

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

FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
MAR 22 2009

ROBERT GLEN COE

Petitioner

No. 08-0230
Judge Trauger

v.

RICKY L. L. WARDEN

Respondent

SUPPLEMENT TO MOTION TO STAY EXECUTION

The Sixth Circuit Court of Appeals has answered the threshold jurisdictional question in this case: Robert Coe's Petition for Writ of Habeas Corpus raising the claim that he is incompetent to be executed under Ford v. Wainwright, 477 U.S. 399 (1986) is a first petition and properly before this court for resolution. Cox v. Bell, Nos. 08-5323/5227/5128/5129 (March 21, 2008) p. 5-6. Accordingly, this Court should issue a stay of execution to allow consideration on the merits the myriad of complex and difficult federal constitutional issues contained in the petition. Lanchar v. Thomas, 517 U.S. 314, 116 S.Ct. 1293 (1996) (Commons Bancraft v. Estate, 469 U.S. 880, 103 S.Ct. 3383 (1983)(in appeal of Ford habeas petition, where petitioner has obtained certificate of probable cause to appeal, petitioner entitled to review of merits of petition; to allow consideration of merits of appeal, court of appeals should grant stay to prevent case from becoming moot).

The mere fact that this is a first petition and is not frivolous is sufficient to warrant a stay of execution pending a final resolution of the claims in federal court. Stays of execution are routinely granted to capital habeas petitioners who enter federal court for the first time. See e.g., Abner Schuman v. Bell, 927 F.Supp. 262, 263 (M.D. Tenn. 1996)("[A] district court is obligated to issue a stay of execution upon the filing of a first habeas petition, to prevent the case from being moot, if

the district court cannot dismiss the petition on the merits before the scheduled execution; stay granted where "claims are substantial enough to prevent summary dismissal of the petition."); Clayton L. Hall, 956 F.Supp. 1401, 1403 (W.D. Tenn. 1997)(acknowledging holding in Lanchar and granting stay to consider first federal habeas petition).

The Court of Appeals, and this Court, has recognized that Petitioner is in the same position as the petitioner in Martinez-Villareal. In that case, on remand from the United States Supreme Court for consideration of his Ford claim, the district court granted a stay of execution. Citing Lanchar and McFarland, the judge wrote, "While a federal court should strive to expedite consideration of habeas claims so as not to frustrate state proceedings, it is equally true that such consideration ought to be deliberate and thoughtful." Martinez Villareal v. Stewart, No. CIV98-446-TJC-WFN (Dist. Ariz. March 17, 1999), p 4 (Attached as Exhibit "A.")

In the case of Horace Kelly, the court stated:

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

Goldman v. United States District Court, 167 F.3d 539, 536 (9th Cir. 1998). In fact, once a petitioner raises his Ford claim for the first time in federal court "a delay in . . . execution is inevitable" to allow federal consideration of such claims on initial habeas review. Id. See also Polanco-Stanow, Nos. CIV-90-1822-PHX-SMK, CIV 98 1891-PHX-SPK (D.Ariz. Oct 20, 1998) order granting stay of execution to allow merits consideration of Ford claims which fall under Martinez-Villareal exception to successive petitions; citing Lanchar for proposition that district court is

¹McFarland v. Scott, 512 U.S. 880, 889 (1994).

obligated to address merits of first petition and must issue a stay to prevent the case from becoming moot)(Exhibit 2 to Motion for Stay of Execution), motion to vacate, rev. denied Stewart v. Poland, 525 U.S. 936, 119 S.Ct. 390 (1998).

A stay of execution is further warranted, given that: (1) this case presents numerous complicated procedural and substantive issues; (2) this case involves federal issues which require further development in this court; and (3) Robert Cox is entitled to an evidentiary hearing in this court, having been denied full and fair proceedings in the state courts. The court should issue a stay of execution and set the case for further proceedings which will ensure that Robert Cox will receive a full and fair adjudication of his claims on federal habeas review.

For centuries, Anglo-American jurisprudence has regarded the execution of an innocent person as a "miserable spectacle." Early Wainwright, 477 U.S. at 405. One of the reasons for prohibiting such a spectacle is that it "simply offends humanity" and "protect[s] the dignity of society itself from the barbarity of exacting mindless vengeance . . ." *Id.*, 477 U.S. at 410. It would be rotter and unwarranted to expect this court to consider and resolve the complex issues this case entails in the few hours remaining before Robert Cox is scheduled to die. The interests of justice require this Court to enter a stay of execution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid to Glenn R. Pruden, Assistant Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243, on this 27 day of March, 2000.

Paul Bittel
Paul Bittel

EXHIBIT A

FILED
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 MAR 12 1997
 CLERK U.S. DISTRICT COURT
 DISTRICT OF ARIZONA
 BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

NO. CIV 86-446-JOC-WFN

RAMON MARTINEZ-VILLARREAL,
 Petitioner.
 vs.
 MERRY STEWART, Director,
 Arizona Dept. of Corrections,
 Respondent.

ORDER FOR
STAY OF EXECUTION

Petitioner Ramon Martinez-Villarreal has filed a Petition for
 Writ of Habeas Corpus by a Person in State Custody pursuant to 28
 U.S.C. § 1257. Petitioner also requests this Court to stay his
 execution, currently scheduled for April 7, 1997, and to hold an
 evidentiary hearing regarding his competency to be executed. For
 the reasons set forth below, the Court stays Petitioner's execution
 for 120 days.

BACKGROUND

Petitioner is an Arizona prisoner under sentence of death. In
 March 1987, petitioner filed a habeas petition in federal court
 which asserted, among other things, that he was incompetent to be
 executed ("Ford claim"). The court ultimately denied habeas relief

but dismissed the Ford claim as premature. See also Martinez-
 Villarreal v. Lewis, 80 F.3d 1301 (9th Cir.), cert. denied, 117 S.
 Ct. 586 (1997) (Martinez-Villarreal I).

In March 1997, the Arizona Supreme Court issued a warrant for
 petitioner's execution, setting the date for April 16, 1997. A
 week before the scheduled execution, the Arizona Supreme Court
 quashed the warrant and reset the execution for May 11, 1997, to
 provide additional time for an evidentiary hearing on petitioner's
 general competency. See generally A.R.S. §§ 13-6031, 13-6032. At
 the conclusion of the hearing in the Pinal County Superior Court,
 the judge determined that petitioner was competent to be executed.
 The Arizona Supreme Court affirmed.

Petitioner then moved in federal court for appointment of
 experts to assist in the development and preparation of his Ford
 claim. On May 16, 1997, the District Court denied the motion,
 finding that the AEDPA's prohibition against successive petitions
 deprived it of jurisdiction to entertain petitioner's claim. See
 28 U.S.C. § 2244(b)(3). Petitioner then sought relief in the Ninth
 Circuit Court of Appeals, which granted a stay of execution and
 ordered briefing on the constitutionality of the AEDPA with respect
 to Ford claims. See Martinez-Villarreal v. Stewart, 118 F.3d 825
 (9th Cir. 1997) (Martinez-Villarreal II).

In an opinion filed June 23, 1997, the Ninth Circuit found
 that petitioner's competency claim was not subject to
 § 2244(b)(3)'s restrictions unless second or successive petitions.
 See Martinez-Villarreal v. Stewart, 118 F.3d 828 (9th Cir. 1997)
 (Martinez-Villarreal III). Consequently, the court dismissed as
 unnecessary petitioner's request for permission to file a

1 successive petition and directed that the petition presented to the
2 circuit be transferred to the District Court pursuant to 28 U.S.C.
3 § 2241(b). See id. at 534-35. The United States Supreme Court
4 affirmed. Stewart v. Martinez-Villareal, 118 S. Ct. 1018 (1998).

5 On September 14, 1998, following a delay unexplained in the
6 record, this court received from the Ninth Circuit the petition
7 containing the habeas claim which had been presented by petitioner to
8 that court. Pursuant to the Ninth Circuit's directive in Martinez-
9 Villareal III, the District Court filed the petition.

10 Subsequently, petitioner sought an order permitting contact
11 visitation with a mental retardation expert. Respondent opposed
12 the visitation request, arguing in part that the competency claim
13 was unripe, and hence the court lacked jurisdiction, because no
14 warrant of execution was pending. The court disagreed and issued
15 petitioner's requested order. Respondent petitioned for a writ of
16 habeas corpus. The Ninth Circuit granted the writ, stating that
17 petitioner's claim was not ripe until an execution warrant issued.
18 See Stewart v. United States District Court, No. 98-71232 (9th Cir.
19 Dec. 10, 1998) (Unpublished Order). The court therefore vacated
20 its visitation and briefing orders but kept the habeas petition on
21 file to await issuance of a new execution warrant.

22 On February 24, 1999, the Arizona Supreme Court issued such a
23 warrant, setting the execution date for April 7, 1999. Petitioner
24 then filed the present motion to stay and motion for evidentiary
25 hearing. Petitioner also requests that the court rescind an order
26 granting contact visitation with a mental retardation expert.
27 That request is granted in a separate order issued this
28 same day.

DISCUSSION

1 Congress has granted to federal courts "before whom a habeas
2 corpus proceeding is pending" the authority to stay a state court
3 action "for any matter involved in the habeas corpus proceeding."
4 28 U.S.C. § 2252. See also Louche v. Thomas, 517 U.S. 314, 320,
5 116 S. Ct. 1252, 1257 (1995) ("[I]f the district court cannot
6 decide the petition on the merits before the scheduled execution,
7 it is obligated to address the merits and must issue a stay to
8 prevent the case from becoming moot."). Unquestionably, this court
9 presently has jurisdiction in this matter. No issues are pending
10 in any state forum, the Arizona Supreme Court has issued a warrant
11 of execution, and petitioner has filed a habeas petition pursuant
12 to 28 U.S.C. § 2254 which raises a cognizable federal claim.

13 While a federal court should strive to expedite consideration
14 of habeas claims so as not to frustrate state proceedings, it is
15 equally true that such consideration ought to be deliberate and
16 thoughtful. "Where this opportunity is not afforded, [a]pproving
17 the execution of a defendant before his [petition] is decided on
18 the merits would clearly be improper." Morganland v. Scott, 512
19 U.S. 843, 850, 114 S. Ct. 1560, 1573 (1994) (citing Harrison v.
20 Estelle, 457 U.S. 849, 859, 102 S. Ct. 2143, 2152 (1981)). Stays
21 of execution to allow for review of a prisoner's competency to be
22 executed claim are not unusual. See, e.g., Scott v. Strickland,
23 734 F.2d 538 (11th Cir. 1984), motion to vacate sentence, 457 U.S.
24 1220 (1984); Shaw v. Dalo, 762 F. Supp. 853, 855 (E.D. Mo. 1991);
25 Martin v. Dunlap, 808 F. Supp. 1021 (S.D. Fla. 1990).

26 Indeed, in Calderon v. United States District Court (Calley),
27 163 F.2d 830, 836 (9th Cir. 1948) (en banc), petition for cert.
28

1 Files, 57 U.S.L.W. 2458 (U.S. Jan. 4, 1933) (No. 98-1021), the Ninth
2 Circuit expressly recognized that a ripe habeas claim is due the
3 same consideration as other issues raised in a first habeas
4 petition.

5 [A] stay of execution is inevitable. Kelly's claim of
6 present incompetence to be executed habeas claim and
7 requested only in 1934. Under Wheeler v. United States
8 Wheeler, 298 U.S. 369, 56 S.Ct. 1631, 80 L.Ed. 649
9 (1936), Kelly's presentation of the habeas claim to the
10 district court in a first petition under the ADCA, this
11 claim is clearly not time-barred, and under Lochner,
12 Kelly is therefore entitled to a stay.

13 One of the primary contentions raised in the present habeas
14 petition is that the state court's evidentiary hearing regarding
15 petitioner's competency to be executed was inadequate and therefore
16 the state court's findings are not entitled to a presumption of
17 correctness. One aspect of this argument is that the state court
18 acted in not allowing a mental retardation evaluation of
19 petitioner. Petitioner has consistently claimed that such testing
20 was "relevant and necessary to accurate and reliable findings."
21 Consequently, part of the relief sought by petitioner in his habeas
22 petition is that this Court hold its own evidentiary hearing.
23 (Petition at 23; Motion for Evidentiary Hearing at 4-20.)

24 In a separate order filed today, the Court has directed that
25 petitioner be examined by a mental retardation expert to resolve
26 the parties' dispute as to whether the failure to provide such an
27 examination undermines the state court's competency assessment.
28 This examination is scheduled to take place on March 19, 1939, and
29 a final report is not expected for approximately two
30 weeks thereafter. Undoubtedly, the state will want to call its
31 own expert to review that report, and has requested that its

32 response to petitioner's motion for evidentiary hearing be delayed
33 until the mental retardation evaluation is complete. In all, the
34 Court does not anticipate bringing on the important issues raised
35 in the present petition to be finished until the beginning of June.

36 Respondents have also acknowledged that because petitioner is
37 one of the first Arizona prisoners to challenge his competency
38 under the state's present statutory scheme, the Court is faced with
39 several difficult legal issues, one of which is whether the state
40 provided adequate procedures for determining competency. In
41 addition, the state court record on this issue is not
42 insignificant. It includes four days of testimony and numerous
43 exhibits and pleadings pertaining to both petitioner's mental state
44 and adequacy of the competency proceedings. These issues simply
45 cannot be addressed in an adequate manner prior to the scheduled
46 April 7, 1939 execution. The Court therefore finds that a 120-day
47 stay is both reasonable and necessary to provide sufficient time
48 for the Court to determine whether an evidentiary hearing is
49 warranted in this matter and to resolve the issues raised in the
50 habeas petition.

51 Accordingly,

52 it is hereby ordered that petitioner's warrant of execution is
53 stayed pending resolution of the issues raised in the petition for
54 writ of habeas corpus and the motion for evidentiary hearing, for
55 a period not to exceed 120 days from the filing date of this Order.
56 It is further ordered that petitioner remain in the custody of
57 the Arizona Department of Corrections, pending further order of
58 this Court.

59 It is further ordered that petitioner shall file his Traverse

18 or before April 15, 1997. The Traverse shall be a responsive pleading to Respondent's Answer, including briefing on the issue of whether the Antiterrorism and Effective Death Penalty Act of 1996 applies to Petitioner's habeas petition. The Traverse shall also include any supplemental briefing regarding petitioner's motion for an evidentiary hearing.

IT IS FURTHER ORDERED that if Respondent files a Reply, he shall do so no later than May 17, 1997. Respondent's Reply shall be limited to a response to Petitioner's arguments concerning the necessity for an evidentiary hearing.

IT IS FURTHER ORDERED that if Respondent files a Reply, Petitioner may file a sur-reply no later than June 1, 1997. The sur-reply shall be limited to Respondent's arguments concerning the necessity of an evidentiary hearing.

IT IS FURTHER ORDERED that the Clerk of the Court make immediate telephone notice of this Order to Terry Stewart, Director of the Arizona Department of Corrections; Janet Napolitano, Attorney General of the State of Arizona; the Supreme Court of Arizona; and Doug Savage, Warden of the Arizona State Penitentiary at Florence; and that a copy of this Order be served on these individuals by the United States Marshal forthwith.

DATED this 12 day of March, 1997.


FREDERICK STALDER
United States District Judge

Copy to all counsel of record.