

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT GLEN COE
Petitioner-Appellant

v.

RICKY BELL, Warden
Respondent-Appellee

No. _____

EXECUTION DATE:
MARCH 23, 2000
1:00 AM

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

RESPONSE TO RESPONDENT'S MOTION TO VACATE STAY
IN DISTRICT COURT No. 3:92-0180

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Robert Coe has substantial, non-frivolous claims under *Ford v. Wainwright* and has tried by all means possible to have those newly-ripe claims heard on federal habeas review. In this proceeding, he sought leave to amend his initial petition to include those claims -- even though they *still were not ripe under Tennessee law*. The District Court denied leave to amend, but has granted a stay of execution to allow consideration of the propriety of that ruling.

The stay was proper. Indeed, two United States District Court judges have indicated that Robert Coe is *no different* from the petitioners raising incompetency to be executed claims in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595 (1986) and *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998). Judge Trauger has recognized the lack of any "true distinction" between Robert Coe and Mr. Martinez-Villareal. See *Coe v. Bell*, No. 3:00-0239 (M.D. Tenn. Mar. 18, 2000), p. 13 n.18. The stay of execution entered here likewise recognizes the substantial nature of Robert Coe's assertion that it is arbitrary to close the courthouse to his *Ford* claims when such claims, as in *Ford* and *Martinez-Villareal*, only became ripe *after* the federal courts resolved his initial habeas claims.

The stay was proper, for it ensures that this Court may carefully review and resolve the complicated issues concerning the appropriate method for raising non-frivolous newly-ripe *Ford* claims following the conclusion of initial habeas review.

See *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997)(granting stay of execution to assess process for considering *Ford* claims).

I.
STATEMENT OF FACTS

Petitioner Robert Glen Coe filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Tennessee. *Coe v. Bell*, No. 3:92-0180 (M.D. Tenn.). On December 8, 1996, following an evidentiary hearing, the United States District Court granted habeas corpus relief. *Coe v. Bell*, No. 3: 92-0180 (Order, Dec. 8, 1996). On appeal, this Court reversed. *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998).

On remand to the District Court, Robert Coe then sought to amend into his petition a claim of incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), given that an execution date now appeared imminent. Indeed, that same day, on November 23, 1999, the Tennessee Supreme Court held for the first time that a *Ford* claim only becomes ripe in Tennessee upon the conclusion of initial federal habeas proceedings. *Van Tran v. State*, 6 S.W.3d 257, 267 (Tenn. 1999). On remand, therefore, Robert Coe had his first opportunity to raise an arguably ripe *Ford* claim before the federal courts.

On January 14, 2000, the United States District Court denied Robert Coe

leave to amend his petition to include his *Ford* claim, but noted that any claim under *Ford* would not later be barred as a 'second or successive' petition. Memorandum, *Coe v. Bell*, No. 3:92-0180 (Jan. 14, 2000), pp. 20-42. The District Court later dismissed Robert Coe's petition for writ of habeas corpus and reaffirmed its decision. *Coe v. Bell*, No. 3:92-0180 (Jan. 19, 2000); *Id.* (Feb. 25, 2000).

On March 20, 2000, Robert Coe filed a timely notice of appeal from the dismissal of his petition.¹ Robert Coe filed a motion for certificate of probable cause to appeal, noting the substantial nature of his claimed entitlement to review of his *Ford* claims and the identity of his facts with that in *Ford* itself. See Motion For Certificate of Probable Cause, p. 1 (Mar. 20, 2000). The District Court granted Robert Coe the requested certificate of probable cause, acknowledging that his claims appear to be controlled by the reasoning of *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998);

¹After the District Court denied Robert Coe's request to amend his petition for writ of habeas corpus to raise a *Ford* claim, Robert Coe exhausted that claim in State Court. At the conclusion of the state court proceedings, Robert Coe sought leave to file a Petition for Writ of Habeas Corpus in an effort to exercise his right to federal review of his *Ford* claim. That petition was assigned to a different judge of the United States District Court for the Middle District of Tennessee, who concluded that she did not have the authority to decide if a *Ford* claim could be brought under either 28 U.S.C. § 2241 or 28 U.S.C. §2254. Accordingly, the district court has transferred Robert Coe's petition to this Court. No. 00-5323. Robert Coe has appealed that decision as well.

In light of the reasoning set forth by the Supreme Court in both Ford v. Wainwright, 477 U.S. 399 (1986) and Stewart v. Martinez-Villareal, 118 S.Ct. 1618, 1621 (1998), the Court finds that there is a reasonable likelihood that Petitioner may succeed on the merits of his appeal.

Certificate of Probable Cause, p. 1.

In light of the granting of the CPC, the District Court also granted Robert Coe's motion for stay of execution pending consideration of his appeal. Coe v. Bell, No. 3:92-0180 (R. 480). Upon the motion of Respondent to stay the stay order, Petitioner noted in oral argument that the issues were indeed substantial and warranted a stay for further review, because Robert Coe was in no different posture than other cases in which petitioners received habeas review of their incompetency claims following conclusion of initial federal habeas proceedings: Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618 (1998); Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986); and Poland v. Stewart, No. CIV-90-1822-PHX-SPK, CIV-98-1891-PHX-SPK (D. Ariz. Oct. 20, 1998).² Yet unlike those petitioners, Robert Coe risks being denied any access to the federal courts - merely because he did not raise his incompetency claims when they weren't ripe. Rather, he sought

² Petitioner noted that Poland was attached as Exhibit 2 to his Memorandum in support of his habeas petition in Coe v. Bell, No. 3:00-0239 (M.D.Tenn.). A transcript of the proceedings before the District Court on the motion to stay the stay is not yet available, but Petitioner will file it with the court upon its completion.

to raise his claims by amendment when their ripeness arose, but once they were ripe, he was then denied the opportunity to amend. Given this unfairness, he noted that the issues on appeal are weighty, and indeed could be resolved in his favor so as to allow federal consideration of his claims – the same type of review received by others.

By a second order, the District Court reaffirmed its entry of the stay of execution to allow proper appellate review of Robert Coe's substantial claims concerning his right to raise his *Ford* claims on remand. The District Court carefully noted the standards for issuing a stay of execution pending appeal as set forth by this Court in Michigan Coalition of Radioactive Material Users, Inc. v. Gricpentrog, 945 F.2d 150, 153-154 (6th Cir. 1991).

Applying those factors, the District Court concluded that a stay was warranted, given a reasonable likelihood of relief on the merits, and the irreparable harm facing Robert Coe: "Indeed, it is hard to imagine a harm more irreparable and substantial than death, which would likely occur before the Sixth Circuit has had adequate opportunity to consider the merits of Petitioner's appeal." Order, p. 3. Also, the District Court noted that any harm the state might suffer pales in comparison to the prospect of a man losing his life, and there is simply no legitimate reason to execute one who is insane:

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With respect to the public interest, the Court finds that, while it has a legitimate interest in ensuring that its lawfully imposed sentences are carried out, the State of Tennessee has no interest in executing an insane person. See Ford v. Wainwright, 477 U.S. 399, 410-411 (1986), . . . [and] Petitioner's appeal . . . directly concerns the State's ability to execute him.

Order, p. 3.

II.

THE MOTION TO VACATE THE STAY SHOULD BE DENIED

In granting a certificate of probable cause and stay of execution, the District Court has properly allowed for consideration of the unsettled, but weighty, question concerning the proper procedure for a petitioner to raise a claim of incompetency to be executed under Ford v. Wainwright, 477 U.S. 399 (1986), an issue which this Court has yet to definitively resolve. The stay, therefore, should not be vacated. See Ford v. Haley, 179 F.3d 1342 (11th Cir. 1999) (district court stay to be upheld where district court granted certificate of probable cause and appeal not frivolous); Orey v. Hopkins, 972 F.2d 210 (8th Cir. 1992) (upholding stay).

Robert Coe sought to have his *Ford* claims heard by seeking to amend his petition once those issues became ripe following remand by this Court on issues relating to his conviction and sentence. Amendment at that time was – and is – a legitimate means for Robert Coe to seek federal habeas review of *Ford* claims, for such a procedure ensures that the petitioner is not raising non-ripe claims (which

would have to be dismissed), and is raising the claims at a point in time when they can finally be addressed by both the state and federal courts. In fact, the petitioner in *Ford* followed a similar course, and the petitioners in *Martinez-Villareal* and *Poland* received review of their claims under similar circumstances.

By granting a stay to allow appellate consideration of his claims, the District Court has merely recognized that, with Robert Coe's life at stake, with him having legitimate *Ford* claims (See Petition For Habeas Corpus Relief, M.D.No. 3:00-0239), and with the state having no legitimate interest in executing the insane, there is a serious question whether a District Court should allow a petitioner to raise his *Ford* claims through amendment following conclusion of review of his conviction and sentence. Such a procedure ensures that legitimate *Ford* claims are not barred in federal court because of a procedural trap in which the petitioner can only raise the claim when it is ripe, but federal law might otherwise then preclude him from raising his claim at that time. And, in fact, as Robert Coe has noted, *the state has no legitimate interest in denying amendment at that time*, for, in Tennessee, the claims cannot even be exhausted in the Tennessee courts before that time.

The issue presented for appeal is all the more pressing, given that Robert Coe has been striving to have his *Ford* claims heard by whatever means possible. If amendment following remand is not permitted, then he should be allowed to raise

it in a second-in-time petition. See Memorandum In Support Of Appeal, *Coe v. Bell*, No. 00-5323. Either way, this Court has yet to decide whether each method (or both) is permissible: but petitioners and the lower courts alike require such guidance. The stay is warranted to allow for deliberate consideration of this appeal.

Moreover, with the District Court having granted a certificate of probable cause to appeal, it is clear that his claim is not frivolous, especially where his situation is virtually indistinguishable from the situation of the petitioners in *Martinez-Villareal*, *Ford*, and *Poland*. His claim on appeal is "a question of some substance," (*Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 3394 n. 4 (1983)) especially given the fact that denying him leave to amend could result in complete denial of habeas review, if he cannot raise his claims in a second-in-time petition. See Memorandum In Support Of Appeal, *Coe v. Bell*, No. 00-5323, pp. 45-46. With *Ford*, *Martinez-Villareal*, and *Poland* having received the opportunity to have their claims heard in federal court, unlike Robert Coe (given the denial of amendment), his claims are clearly "debatable among jurists of reason; . . . a court could resolve the issues [in his favor]; [and] the questions are 'adequate to deserve encouragement to proceed further.'" *Barefoot v. Estelle*, 463 U.S. at 893 n.4, 103

S.Ct. at 3394 n. 4.³

Respondent's suggestion that Fed.R.App. 8 was not a proper vehicle for granting a stay is simply incorrect. In fact, the Rules of this Court require petitioners in death penalty cases to move for any stay of execution in the District Court under Fed.R.App.P. 8(a). See 6th Cir.R. 22(e)(4) (stay motions "first must be presented to the district court by motion pursuant to FRAP 8(a).")

Finally, Respondent's assertions that the District Court lacked "jurisdiction" to enter the stay begs the question presented on appeal. The District Court believed that it did not have the authority to allow amendment, but certainly it did have jurisdiction on remand: the question was what action it could take within the scope of its jurisdiction, in light of the mandate. See Exxon Chem. Patents Inc. v. 1 Lubrizol Corp., 137 F.3d 1475, 1482 (Fed. Cir. 1998) (following mandate, district court has jurisdiction to take further action). And allowing amendment was permissible, given that an execution was now imminent.

³ Further, with the District Court having granted a certificate of probable cause on these issues, which relate to his entitlement to review of initial claims in his first habeas corpus petition, the stay is proper. Indeed, "[A] court of appeals, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause on his initial habeas appeal." Barefoot, 463 U.S. at 893-894, 103 S.Ct. at 3395.

Although the court believed that amendment of a previously non-ripe *Ford* claim was not permissible, the District Court has acknowledged the force of the logic and law underlying *Ford* and *Martinez-Villareal* by granting a certificate of probable cause and a stay following the ultimate dismissal of the action. The District Court has recognized that Robert Coe's position is indeed substantial, especially where denial of any habeas review and the execution of an insane person might be the ultimate outcome of denying amendment.

Other courts of appeals have recognized that a stay of execution is warranted where the petitioner has raised substantial, unresolved issues, which could ultimately result in relief for a death-sentenced inmate, including under *Ford*. See *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997)(granting stay). The District Court's action was not an abuse of discretion; the motion to vacate should be denied. Further, as the District Court noted, there is a reasonable likelihood of success, in light of the fact that the petitioners in *Martinez-Villareal* and *Ford* were allowed to present their similar claims under similar circumstances.

CONCLUSION

The motion to vacate should be denied.

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