available to him through due diligence).

In light of the Sixth Circuit's holding, Petitioner cannot meet this burden.

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[10] In light of its holding that Petitioner had not met this evidentiary burden, the court found it unnecessary to reach the issue relied upon by the District Court regarding the effect of the alleged Brady violations upon Petitioner's conviction. Nonetheless, the Sixth Circuit, assuming *arguendo* that the evidence was not in fact disclosed to Petitioner, and that it should have been, stated that upon a review of the record as a whole, it agreed ". . . with the district court that there is not a reasonable probability that Coe would have been acquitted had this evidence been disclosed." Coe, 161 F.3d at 345.

Despite Petitioner's argument that the Sixth Circuit merely made non-binding factual findings regarding Petitioner's failure to meet his evidentiary burden, (Nov. 30, 1999 Tr. at 8-9), the Court understands the Sixth Circuit's holding to be a binding disposition of a legal question which bars the Court from reconsidering this issue. See, e.g., White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967) (stating that a district court must follow the decision of a reviewing court on a legal issue). Moreover, the Sixth Circuit's holding regarding Petitioner's failure to carry his evidentiary burden applies equally to both the guilt phase Brady claim and the sentencing phase Brady claim because the factual predicate underlying both claims is identical. (Doc. No. 86 at ¶15(a-z).) Petitioner's Brady claims do not allege separate and distinct Brady violations. Rather they separately allege that the same set of twenty-six Brady violations had two distinct effects of unconstitutionally depriving Petitioner of a fair guilt phase trial and a fair capital sentencing hearing. Thus, assuming *arguendo* that Petitioner properly presented for consideration his claim regarding the effect of Brady violations upon his capital sentencing hearing, this claim would be moot in light of the Sixth Circuit's holding.[11]

C. Petitioner's Motions to Amend to Include a Ford Claim and a Claim Challenging the Constitutionality of Electrocution

Petitioner argues that this Court has jurisdiction to grant him leave to amend his original habeas corpus petition to include a claim of present incompetency to be executed under Ford v. Wainwright, 477 U.S. 399 (1986), and a claim challenging the constitutionality of electrocution. (Doc. No. 434 at 7-9.)

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[11] Moreover, the Court notes that if Petitioner disagrees with this Court's reading of the Sixth Circuit's holding, the appropriate way to raise this issue is to file an application for a writ of mandamus or a new appeal so that the Sixth Circuit Court of Appeals may construe its own mandate, and act accordingly. See *In re* Sanford Fork & Tool Co., 160 U.S. 247, 256 (1895).

1. Legal Standard Governing the Amendment of Habeas Corpus Petitions

Amendment of a petition for habeas corpus relief is governed by the "rules of procedure applicable to civil actions." 28 U.S.C. § 2242; see also Hodges v. Rose, 570 F.2d 643, 649 (6th Cir. 1978). Federal Rule of Civil Procedure15(a) vests the district court with virtually unlimited discretion to grant leave to amend when "justice so requires." FED. R. CIV. P. 15(a) (West 1999). However, "the thrust of Rule 15(a) is aimed at the pre-judgment phases of litigation." Dartmouth Review v. Dartmouth College, 889 F.2d 13, 22 (1st Cir. 1989). As such, once a final judgment on the merits is entered by the district court, amendment generally will not be permitted unless that judgment is set aside or vacated under Rule 59 or Rule 60. 6 Wright & Miller, Federal Practice and Procedure § 1489 at 692-93 (2d Ed. 1990); see also Collins v. City of Detroit, 780 F.2d 583, 584 n.1 (6th Cir. 1986). Furthermore, once an appeal has been taken from a final judgment, the district court is divested of its jurisdiction over the case and thus, cannot reopen the judgment to allow an amendment. See, e.g., Denny v. Barber, 576 F.2d 465, 468 (2d Cir. 1978); Thompson v. Harry C. Erb, Inc., 240 F.2d 452, 454 (3d Cir. 1957).

A final judgment for purposes of Rule 15 and Rule 60 amendments includes a "decree and any order from which an appeal lies." FED. R. CIV. P. 54 (West 1999). Similarly, an appeal in a habeas corpus proceeding "lies from a 'final order . . . .'" Phifer v. Warden, 53 F.3d 859, 862 (7th Cir. 1995); see also 28 U.S.C. §§ 1291, 2253.[12] Furthermore, an

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n 28 U.S.C. § 1291, entitled "Final decisions of district courts," provides in part that the "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291 (West 1999). 28 U.S.C. § 2253 states that "[i]n a habeas corpus proceeding . . . before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." 28 U.S.C. § 2253 (West 1999).

order granting a petition for a writ of habeas corpus is "ordinarily considered a final judgment, even if the district court does not address all of the petitioner's claims." Sprosty v. Buchler, 79 F.3d 635, 645 (7th Cir. 1996); see also Phifer, 53 F.3d at 862 (same).

The liberal amendment policy set forth in Rules 15, 59(e) and 60 must be balanced against the interest in obtaining and preserving finality of judgment. See, e.g., Lussier v. Dugger, 904 F.2d 661, 667 (11th Cir. 1990) (noting that the interest in finality is compelling after a district court enters judgment); see generally Wright & Miller, supra, § 1489 at 694. Accordingly, although "amendments are still possible" after "judgment has entered and jurisdiction has been transferred to an appellate court," leave to amend at that late stage in the litigation "will be granted [by the appellate court] sparingly and only if justice requires further proceedings." Dartmouth Review, 889 F.2d at 22-23 (denying review to plaintiffs petitioning the circuit court to "direct . . . the district court to grant leave" to amend their complaint). After the appellate court has entered a judgment on the pleadings, the district court cannot amend the original pleadings absent direct or implied authorization to do so from the appellate court. See, e.g., Johnson v. Ventra Grp., Inc., 191 F.3d 732, 738 (6th Cir. 1999) (interpreting reversal and remand of previous case as allowing plaintiff to amend his complaint); Doran v. Petroleum Mgmt. Corp., 576 F.2d 91, 93 (5th Cir.1978) (holding that parties were free on remand to present by amendment new issues not inconsistent with appellate decision); *In re* Sanford Fork, 160 U.S. 247, 258-59 (1895) (holding that where Court remanded case to court of appeals with directions to conduct further proceedings not inconsistent with Court's opinion, court of appeals could

allow amendment of pleadings because they were within the scope of Court's mandate).[13]

2. Jurisdiction to Grant Petitioner Leave to Amend

Instead of asking the Court of Appeals to authorize this Court to grant him leave to amend, Petitioner has come to this Court, arguing that it is free to permit amendment because it has yet to enter a final judgment disposing of the petition. As such, Petitioner concludes that "allowing amendment is fully within the Court's powers under Fed. R. Civ. P. 15." (Doc. No. 434 at 7.)

While Petitioner is correct that the Court has not issued a judgment disposing of his petition, the Court finds that a final judgment for purposes of Rule 15 and Rule 60 amendments has issued in this case. The District Court vacated all of Petitioner's convictions and sentences and ordered his release unless the State afforded him a new trial. (Doc. No. 404 at 2.) In addition, the parties appealed, and the Sixth Circuit exercised jurisdiction over, the District Court's judgment pursuant to 28 U.S.C. §§ 1291 and 2253, thus indicating that the District Court's Opinion was a final, appealable judgment. (Opening Brief of Appellee/Cross-Appellant Robert Glen Coe Before the Sixth Circuit Court of Appeals at 1; Doc. No. 438, Exs. 1, 2.) As such, the Court finds that its 1996 Opinion is a final judgment for purposes of Rule 15 and Rule 60 amendments.

Given that the 1996 Opinion was a final judgment which was appealed to the Sixth Circuit and the United States Supreme Court, the interests in finality are significant at this point in the litigation. Absent a direct or implied order from the Sixth Circuit to amend the

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[13] The Court notes that thorough research reveals no case in which a district court has allowed amendments to pleadings *after* a judgment has issued from the court of appeals *absent a direct or implied mandate* from the court of appeals allowing the parties to amend their pleadings.

petition, this Court lacks jurisdiction to allow such an amendment. Thus, the Court must examine the opinion and mandate of the Court of Appeals to determine whether it expressly or impliedly includes such an order.

In this case, the Sixth Circuit's mandate did not remand the petition to the District Court or order further proceedings consistent with the appellate court's opinion. Rather, the mandate simply reversed the District Court's judgment insofar as it granted a writ of habeas corpus to Petitioner, and affirmed the judgment insofar as it denied relief. As such, the mandate does not include an express directive to grant Petitioner leave to amend. Furthermore, neither the mandate, the opinion, nor the dissent includes an implied directive allowing amendment to the habeas petition. See Jones v. Lewis, 957 F.2d 260, 262 (6th Cir. 1992) (stating that "[i]n determining the scope of an appellate mandate, the majority, concurring, and dissenting opinions may be consulted"). Thus, in light of the finality of its 1996 judgment and the mandate issued by the Sixth Circuit, this Court finds that it lacks jurisdiction to allow Petitioner to amend his petition at this late stage in the litigation and that it only possesses jurisdiction to execute the mandate. Accordingly, Petitioner's request for leave to amend his petition to include a Ford claim and a claim challenging the constitutionality of electrocution is hereby denied. Petitioner must instead seek permission from the Court of Appeals to amend his petition to include such claims.[14] See Dartmouth Review, supra.

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14 Although the Sixth Circuit has not ruled on the issue of whether a habeas corpus petitioner may bring post-judgment amendments, the Court notes that at least one circuit court has held that post-judgment amendments brought pursuant to Federal Rule of Civil Procedure 60(b) are barred under the Antiterrorism and Effective Death Penalty Act's provisions against second and successive provisions. See *In re* Medina, 109 F.3d 1556 (11th Cir. 1997); Felker v. Turpin, 101 F.3d 657 (11th Cir. 1996).

D. Petitioner's Ford Claims

While the Court lacks jurisdiction to permit Petitioner to amend his original habeas petition as discussed above, the Court will consider whether Petitioner may file a new petition raising Ford claims.[1]

1. Claims Under *Ford v. Wainwright*

In Ford v. Wainwright, the Supreme Court considered "whether the Eighth Amendment prohibits the execution of the insane and, if so, whether . . . [a] [d]istrict [c]ourt . . . [is] under an obligation to hold an evidentiary hearing on the question of a prisoner's sanity." 477 U.S. 399, 405, 410 (1986). Holding that the Eighth Amendment bars states from "inflicting the penalty of death upon a prisoner who is insane," the Ford Court found that federal courts are "obliged to hold an evidentiary hearing on . . . [the issue of a prisoner's sanity] if, among other factors, 'the factfinding procedure employed by the [s]tate court was not adequate to afford a full and fair hearing, . . . or the 'material facts were not adequately developed at the State court hearing, . . . or 'the applicant did not receive a full, fair, and adequate hearing in the State court proceeding.'" Id. at 411 (citing 28 U.S.C. § 2254(d)). Thus, under Ford, a petitioner can challenge both the state's ability to execute him while he is incompetent, as well as the adequacy of the state's procedures by which his competency to be executed was determined. Id. at 405, 410.

2. The Bar Against Second or Successive Petitions

Whether Petitioner may now bring Ford claims before this Court turns on

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[1] In its Order issued December 9, 1999, the Court directed that the parties brief the issues addressed in this section. (Doc. No. 447.)

whether those claims are barred by certain provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") set forth at 28 U.S.C. § 2244(b) (West 1999).

Historically, state prisoners have been prohibited, by statute and under the common law, from bringing more than one petition for a writ of habeas corpus challenging the legality of their conviction or sentence in federal court. See 28 U.S.C. §§ 2244, 2254 (West 1995); see generally McCleskey v. Zant, 499 U.S. 467, 490 (1991). Despite this general prohibition against second habeas petitions, however, certain exceptions have always existed. Prior to 1996, 28 U.S.C. § 2244 allowed state prisoners to bring a second habeas petition if the applicant pled and the district court found

> the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and . . . that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

28 U.S.C. § 2244(c) (West 1995). Additionally, § 2244(a) permitted federal courts to grant state and federal prisoners a writ of habeas corpus if granting the writ would serve the "ends of justice." 28 U.S.C. § 2244(a) (West 1995). Although left undefined by Congress, this "ends of justice" exception was construed narrowly by courts and reserved for those cases in which the petitioner presented evidence demonstrating that the exception was "necessary to prevent a fundamental miscarriage of justice." Fearance v. Scott, 56 F.3d 633, 637 (5th Cir. 1995). In most cases, courts required that such evidence demonstrate the prisoner's "actual innocence" of the crime for which he was convicted. Id.; see also Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (defining "actual innocence" as facts which establish that petitioner has a "colorable claim of factual innocence").

In addition to these statutory exceptions, there were also judicially created, equitable exceptions to the prohibition against second and successive petitions, wherein courts would permit a petitioner raising a claim for the first time in a second petition to proceed if "he ha[d] a legitimate excuse for failing to raise [the] claim at the appropriate time." McCleskey, 499 U.S. at 490. Prisoners without a legitimate excuse were prohibited from bringing omitted claims in a second habeas petition primarily under the doctrine of abuse of the writ. See id.; Sawyer, supra

Historically grounded in the need for finality and respect for comity, Carlson v. Pitcher, 137 F.3d 416, 419 (6th Cir. 1998), the abuse of the writ doctrine functions as a "modified *res judicata* rule" to preclude courts from adjudicating certain categories of claims not presented in a first habeas petition. Felker v. Turpin, 518 U.S. 651, 664 (1996). The doctrine "concentrate[s] on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." McCleskey, 499 U.S. at 490. Under the abuse of the writ doctrine prior to 1996, a petitioner filing a second habeas petition was allowed to pursue his claim if he demonstrated "cause for failing to raise it [in an earlier petition] and prejudice therefrom," or if he could not show cause, demonstrated "that a fundamental miscarriage of justice would result from a failure to entertain the claim. McCleskey, 499 U.S. at 494-95. Cause and prejudice requires that the petitioner "show that some objective factor external to the defense impeded counsel's [or petitioner's] efforts to raise the claim" in a prior petition, such as "interference by [state] officials that makes compliance with a . . . procedural rule impracticable" or a "showing that the factual or legal basis for a claim was not reasonably available to counsel" or the petitioner. Id. at 493. Accordingly, the doctrine of abuse of the writ has most commonly

been used to preclude claims in which a petitioner has failed "to raise a claim through inexcusable neglect," where he has "deliberate[ly] abandon[ed] his claims," and then sought to raise them in a subsequent petition, and where claims presented in a subsequent petition "could have been raised or could have been developed in the first habeas petition." Id. at 488-90 (citing cases) (internal citations omitted). See, e.g., Felker, 518 U.S. at 657, 665 (finding petitioner's claims that the testimony of the state's forensic expert at trial was suspect and that the jury charge and voir dire violated due process by equating guilt beyond a reasonable doubt with moral certainty, to be second and successive under the AEDPA in large part because the claims were based upon facts that the petitioner knew or should have known at the time he filed his first petition); United States v. Barrett, 178 F.3d 34, 45 (1st Cir. 1999) ("unlike the Ford claim at issue in [Villareal II]," petitioner's claim, based upon violations of the Jencks Act, 18 U.S.C. § 3500, "could have been brought and adjudicated at the time of the first petition," because petitioner knew the facts upon which to base the claim at that time).

In 1996, with the passage of the AEDPA, Congress amended 28 U.S.C. § 2244(b) to "substantially curtail" the ability of a state prisoner to file a "second or successive application[] for a writ of habeas corpus," by modifying the availability of these statutory and common law exceptions. *In re* Medina, 109 F.3d 1556, 1561 (11th Cir. 1997). Under the current version of 28 U.S.C. § 2244(b):

> (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 second or successive habeas corpus applications 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 [§ 2254] 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.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of [§ 2244(b)].

28 U.S.C. § 2244(b) (West 1999).

Significantly, the new statutory provisions under the AEDPA no longer contain an "ends of justice" exception. Compare 28 U.S.C. § 2244(b) (West 1999) with 28 U.S.C. § 2244(b) (West 1995). And while the abuse of the writ doctrine still functions as a bar to the filing of second or successive petitions, it is arguable that the doctrine has been modified. See Felker, 518 U.S. at 664 (holding that "[t]he new restrictions on successive petitions [in § 2244(b)] constitute a *restraint* on what is called in habeas corpus practice 'abuse of the writ'") (emphasis added). Specifically, the "fundamental miscarriage of justice" exception may no longer be available. Prior to 1996, courts interpreted the common law "fundamental miscarriage of justice" exception consistently with the statutory "ends of justice" exception previously found in § 2244. See e.g., Fearance, 56 F.3d at 637 (equating the standard used to find a fundamental miscarriage of justice with that used by courts applying the ends of justice exception). As such, it is arguable that Congress' elimination of the ends of justice exception necessarily means that the common law

fundamental miscarriage of justice exception no longer exists as well. See Martinez-Villareal v. Stewart, 118 F.3d 628, 635 (9th Cir. 1997), aff'd 118 S.Ct. 1618 (1998), (Nelson, J., concurring) (hereinafter referred to as "Villareal I") (concluding that the "ends of justice" exception is no longer included in or contemplated by the statute, thereby implying that the common law fundamental miscarriage of justice exception has been eradicated); but see *In re* Minarek, 166 F.3d 591, 607-08 (3d Cir. 1999) (considering pre-1996 "fundamental miscarriage of justice" standard, thereby implying that "ends of justice" exception may still be a valid exception to bar against second or successive petitions).

Although the AEDPA has further restricted the filing of second or successive petitions, it remains clear that not every "second-in-time" petition, even one which contains "new habeas claims not presented in the first petition," is automatically considered a "second or successive" petition barred by 28 U.S.C. § 2244(b). Carlson, 137 F.3d at 420. However, because Congress "did not define what it meant by 'second or successive' applications," courts have been left to determine which petitions Congress intended to bar as second or successive under the AEDPA. Id. at 418. Recently, the Supreme Court rejected a plain language interpretation of the new restrictions set forth in 28 U.S.C. § 2244(b). See Stewart v. Martinez-Villareal, 118 S.Ct. 1618, 1621 (1998) (hereinafter referred to as "Villareal II") (rejecting the State's argument that the "plain meaning of § 2244(b) as amended requires . . . [a] new petition [containing a Ford claim] to be treated as successive"); see also *In re* Page, 170 F.3d 659, 661 (7th Cir. 1999) (acknowledging that § 2244(b) does not forbid the filing of a second or successive petition, but instead only "impose[s] certain limitations designed to make sure that the second or subsequent petition is not gratuitous"). Instead, the Court in Villareal II ". . . construed

§ 2244(b) in a manner that avoids an overly literal construction of the term 'second or successive' petition, . . . recognizing that some types of 'second' petitions do not implicate the judicially developed abuse-of-the-writ principles that were the basis for the AEDPA's statutory restrictions." Vancleave v. Norris, 150 F.3d 926, 928 (8th Cir. 1998), citing Villareal II, 118 S.Ct. at 1622; see also 4 U.S.C.C.A.N. 1996, H.R. 104-518, at 944 (1997 West) (the 1996 amendments to 28 U.S.C. § 2244 were passed "to curb the abuse of the statutory writ of habeas corpus"). Cases in which courts have held that "numerically second petitions" are not "'second or successive' can [best] be understood as describing factual scenarios in which the application of a modified *res judicata* rule would not make sense." Barrett, 178 F.3d at 44.

Thus, despite the modification of the abuse of the writ doctrine, courts continue to look to pre-AEDPA abuse of the writ caselaw to determine whether a claim is barred under the AEDPA. See e.g., Vancleave, 150 F.3d at 928 (noting that "[t]he [Supreme] Court's approach in . . . [Villareal II] suggests that pre-AEDPA abuse of the writ cases are important in construing the term 'second or successive'"). As such, whether a claim traditionally has been considered an "abuse of the writ," weighs heavily in a court's determination that the claim is not barred as a second or successive petition under the AEDPA. See e.g., Carlson, 137 F.3d at 419. Thus, applying these principles, courts have held that "a *habeas* petition filed after a previous petition has been dismissed on either exhaustion or ripeness grounds is not a 'second or successive' petition" within the scope of the AEDPA. Carlson, 137 F.2d at 420 (applying holding to several unnamed claims in second petition that were previously dismissed on exhaustion grounds); see also Villareal II, 118 S.Ct. at 1622 (holding that Ford claim presented in prior petition but dismissed on exhaustion grounds is not a second or successive petition to which the

modified *res judicata* rules apply because no form of *res judicata* would bar a petition timely filed and dismissed previously only because it was not ripe for adjudication). Such claims, allowed prior to 1996, are not second petitions, but instead constitute a "continuation of the earlier petition." Carlson, 137 F.3d at 419, quoting McWilliams v. Colorado, 121 F.3d 573, 575 (10th Cir. 1997). Additionally, courts have held that habeas claims presented under 28 U.S.C. § 2241, which attack only the "execution of a sentence" and not the "legality of the imposition of a sentence," are not barred under the express terms of 28 U.S.C. § 2244(b), in part because claims presented in a § 2241 petition necessarily arise after the fact of conviction and sentence, and thus could not have been adjudicated beforehand in the prisoner's initial habeas petition. Chambers v. United States, 106 F.3d 472, 474 (2nd Cir. 1997); see also *In re* Slatton, 1998 WL 661148, at **3 (6th Cir.) (unpublished table decision). As such, application of a modified *res judicata* rule to § 2241 petitions would not make sense. Finally, courts have also created an exception to the "second or successive" rule in cases "where the earlier petition was rejected for failure to pay the filing fee or for mistakes in form, . . . where the second petition challenges parts of the judgment that arose as the result of the success of an earlier petition," Barrett, 178 F.3d at 43-44 (citing cases), and where the petitioner is challenging "proceedings that became final subsequent to [the filing of] a prior habeas petition." *In re* Cain, 137 F.3d 234, 235 (5th Cir. 1998) (holding that § 2254 challenge to prison disciplinary proceedings that became final subsequent to a prior habeas petition was not second or successive petition under the AEDPA).

Conversely, where the petitioner's second-in-time claim can be classified as a traditional abuse of the writ, it necessarily "falls within the definition of second or successive." Barrett, 178 F.3d at 45. Accordingly, second or successive petitions are most commonly those in

which a petitioner attempts to raise a claim based upon facts which were known or could reasonably have been known to the petitioner at the time when he filed his first habeas petition, and therefore "could have been raised or could have been developed in the first habeas petition." McCleskey, 499 U.S. at 488-90. Additionally, courts have found that second-in-time petitions challenging the legality of a prisoner's conviction and sentence or those raising the same claims alleged in an original habeas petition are precisely the kind of petitions contemplated by the AEDPA's prohibitions. See, e.g., Barrett, 178 F.3d at 45 (petitioner's second § 2254 petition barred in part because it "challenged the same judgment that was challenged in his" earlier petition, and there was "no new judgment or amendment of sentence" upon which to base a new, valid claim that would not be subject to the "second or successive" provisions of 28 U.S.C. § 2244(b)(2)); see also Charles v. Chandler, 180 F.3d 753, 758 (6th Cir. 1999) (finding second § 2255 petition in which petitioner sought "to file the same claims" challenging the validity of the petitioner's conviction, which had "already been denied on the merits" in his first petition, to be a successive petition under 28 U.S.C. § 2244(b)(1)).

The State contends Petitioner's Ford claims would be barred by the prohibitions against second or successive habeas petitions set forth in 28 U.S.C. § 2244(b). (Nov. 30, 1999 Tr. at 18-19; Docs. No. 451 at 9-14; 453 at 9-10.) However, the Court finds that Petitioner's Ford claims are properly brought pursuant to 28 U.S.C. § 2241 and, in the alternative, that Petitioner's Ford claims would not constitute a second or successive petition subject to the bar of 28 U.S.C. § 2244(b).

3. Bringing *Ford* Claims Pursuant to 28 U.S.C. § 2241

Although courts traditionally have permitted Ford claims to be brought

pursuant to 28 U.S.C. § 2254, see, e.g., Ford, 477 U.S. at 399; Medina, 109 F.3d at 1556, 1561; Villareal II, 118 S.Ct. at 1618-19; In re Davis, 121 F.3d 952 (5th Cir. 1997); Nguyen v. Gibson, 162 F.3d 600 (10th Cir. 1998); Poland v. Stewart, 41 F.Supp.2d 1037 (D. Ariz. 1999), § 2254 does not appear to provide a cause of action for such claims. By its express terms, 28 U.S.C. § 2254 allows a prisoner to bring applications for a writ of habeas corpus "*only* on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[16] 28 U.S.C. § 2254(a) (West 1999) (emphasis added). Such claims challenge "the legality of the imposition of a sentence" and a prisoner's actual guilt or innocence. Chambers, 106 F.3d at 474; see also Slatton, 1998 WL 661148, at **3.

By contrast, Ford claims do not challenge the validity of the imposition of a death sentence but rather, they challenge "when" such a sentence may be executed. Ford, 477 U.S. at 425 (Powell, J., concurring) (stating that "the only question raised" by a Ford claim "is not whether, but when, his execution may take place"). Ultimately, a prisoner deemed presently incompetent to be executed does not escape punishment justly imposed by the State. Rather, a prisoner who brings a successful Ford claim "simply prevents the State from carrying out the sentence [of death] until the prisoner's competence is restored." Van Tran v. State, 1999 WL

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16 Additionally, § 2254 states that courts may only grant a writ of habeas corpus to a petitioner if it appears that

> (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(b). Furthermore, writs may not be granted 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 . . . 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.

28 U.S.C. § 2254(d).

1060445 (Tenn. Nov. 23, 1999) at 4. Furthermore, because Ford claims challenge the State's ability to carry out a lawfully imposed death sentence at a particular point in time rather than the legality of the sentence, they are not ripe until execution is imminent.[17] See Ford, 477 U.S. at 401-403; Villareal II, 118 S.Ct. at 1622. Accordingly, the Court finds that Ford claims are properly viewed as challenges to the "execution of a sentence."[18] Chambers, 106 F.3d at 474; see also *In re* Cain, 137 F.3d 234, 236 n.2 (5th Cir. 1998) (acknowledging "that a Ford [competency to be executed] claim . . . is not an attack on the validity of a death sentence"); Van Tran, supra at 3-4 (same).

Case law indicates that habeas claims challenging only the execution of a

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[17] In Tennessee, execution is considered 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 the State Supreme Court has set an execution date. Van Tran v. State, 1999 WL 1060445 (Tenn. Nov. 23, 1999), at 7.

[18] The Court finds that *In re* Sapp, in which the Sixth Circuit held that "a challenge to a method of execution" is to be treated as a habeas petition under Sections 2254 or 2255, and opined that "[t]he prevention of the execution is itself an overturning of the sentence"of death, is inapposite. 118 F.3d 460, 464 (6th Cir. 1997) (internal citations omitted) (finding that petitioner's challenge to sentence of death by electrocution pursuant to 42 U.S.C. § 1983 would function to prevent the petitioner's execution and act to "overturn" the sentence of death). First, Ford claims do not challenge a method of execution. Second, although Petitioner's execution may be stayed should he successfully bring a Ford claim, the claim will not ultimately "interfere with the sentence itself." Id. at 462. Indeed, a petitioner bringing a successful Ford claim merely delays his sentence of death until he is deemed competent. Such a delay is not necessarily indefinite, for medication and counseling could in fact make that delay short. See Van Tran, supra, at 13 (discussing method by which State of Tennessee should monitor a prisoner, deemed presently incompetent to be executed, to determine when he regains competency). Accordingly, a Ford claim is fundamentally different from a claim in which a prisoner challenges the *exclusive manner* in which an execution can be implemented pursuant to statute, thereby invalidating that method of execution and necessarily his sentence of death. See Sapp, 118 F.3d at 463.

sentence should be brought pursuant to 28 U.S.C. § 2241(a).[19] Indeed, the Sixth Circuit "consistently [has] held that 'an attack upon the execution of a sentence is properly cognizable in a 28 U.S.C. § 2241(a) habeas petition,'" whereas state prisoners . . . "attacking the validity of their court conviction[s]" should utilize § 2254. Slatton, 1998 WL 661148, at **3 (holding that § 2241, and not § 2254, is the proper vehicle for a state prisoner attacking the procedures of the prison parole board), quoting United States v. Jalili, 925 F.2d 889, 893 (6th Cir. 1991) (holding that prisoner's attack on the Bureau of Prison's designation of facility in which prisoner was to serve his lawful sentence constituted an attack "upon the execution of a sentence," and not the fact of conviction, and thus district court lacked jurisdiction to hear the challenge pursuant to 28 U.S.C. § 2255; instead, such an attack "is properly cognizable in a 28 U.S.C. § 2241(a) habeas petition"). Accordingly, the Court finds that Ford claims are properly brought pursuant to 28 U.S.C. § 2241(a).[20]

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[19] 28 U.S.C. § 2241, entitled "Power to grant writ," provides in part that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241 (West 1999).

[20] The Court notes that the Sixth Circuit has not addressed specifically whether Ford claims are brought properly pursuant to 28 U.S.C. § 2241 or § 2254. Indeed, *In re* Davis, 121 F.3d 952 (5th Cir. 1997) is the only case of which the Court is aware addressing this issue, albeit indirectly and in *dictum*.

In Davis, a case considering whether a second habeas petition raising a Ford claim constituted a second or successive petition under the AEDPA, the State of Texas argued that "a Ford claim does not state a basis for federal habeas relief because it does not seek to invalidate the conviction or sentence, and the relief sought - - an indefinite stay of execution - - is not available in a habeas proceeding." 121 F.3d at 955.

The Fifth Circuit agreed that the language of § 2254(a) did not appear to provide a cause of action for a Ford claim. The court noted that "a Ford [incompetency to be executed] claim does not invalidate the conviction or sentence, . . . [the petitioner] would not be entitled to be released from custody even if he were found incompetent in this regard . . . [and] the only question raised is not whether, but when, his execution may take place." Id. Nevertheless, the Fifth Circuit permitted the petitioner to bring his claim under § 2254, reasoning simply that "Ford

Additionally, the Court finds that Petitioner's Ford claims, properly brought pursuant to 28 U.S.C. § 2241(a), would not be barred under the second or successive petition provisions of 28 U.S.C. § 2244(b). By its terms, § 2244(b)'s prohibition against second or successive petitions applies only to those actions brought pursuant to 28 U.S.C. § 2254. See Slatton, 1998 WL 661148, at **3 (stating that "[b]y its own language, § 2244(b) does not contemplate a habeas corpus petition filed under § 2241"). Thus, a "§ 2241 motion would not be barred by the new restriction on successive motions and petitions" set forth in 28 U.S.C. § 2244. *In re* Hanserd, 123 F.3d 922, 930 (6th Cir. 1997). Moreover, a petition asserting a claim to relief available under § 2241 "is not a 'second or successive' application where the prior petitions sought relief available only under" 28 U.S.C. § 2255 or § 2254. Chambers, 106 F.3d at 474 (holding that "a petition asserting a claim to relief available under 28 U.S.C. § 2255 is not a second or successive application where the first application sought relief available only under 28 U.S.C. § 2241"); see also Slatton, supra, at **3; Jalili, 925 F.2d at 893.

In conclusion, the Court notes that utilization of 28 U.S.C. § 2241 is particularly warranted in this case because it protects the interests of both Petitioner and the State. With respect to Petitioner, resort to 28 U.S.C. § 2254 alone would be an inadequate and incomplete means of ensuring that Petitioner is not executed in violation of the Eighth Amendment because § 2254 neither contemplates nor encompasses Ford claims. See Van Tran,

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is a habeas case [brought pursuant to 2254], and our court has considered Ford claims [filed under § 2254] in habeas proceedings." Id.

While the Court agrees with the Fifth Circuit's conclusion that § 2254 is not the proper vehicle by which to bring such Ford claims, it disagrees with the court's decision to exercise jurisdiction pursuant to § 2254 simply because Ford claims traditionally have been reviewed under that section. As set forth above, the Court finds that an attack on the "administration of" a sentence is more properly addressed in a § 2241 petition.

supra, at 4 (holding that "[a] prisoner's competency to be executed is a question independent of the validity of trial and sentencing, and, as such, not within the contemplation of [Tennessee's Post-Conviction Procedure] Act,"[21] and thus the Act is "an ineffective and incomplete means to protect the insane from execution"). With respect to the State of Tennessee, the Court notes that while it has a legitimate interest in ensuring that its lawfully imposed sentences are carried out, McCleskey, 499 U.S. at 491, it has no interest in executing the insane, an act which disgraces the "dignity of society itself" and exacts "mindless vengeance" on those who cannot presently appreciate the significance of the penalty of death. Ford, 477 U.S. at 410; see also Van Tran, supra, at 4. Indeed, the bar against executing an insane prisoner is firmly rooted in the common law and "bears impressive historical credentials" stretching back to the medieval era, Ford, 477 U.S. at 406, because such an execution "is inhumane, has no deterrent value, prevents religious reckoning, denies the defendant the ability to assist in his own defense, and serves no retributive purpose." Van Tran, supra, at 3; see also Ford, 477 U.S. at 405-409. Thus, allowing Petitioner to file his Ford claim pursuant to 28 U.S.C. § 2241(a) will protect the interests of both parties.

Assuming *arguendo*, however, that Ford claims are in fact properly brought pursuant to 28 U.S.C. § 2254, the Court must consider whether the prohibition against second and successive petitions in 28 U.S.C. § 2244(b) would bar Petitioner from filing his Ford claims with this Court.

4. Second or Successive Petitions Brought Under § 2254

In Villareal II, the Supreme Court expressly left undecided the question of

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21 Tenn. Code Ann. §§ 40-30-201, et seq. Tennessee's Post-Conviction Act is worded similarly to 28 U.S.C. § 2254 and contemplates exceptions to late and second filings similar to those found in 28 U.S.C. § 2244. See Tenn. Code Ann. § 40-30-202(b).

whether a petitioner raising Ford claims for the first time in a habeas petition filed after the federal courts have adjudicated the petitioner's initial habeas application is barred by the AEDPA's prohibition against second or successive petitions. 118 S.Ct. at n.*. Although several courts have considered the question, the Sixth Circuit has not, and thus it remains for this Court's consideration. See *In re* Davis, 121 F.3d 952 (5th Cir. 1997) (disallowing such a petition); *In re* Medina, 109 F.3d 1556 (11th Cir. 1997) (same); Nguyen v. Gibson, 162 F.3d 600 (10th Cir. 1998) (per curiam) (same); Poland v. Stewart, 41 F.Supp.2d 1037 (D. Ariz.1999) (allowing such a petition). For the reasons set forth below, the Court concludes that if Petitioner were to file his Ford claims pursuant to § 2254, neither claim would constitute a second or successive petition within the meaning of 28 U.S.C. § 2244(b). Thus, in the alternative to filing his Ford claims pursuant to 28 U.S.C. § 2241, Petitioner may file his Ford claims pursuant to 28 U.S.C. § 2254.

a. Petitioner's Ford claim challenging his competency to be executed

As discussed previously, see section (D)(2), supra, in determining whether a petition is "second or successive" under the AEDPA, courts consider whether the claim at issue constitutes an "abuse of the writ." See Barrett, 178 F.3d at 45 (noting that second or successive petitions under the AEDPA include petitions traditionally barred under the abuse of the writ doctrine and claims to which application of the modified *res judicata* rule of Felker makes sense) (citing cases).

Analysis of whether a claim is an abuse of the writ necessarily begins with pre-AEDPA case law. Carlson v. Pitcher, 137 F.3d 416, 419 (6th Cir. 1998). Prior to the enactment of the AEDPA, Ford incompetency to be executed claims presented at the close of a petitioner's first habeas petition were not considered an abuse of the writ. Nguyen, 162 F.3d at

602 (Briscoe, J., dissenting). Instead, after resolution of the petitioner's first application, and "subsequent establishment by the state of an execution date, the prisoner could assert a ripe Ford [incompetency to be executed] claim." Id. (citing cases); see e.g., Ford, 477 U.S. at 425 n.1 (Powell, J., concurring) (allowing petitioner to present both Ford claims after petitioner's original habeas petition had been denied).

The rationale of the pre-AEDPA approach was two-fold. First, it allowed a petitioner to avoid the rule set forth in Rose v. Lundy, 455 U.S. 509, 522 (1982), which required district courts to dismiss "mixed" habeas petitions, containing both exhausted and unexhausted claims.[22] See Nguyen, 162 F.3d at 602-03 (Briscoe, J., dissenting); Ford, supra. By their nature, Ford claims could never be exhausted at the initial filing of a habeas petition because the state's competency procedure could not be conducted until execution was imminent, thus resulting in dismissal of the entire petition. Second, Ford claims could not be considered during the adjudication of the initial habeas petition because they were simply unripe until execution was imminent. Nguyen, 162 F.3d at 603 (Briscoe, J., dissenting).

In addition, it is necessary to examine relevant post-AEDPA case law to determine whether a claim constitutes an abuse of the writ. The Court is aware of only two decisions addressing, albeit indirectly, whether Ford competency to be executed claims constitute an abuse of the writ under the AEDPA, and thus are barred by § 2244(b). First, the Fifth Circuit in *In re* Cain, implied in *dictum* that Ford claims filed for the first time in a second petition are an abuse of the writ, stating that

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22 This rule was modified only very recently in Villareal II, which indicates that a mixed petition need not be dismissed in its entirety. Instead, courts need only dismiss the unexhausted claims, without prejudice, and the other claims may go forward. See 118 S.Ct. at 1622.

> if successful, a Ford claim prevents a state from executing an imposed sentence and thus allows a criminal to escape indefinitely the consequences of his atrocious actions. Thus, . . . a petition containing a Ford claim that is filed after the petitioner has challenged the validity of his sentence in another application strongly resembles the type of petition Congress intended to preclude as successive under the AEDPA.

137 F.3d 234, 236 n.2 (5th Cir. 1998). Second, the Tenth Circuit in Nguyen implied that a petitioner who claims insanity at trial but fails to include a Ford claim in his initial habeas petition may be barred from bringing a second petition raising a Ford claim, in part because "all of the operative facts were known at the time he filed his first petition." 162 F.3d at 601.

After careful consideration of pre- and post- 1996 AEDPA case law addressing the abuse of the writ doctrine, the Court finds that an incompetency to be executed claim filed after the petitioner's first habeas petition has been fully litigated is not an abuse of the writ. As an initial matter, the *dicta* in Nguyen and Cain is unpersuasive because both cases ignore the history of Ford claims in the pre-1996 AEDPA era. Specifically, Ford claims were neither typically considered an abuse of the writ, nor are they factually similar to those cases in which courts traditionally have found an abuse of the writ.[23] See Ford, McCleskey, and Nguyen, supra. In contrast to cases in which courts have found an abuse of the writ, the factual basis for a Ford

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[23] McCleskey is a typical example of a case in which a claim was found to be an abuse of the writ. In McCleskey, the Court found that the petitioner's second petition, which included a Massiah claim based upon petitioner's signed statement made to the police two weeks before trial, was an abuse of the writ because the petitioner knew or should have known the factual predicate upon which the Massiah claim was based. McCleskey, 499 U.S. at 498-99. The facts and testimony elicited at the trial, and the petitioner's own knowledge of the existence and content of the statement were enough to "put McCleskey on notice to pursue the Massiah claim in his first federal habeas petition." Id. at 499. Because the petitioner failed to demonstrate that an "external impediment" such as "government interference or the reasonable unavailability of the factual basis for the claim," prevented him from filing his claim earlier, the Court held he was barred from filing a second petition based upon facts which he knew or should have been known when he filed his first petition. Id. at 498.

claim is reasonably unavailable until execution is imminent because a petitioner bringing a Ford claim cannot know in advance of the time execution becomes imminent whether the facts supporting such a claim will exist. Indeed, execution dates often are not set until years after a petitioner has been sentenced to death and has filed an initial federal habeas petition. See, e.g., Medina, 109 F.3d at 1559-61 (setting execution date for prisoner more than 12 years after his conviction and sentence were imposed). Moreover, *even a petitioner who presented an insanity defense at trial* would not be able to predict whether he will be incompetent at the point execution becomes imminent because his competency could change, thus eviscerating the factual predicate upon which the claim may have once been based.[24] See Van Tran, supra, 15-16.

Second, because Nguyen and Davis fail to adequately address the fact that Ford claims will not be ripe for adjudication until an execution is imminent,[25] see Villareal II, 118 S.Ct. at 1622, they would require that a petitioner, unlike any other claimant litigating in federal court and guided by the Federal Rules of Civil Procedure, *anticipate* years beforehand a claim that *cannot* become ripe until execution is imminent.[26] Moreover, because second-in-time

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[24] In fact, Tennessee law expressly contemplates that a prisoner, who is deemed incompetent either to stand trial or incompetent to be executed at a certain point in time, may eventually *regain* his sanity. See Van Tran, supra, at 13 (addressing lack of procedures in State of Tennessee by which the sanity of a prisoner declared presently incompetent to be executed may be monitored, stating that legislature must craft "some procedure . . . for reviewing the prisoner's case to determine whether he or she has regained competency," and setting forth procedures to be used unless and until the legislature acted upon the Court's directive); see also Tenn. Code Ann. § 33-7-301(c) (1999 Supp.) (requiring a report to be issued every six months detailing defendant's mental state when defendant has been found incompetent to stand trial).

[25] Of the two decisions, Nguyen is the only one issued after the opinion in Villareal II.

[26] In this regard the Court notes that claims having no basis in fact are precluded under the Federal Rules of Civil Procedure. See FED. R. CIV. P. 12(b)(6).

Ford claims alleging that a prisoner is incompetent to be executed *cannot* become ripe for adjudication until execution is in fact imminent, they do not implicate concerns such as judicial economy, the efficiency of the criminal justice system or the State's interest in finality with respect to petitioner's initial habeas petition.[27] See McCleskey, supra, at 491-92.

Finally, the Court notes that the Nguyen and Davis courts do not contemplate situations where a petitioner becomes insane *after* filing his initial habeas petition, as was the case in Ford.[28] Thus, under the Davis and Nguyen analysis, a petitioner such as Ford, who became insane years after his initial habeas petition was resolved, would be precluded from ever receiving federal court review of that claim.[29] Accordingly, the Court finds that because Petitioner's Ford claim challenging his present competency to be executed brought pursuant to § 2254 would not constitute an abuse of the writ, it is not the type of claim contemplated by the 1996 restrictions against second or successive petitions, and thus is not barred under 28 U.S.C.

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[27] Indeed, filing a Ford claim before the time at which the petitioner's execution is imminent would waste the time of both the petitioner and the Court.

[28] At the time Ford was convicted and sentenced to death in 1974, there was "no suggestion that he was incompetent." Ford, 477 U.S. at 401. However, in 1982, Ford began to "manifest gradual changes in behavior," and in 1983, he was diagnosed with "a severe, uncontrollable mental disease . . . severe enough to substantially affect . . . [his] ability to assist in the defense of his life." Id. at 402-403. Shortly thereafter, Ford challenged the State's present ability to execute him, invoking procedures under Florida law governing the determination of competency of a condemned inmate. Id. at 403. It was only then, following the state's determination that Ford was competent to be executed, that Ford filed a second habeas petition raising the issue of his present incompetency to be executed. Id. at 404.

[29] The Court notes that the petitioner in Ford would have been precluded from bringing his petition under the reasoning of Medina as well, where the court held that the plain language of the statute precluded all second-in-time petitions. 109 F.3d at 1564-65.

§ 2244(b).[30]

b. Petitioner's Ford claim concerning the adequacy of State procedures for determining competency to be executed

Courts regularly have found claims arising from facts that materialized only after a prisoner's first habeas petition has been adjudicated to be outside the scope of the prohibitions against second and successive petitions. See Cain, 137 F.3d at 235 (petition based on administrative proceedings concluded after petitioner filed his first habeas petition was not second or successive); *In re* Taylor, 171 F3.d 185, 187-88 (4th Cir. 1999) (holding that second in time petition was not second or successive under AEDPA where petitioner sought only to raise claims under § 2255 that "originated at the time of his resentencing, after his first § 2255 petition had been granted"); Esposito v. United States, 135 F.3d 111, 114 (2d Cir. 1997) (same); Walker v. Roth, 133 F.3d 454, 455 (7th Cir. 1997) (same). Moreover,

> Congress did not intend for the interpretation of the phrase "second or successive" to preclude federal district courts from providing relief for an alleged procedural due process violation relating to the administration of a sentence of a prisoner who has previously filed a petition challenging the validity of his conviction or sentence, but is nevertheless not abusing the writ.

Cain, 137 F.3d at 236-37.[31]

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30 As discussed previously, there is some debate as to whether the elimination of the "ends of justice" exception from the 1996 AEDPA precludes second-in-time Ford claims from being brought. See section (D)(2), supra. However, because the Court finds that Petitioner's claim does not constitute an abuse of the writ, it need not reach this issue.

31 In Cain, the Fifth Circuit distinguished a Ford claim challenging the prisoner's competency to be executed from claims challenging the removal of a prisoner's good time credits, finding that the above holding did not apply to such Ford claims because

> [t]here can be no question that [such] a Ford claim is different than an effort to recover good time credits, for if successful, a Ford claim *prevents* a state from executing an imposed sentence and thus allows a criminal to escape *indefinitely the consequences of his atrocious actions*. Thus, unlike Cain's petition, a petition containing [this kind of] a Ford

The Court finds that if Petitioner were to file a Ford claim challenging the adequacy of the state procedures used to determine his present competency to be executed, such a claim would not be barred by § 2244(b)'s prohibitions against second or successive petitions. Obviously the results of Petitioner's state competency hearing will only become final upon the conclusion of the state proceedings which have yet to be conducted. Thus, "[g]iven the timing" and nature of the competency proceedings, Petitioner could not have brought a Ford claim challenging the adequacy of the state's procedures "in conjunction with his earlier petition[],"[32] nor will he even know if it is necessary to bring such a claim until the conclusion of the state competency hearing. Cain, 137 F.3d at 236. Such a claim is not only unripe, but simply

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> claim that is filed after the petition has challenged the validity of his sentence in another application strongly resembles the type of petition Congress intended to preclude as second or successive under the AEDPA.

Cain, 137 F.3d at 236 n.2 (emphasis added).

The Court finds this judgment-laden pronouncement of the Fifth Circuit inapplicable to those Ford claims challenging only the adequacy of the State's competency procedures. As discussed above, Ford claims challenging the adequacy of competency proceedings resemble closely proceedings conducted by administrative bodies which impact the administration of a prisoner's sentence and which become final long after the prisoner has filed his first habeas petition. Moreover, the factual predicate for such Ford claims inarguably *cannot* exist prior to the completion of the State's proceedings. See discussion, supra.

Furthermore, the Court notes that the distinction made by the Fifth Circuit between Ford claims challenging the competency of a prisoner to be executed and the good time credit claims asserted in Cain is based on the Fifth Circuit's erroneous statement that a successful Ford claim *prevents* a state from executing the petitioner *indefinitely*. This statement is contrary to Justice Powell's observation in Ford and the Fifth Circuit's own observation in Davis that a "Ford claim [alleging incompetency to be executed] does not invalidate the conviction or sentence," and does not entitle a prisoner "to be released from custody even if he were found incompetent." Davis, 121 F.3d at 955. Instead, "the only question raised is not whether, but when," a prisoner's "execution may take place." Ford, 477 U.S. at 425 (Powell, J., concurring).

[32] In this regard, the Court notes that the State's procedures did not even exist prior to November 23, 1999, and therefore Petitioner could not have brought a claim challenging the adequacy of state procedures at the time of his original habeas petition. See Van Tran, supra, at 3.

cannot be filed until the end of the state administrative proceedings because the facts necessary to adjudicate the claim will not be available until such time. Accordingly, such a claim does not constitute an abuse of the writ to which application of a modified *res judicata* rule would "make sense."[n] Harrett, 178 F.3d at 45; see also Felker, 518 U.S. at 664; Villareal II, 118 S.Ct. at 1622 (holding that modified *res judicata* rule would not apply to claims brought in a "timely fashion" and which are not "ripe for resolution until now"). Thus, the Court finds that a Ford claim challenging the adequacy of the State's procedures by which Petitioner's competency to be executed will be determined is not a claim to which the prohibition against "second or successive" petitions applies. Petitioner, therefore, may bring this claim pursuant to 28 U.S.C. § 2254 in this Court at the conclusion of the competency proceedings in the Tennessee state courts.

In sum, the Court finds that neither of Petitioner's potential Ford claims, if brought pursuant to § 2254, would constitute an abuse of the writ and thus, are not the type of claims contemplated by the AEDPA's restrictions against second or successive petitions. Accordingly, neither claim would be barred under 28 U.S.C. § 2244(b). The Court interprets the "newly amended 28 U.S.C. § 2244(b)[] as encompassing only those habeas applications that assert claims that were ripe at the time of the petitioner's original habeas applications." Nguyen, 162 F.3d at 603 (Briscoe, J., dissenting). As such, Coe may file both Ford claims upon the conclusion of state proceedings determining his competency, despite the fact that he has previously attacked the legality of his conviction and sentence. Indeed, this interpretation is "generally consistent with the two 'gateways' provided by Congress in § 2244(b)(2)(A) and (B),

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n The Court notes that it is unaware of any case in which a prisoner's challenge to the adequacy of a state competency proceeding was allowed or disallowed under the former "ends of justice" exception to the former version of 28 U.S.C. § 2244(b).

both of which allow a prisoner to assert a claim in a 'second or successive' petition that was not available at the time of the original petition." Id. Furthermore, it "ensure[s] that a state prisoner has an opportunity for federal court review of all constitutional claims." Id.

E. Motion to Disqualify General Summers and Office of the Attorney General

Petitioner has filed a Motion to Disqualify Attorney General Paul G. Summers and the Office of the Attorney General. (Doc. No. 436.) In light of the Court's holding that it no longer has jurisdiction over his habeas petition, Petitioner's Motion to Disqualify is dismissed as moot. However, this dismissal is without prejudice to Petitioner's right to re-file a motion to disqualify in the event he files a new habeas petition raising a Ford claim as discussed above.

IV. CONCLUSION

For the above stated reasons, the Court hereby DENIES Petitioner's Statement in Support of This Court's Jurisdiction Over Petitioner's Initial Habeas Petition, (Doc. No. 434), and the Motions to Amend and the Motion to Consider Unresolved Claims, included therein. In light of this holding, the Motion to Disqualify Attorney General Paul G. Summers and the Office of the Attorney General is hereby DISMISSED as MOOT. In addition, the Court finds that Petitioner may file a separate habeas petition with this Court raising Ford claims pursuant to 28 U.S.C. § 2241 and in the alternative, pursuant to 28 U.S.C. § 2254.

An Order consistent with this Memorandum shall be entered contemporaneously.

Entered this the 14th day of January, 2000.

JOHN T. NIXON
UNITED STATES DISTRICT COURT