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

ROBERT GLEN COE,	)	
	)	
Petitioner,	)	
	)	Case No. 3:92-0180
v.	)	(Senior Judge Nixon)
	)	
RICKY BELL, Warden,	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF CONCERNING THE SCOPE OF THE DISTRICT COURT'S JURISDICTION IN THIS MATTER AFTER ISSUANCE OF THE MANDATE BY THE COURT OF APPEALS

I. **This Court must dismiss petitioner's habeas corpus action as the mandate of the court of appeals is final and no relief may be granted beyond the scope of the mandate.**

In *Coe v. Bell*, 161 F.3d 320, 355 (6th Cir. 1998), the Sixth Circuit specifically and unequivocally held that

> [b]ased 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.

(Emphasis in original). This Court's memoranda and orders from which appeal and cross-appeal were taken were as follows: R. 290, 291 (Memorandum and Order denying petitioner's motion for partial summary judgment); R. 310, 311 (Memorandum and Order granting in part and denying in part respondent's motion for summary judgment); R. 369 (Order); R. 374, 375 (Memorandum and Order partially granting and denying petitioner's motion to amend); R. 403, 404

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(Memorandum and Order partially granting amended habeas corpus petition); R. 409 (Order denying motion to amend); and R. 415 (Order denying motion to alter or amend). When read together with the habeas corpus petition, as amended, they clearly demonstrate that this Court addressed every claim, dismissing some, while granting habeas corpus relief based upon others. Nowhere in any of its memoranda and orders did this Court state that it was reserving judgment as to any claim or any portion of any claim.[1]

At the time the habeas corpus petition was pending before this Court, petitioner's execution had been stayed. Because of this fact, this Court had a duty imposed upon it by the United States Supreme Court "to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to ***all*** of the issues presented in the case. *In re Blodgett*, 502 U.S. 236, 239, 112 S.Ct. 674, 676, 116 L.Ed.2d 669 (1992) (emphasis supplied); *see, e.g., Rust v. Clarke*, 960 F.2d 72, 73 (8th Cir. 1992) (exhorting the district court to expeditiously achieve finality in capital habeas action).

The fact that this Court's decision was a final one was recognized by both parties by their invocation of 28 U.S.C. § 1291 as the jurisdictional basis for their appeal and cross-appeal. *See* Statement of Subject Matter and Appellate Jurisdiction of Petitioner-Appellee/Cross-Appellant, attached as exhibit 1 and

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[1]*E.g.*, Fed. R. Civ. P. 54(b).

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State of Jurisdiction of Respondent-Appellant/Cross-Appellee, attached as exhibit 2.

Because "[a] State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief," *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 1501, 140 L.Ed.2d 728 (1998), and because after a case has been decided by an appellate court and mandate has issued, the district court may not

> vary [the mandate] 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, 255-56, 16 S.Ct. 291, 293, 40 L.Ed. 414 (1895), this Court is compelled to dismiss the petition.

While a district court has jurisdiction to implement the mandate of the court of appeals, *Caldwell v. Puget Sound Electrical Apprenticeship and Training Trust*, 824 F.2d 765, 767 (9th Cir. 1987), it may not revisit claims after mandate has issued. *Feldman v. Henman*, 815 F.2d 1318, 1321-22 (9th Cir. 1987).

Although petitioner claims that two issues were not adjudicated by either this Court or the Sixth Circuit Court of Appeals and are therefore left open, this argument is without merit. For the court of appeals to have jurisdiction over an action, the district court must issue a final order. 28 U.S.C.

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§1291. The Sixth Circuit considers an order final if it "terminates all issues presented in the litigation on the merits and leaves nothing to be done except to enforce by execution what has been determined." Frederick J. McGavran, et al., Sixth Circuit Federal Practice Manual, at 5 (2d ed. 1999). This avoids piecemeal review of incomplete claims. *Id.* at 6. Accordingly, "all issues within the scope of the appealed judgment are deemed incorporated within the mandate and thus are precluded from further adjudication." *Engel Industries, Inc. v. Lockformer Company*, 166 F.3d 1379, 1383 (Fed. Cir. 1999)(citations omitted). Furthermore, a district court must implement both the "letter and the spirit of the mandate. . . . " *In re Chambers Development Company, Inc.*, 148 F.3d 214, 224 (3d Cir. 1998)(citations omitted). Because it is clear from the mandate and opinion of the Sixth Circuit that it adjudicated every claim presented and reversed the judgment of this court granting habeas corpus relief, this Court must abide by the letter and spirit of the mandate and enter judgment dismissing the petition.

II. There is no unresolved claim regarding the reasonable doubt jury instruction given at the sentencing phase of petitioner's criminal trial.

In paragraph 29 of the second amendment to his habeas corpus petition, Coe challenged the constitutionality of the reasonable doubt jury instructions given at both the guilt and sentencing phases of his criminal trial. This Court, relying on the same

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legal reasoning it applied in *Rickman v. Dutton*, 864 F.Supp. 686 (M.D.Tenn. 1994) and *Austin v. Bell*, No. 3:86-0296 (M.D.Tenn. Jan. 26, 1996), found petitioner's claim as to ***both*** reasonable doubt instructions meritorious. *See Coe v. Bell*, 3:92-0180, memorandum at 32-36, 55 (M.D.Tenn. Dec. 8, 1996). Respondent challenged this ruling in his appeal to the Sixth Circuit.[2] *See* Brief of Respondent-Appellant, pp. 19-24, attached as exhibit 3. In its opinion, the Sixth Circuit discussed the reasonable doubt instruction given at the guilt phase, adding that "[a] functionally equivalent instruction was given at the sentencing stage." Then, citing its prior holding in *Austin v. Bell*, 126 F.3d 843, 846-47 (6th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1547, 140 L.Ed.2d 695 (1998), the Sixth Circuit reversed this Court. *Coe v. Bell*, 161 F.3d 320, 329 (6th Cir. 1998), *cert. denied*, ___ U.S. ___, 120 S.Ct. 110, ___ L.Ed.2d ___ (1999). Accordingly, petitioner's challenge to the reasonable doubt jury instructions at both the guilt and sentencing phases of his trial have been fully and finally adjudicated.

III. Petitioner's claim that the prosecution failed to disclose exculpatory evidence and presented false testimony was fully decided on the merits by this Court and the Sixth Circuit.

In paragraph 15 of his amended petition (first amendment),

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[2] Petitioner has consistently and incorrectly maintained, in both the Sixth Circuit and the U. S. Supreme Court, that this Court only decided so much of his claim as it pertained to the reasonable doubt jury instruction given at the guilt phase, thereby pretermitting consideration of that portion of his claim regarding the reasonable doubt jury instruction given at the sentencing phase.

petitioner alleged "that his ***conviction*** was obtained" by the prosecution's failure to disclose exculpatory evidence and presentation of false testimony. (Emphasis supplied). After making this generalized allegation, he went on to list 26 sub-paragraphs detailing certain factual predicates in support of this claim. Contrary to petitioner's representations, neither his general allegation nor any of his 26 supporting factual predicates indicate that they relate to the sentencing phase of his trial. This Court rejected petitioner's claim in its entirety. *See Coe v. Bell*, 3:92-0180, memorandum at 15-17 (M.D.Tenn. Dec. 8, 1996). The Sixth Circuit affirmed that holding on appeal. *Coe v. Bell*, 161 F.3d at 343-45. Any claim Coe asserts in this regard relating to the ***sentencing*** phase of his trial is an entirely new claim and may not be considered by this Court. *See* p.8, *infra*.

IV. A claim of incompetence under *Ford v. Wainwright*[3] is neither properly exhausted nor ripe.

A federal court may not grant an application for habeas relief until the petitioner has exhausted state remedies, unless there is an absence of an available state corrective process or circumstances exist rendering that process ineffective. 28 U.S.C. § 2254(b)(1) (former 28 U.S.C. § 2254(b)). A review of the state court record in this case clearly shows that petitioner has never presented a *Ford* claim to the state courts for their resolution on

[3] 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

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the merits. Nor can he demonstrate the absence of an available state corrective process or that circumstances exist rendering the state process ineffective. *See Van Tran v. State*, Shelby County, S. Ct. No. W1998-00175-SC-R11-PD, opinion filed Nov. 23, 1999 at Jackson (copy attached) (setting forth Tennessee's procedure for raising, litigating and adjudicating *Ford* claim).

Furthermore, notwithstanding petitioner's failure to exhaust state remedies, he cannot demonstrate that a *Ford* claim is ripe. As many courts have noted, competency is a fluid matter and is therefore a "moving target." *See, e.g., Poland v. Stewart*, 41 F.Supp.2d 1037, 1040 (D.Ariz. 1994). The issue in a *Ford* claim is not whether the death-sentenced defendant was competent at the time of the crime, or even at the time of trial. Rather, the issue is solely whether or not he is aware of the punishment he is about to suffer and why he is to suffer it at the time he seeks to delay his imminent execution. "In Tennessee, execution is imminent only when a prisoner sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the prisoner's conviction and sentence ***and*** [the Tennessee Supreme Court] has set an execution date upon motion of the State Attorney General." *Van Tran v. State, supra*, slip op. at 15 (emphasis in original). Petitioner currently has no imminent execution date.

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V. The Sixth Circuit has affirmed this Court's decision denying Coe leave to amend his habeas petition to include a claim challenging the constitutionality of electrocution.

Coe relies upon the United States 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), to support his assertion that this Court incorrectly denied him leave to amend his habeas corpus petition to include a challenge to the constitutionality of electrocution as a method of execution. This reliance is misplaced for several reasons.

First, this Court disposed of this claim by denying Coe permission to amend his habeas petition with a claim challenging the constitutionality of electrocution. This Court's resolution of the claim was affirmed by the Sixth Circuit. *Coe v. Bell*, 161 F.3d at 341-42. Because this Court disposed of all claims before it, it has no jurisdiction to allow amendment of the habeas corpus petition now.

Second, this issue is moot as Coe has already elected to be executed by means of lethal injection, pursuant to Tenn. Code Ann. § 40-23-114(c). *See* exhibit 4, Copy of Affidavit to Elect Method of Execution.

Third, the United States Supreme Court's grant of certiorari in *Bryan v. Moore* does not, as Coe asserts, "establish[ ] that this Court's previous denial of amendment was incorrect." Statement of Petitioner, at 8. In *Bryan*, the issue before the Supreme Court is

clearly framed in the context of the continued use of Florida's electric chair, and not the constitutionality of electrocution *per se*. Based upon the record developed in three other Florida capital cases involving the use of Florida's electric chair and problems associated therewith,[4] Bryan seeks the Supreme Court's review, under the Eighth Amendment, of the following four questions: 1) whether he will "suffer needless agony and degradation when he is put to death ***by Florida's electric chair;***" 2) whether the record sustains his contention that his "execution ***in Florida's electric chair*** unnecessarily exposes him to physical suffering and degradation; 3) whether the "documented, repeated malfunctioning ***of Florida's electric chair***" supports his claim that his "execution by such means constitutes wanton psychological and moral cruelty;" and 4) whether the presence or absence of conscious pain is the only factor that determines "whether or not ***Florida's electric chair*** constitutes cruel and unusual punishment." *Bryan v. Moore, supra,* (Petition for Writ of Certiorari, p. i) (copy of pertinent portion attached as exhibit 5)(emphasis supplied). In the body of Bryan's petition, he clearly relies upon alleged malfunctions and mishaps involving the use of Florida's electric chair to support his contention that Eighth Amendment review by the Supreme Court of the continued use of that chair is necessary. Based on the issues

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[4] *Bryan's* motion to adopt the record from these three other cases was allowed by the Florida Supreme Court.

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presented to the Supreme Court, then, and contrary to Coe's contention, the Supreme Court's grant of certiorari in *Bryan* does not suggest that the Court is poised to take up the broader question of whether electrocution *per se* constitutes cruel and unusual punishment. Accordingly, just as it was proper for this Court to deny Coe a forum in which to litigate this issue in 1996, it is equally proper, if not more so, today.

Conclusion

There is no dispute between the parties over whether or not this Court has jurisdiction over this case. The issuance of the mandate clearly confers jurisdiction. The disagreement centers on the scope of that jurisdiction. This Court's memoranda and orders demonstrate that all issues presented by Coe were decided. Only matters that are ministerial in nature, such as entry of judgment dismissing Coe's habeas corpus petition and directing the return of the physical evidence to the lawful State custodians, remain to be accomplished. This Court may not entertain new claims. New claims may only be presented in accordance with 28 U.S.C. § 2244.

"Finality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson*, 118 S.Ct. 1489, 1501 (1998). The power granted to the State, under both the state and federal constitutions, to pass criminal laws in an effort to articulate societal norms, means little if the State cannot carry out those laws. *McCleskey v. Zant*, 499 U.S. 467, 491,

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111 S.Ct. 1454, 1469, 113 L.Ed.2d 517 (1991). "Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." *Id.*

Coe has had a trial, direct appeal, three state post-conviction proceedings, and a federal habeas corpus proceeding in which to litigate the constitutionality of his conviction and sentence over the course of the past eighteen and one-half years. He was sentenced to death, not simply to a lifetime of litigating about death. *See In re Sapp*, 118 F.3d 460, 463 (6th Cir. 1997).

Respectfully submitted,

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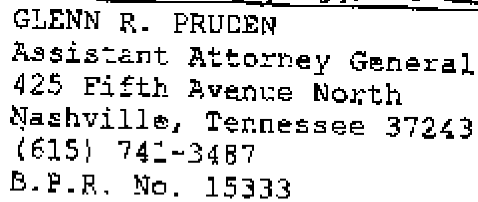

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CERTIFICATE OF SERVICE

I hereby certify that true and exact copies of the foregoing have been forwarded by hand-delivery to Henry A. Martin and Paul R. Bottei, Federal Public Defender's Office, 810 Broadway, Suite 200, Nashville, TN 37203 and James H. Walker, 601 Woodland Street, Nashville, TN 37206 on this the 24th day of November, 1999.

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