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

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

PETITIONER'S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF FURTHER PROCEEDINGS
ON INITIAL HABEAS PETITION

In a December 9, 1999 order, this Court requested that the parties brief several issues concerning this Court's exercise of jurisdiction over Robert Coe's petition for writ of habeas corpus. In particular, this Court requested that the parties address: (1) whether, assuming this Court's December 8, 1996 opinion is a final judgment within the meaning of Fed.R.Civ.P. 54, this Court has jurisdiction to grant Petitioner leave to amend his petition; (2) whether reconsideration of the electrocution claim is barred by 28 U.S.C. §2244(b)(1); (3) whether a claim under Ford is barred by 28 U.S.C. §2244(b)(2); (4) whether a Ford claim is properly brought pursuant to 28 U.S.C. §2254 or 28 U.S.C. §2241. Petitioner respectfully addresses those issues for the Court.

I.

THIS COURT HAS DISCRETION TO ALLOW AMENDMENT
EVEN AFTER THE COURT OF APPEALS HAS RULED,
UNDER LIMITED CIRCUMSTANCES, AND IN THE INTEREST OF JUSTICE:
THE COURT SHOULD PROPERLY ALLOW AMENDMENT HERE

Petitioner does not dispute that this Court's December 8, 1996 order was a final, appealable order. It was, because it granted Robert Coe the relief which he requested – a new trial. See Phifer v. Warden, 53 F.3d 859, 862 (7th Cir. 1995); Hurtun v. Johnson, 975 F.2d 690, 694 (10th Cir. 1992);

Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). The question is not whether the December 8, 1996 order was final and appealable, but whether in and of itself it constituted a complete final judgment. It did not. Rather, Fed.R.Civ.P. 58 requires a final judgment to be separately entered on the docket, and contained in a separate document of judgment. This did not occur, and therefore, there has been no final judgment in this case. Thus, following the conclusion of the prior appellate proceedings, this case remains in the posture of any other case prior to a final judgment. This Court has jurisdiction over the initial petition, admittedly limited by the fact that numerous issues have been decided. Thus, the case is before the Court to either conduct further proceedings, or enter final judgment, and to do so on whatever terms are proper or just.[1]

Yet even assuming a final judgment, this Court retains the power to allow amendment of the petition, even at this stage of the case. "Once the case has been remanded, the lower court will permit new issues to be presented by an amended pleading that is consistent with the judgment of the appellate court." Wright Miller & Kane, Federal Practice and Procedure Civil 2d §1489 (West 1990), pp. 698-699. See City of Columbia v. Paul N. Howard Co., 707 F.2d 338, 341 (8th Cir. 1983) (amendment may be proper upon remand of case to district court); Jones v. St. Paul Fire & Marine Ins. Co., 108 F.2d 123, 125 (5th Cir. 1939). Even after a final judgment, "amendments may be possible" and should be granted "sparingly and only if justice requires." See Dartmouth Review v. Dartmouth College, 889 F.2d 13, 23 (1st Cir. 1989). "The touchstone is equitable and case-specific."

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[1] This situation here differs from a case in which a district court denies relief and an appellate court affirms. Under those circumstances, upon the affirmance by an appellate court, there is nothing left for the district court to do, as judgment has already been entered. In this case, however, relief was granted in Robert Coe's favor. Following the court of appeals' ruling, the district court reassumes jurisdiction to act in conformity with the appellate mandate, and it must take some action before relief can be denied, if that were appropriate.

Id. See also Jarvis v. Regan, 833 F.2d 149, 155 (9th Cir. 1987)(leave to amend may be granted after entry of final judgment).

As Robert Coe has previously asserted, as to the electrocution claim, this Court may properly allow amendment. Robert Coe sought to raise a valid constitutional claim. This Court initially denied the amendment as being frivolous. The only issue before the Sixth Circuit concerning this claim was whether this Court abused its discretion in disallowing amendment on the basis of "frivolousness." The Sixth Circuit upheld this Court's prior exercise of discretion. Allowing amendment of this claim is not inconsistent with the appellate mandate, as the Sixth Circuit only addressed this Court's exercise of discretion. To be sure, had there been no intervening event following this Court's initial denial of the amendment, it would apparently be improper to allow amendment at this stage. But that is not the case here.

Robert Coe sought to raise this non-frivolous claim earlier in the proceedings. This Court mistakenly believed that Robert Coe's claim was frivolous. As a result of the grant of certiorari in Bryan, Robert Coe's assertion that his claim is not frivolous appears to be correct. Thus, while Robert Coe has sought to have his claim heard in his initial habeas petition, he has been denied that opportunity through a ruling which now appears incorrect in light of an intervening event. With amendment not being inconsistent with the appellate court mandate, this is the rare situation in which amendment should now be permitted, because "justice requires" such a result. See Dartmouth Review v. Dartmouth College, 889 F.2d at 23. Otherwise, Robert Coe would be denied consideration of his claim.

As to the Ford claim, this Court may likewise allow amendment because of intervening factual and legal events. First, as previously noted, Stewart v. Martinez-Villareal, 523 U.S. 637, 118

S.Ct. 1618 (1998) constitutes an intervening Supreme Court decision which demonstrates that considering the claim in a first habeas petition is proper. Second, as a matter of fact, the claim has become ripe (if it has) only after this Court's previous consideration of the petition. On December 15, 1999, the Tennessee Supreme Court just set a March 23, 2000 execution date, while ordering state court proceedings on the competency question. Thus, the Tennessee courts have even recognized that the claim was not ripe earlier: accordingly, Robert Coe cannot be faulted for not raising a non-ripe claim, which could only become ripe after the prior proceedings in this Court.

As with the electrocution claim, this issue presents the precise type of narrow changed factual and legal circumstances which warrants the amendment of the petition at this time. And, as Robert Coe has previously argued, Respondent certainly cannot allege any harm in having the claim presented at this time, as it was never ripe before, a fact which the state courts of Tennessee and Respondent appear to clearly acknowledge.

Therefore, the requested amendments – because they are warranted in the interest of justice, are not inconsistent with the appellate mandate, and involve the types of rare circumstances which warrant amendment even after some consideration of the case by the court of appeals – should be allowed.

II.
THE ANTITERRORISM ACT IS INAPPLICABLE TO THE ELECTROCUTION AND FORD CLAIMS

This Court has also requested that the parties address the applicability of the Antiterrorism Act (AEDPA) to these two constitutional claims. Robert Coe respectfully notes that he is not filing claims under the successive provisions of the Antiterrorism Act, but is merely seeking further proceedings on his initial petition. Because the proceedings now before this Court do not involve

a "second or successive habeas corpus application," §2244(b)(1), (2), those subsections simply do not apply. Compare Calderon v. Thompson, 118 S.Ct. 1489, 1500 (1998)(successive petition provisions of AEDPA do not by their terms apply to recall of mandate during initial habeas proceedings, although they influence exercise of discretion of court dealing with recall of mandate of initial petition).[2]

Even so, if the AEDPA provisions were to inform this Court's exercise of its jurisdiction at this time, those standards cannot be used to the extent that they would require the denial of relief on such claims, whereas relief would be permitted under the pre-AEDPA habeas corpus law. As the Sixth Circuit has held in In Re Hanserd, 123 F.3d 922 (6th Cir. 1997), the AEDPA cannot apply to a petitioner who filed his initial habeas corpus petition before the passage of the AEDPA (as Robert Coe did) if the successive petition provisions of the AEDPA would preclude relief, but pre-AEDPA standards would permit relief.

In Hanserd, the petitioner had filed a motion to vacate sentence in 1995 -- before the AEDPA was passed -- but then again requested relief *after* the passage of the AEDPA, following the new Supreme Court case of Bailey v. United States, 516 U.S. 137, 116 S.Ct. 501 (1995). As the Sixth Circuit explained:

> When Hanserd filed his initial §2255 motion, the law would have allowed him to raise a *Bailey* claim in a second motion, as discussed above. Under AEDPA, however, he may not. Applying the new statute would thus attach a severe new legal consequence to his filing a first motion: he would have lost his right to challenge his sentence. . . . Because Congress has not expressed an intent that the new Act have such a retroactive effect, we could not apply AEDPA in this way.

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[2] Robert Coe is merely requesting that this Court allow further proceedings on his initial petition. He is not any way filing a second petition, and is not requesting that this Court treat his request as any type of application for a second petition.

Hansard, 123 F.3d at 930-931. The new standards contained in the Antiterrorism Act thus created a new legal consequence for Hansard, whose entitlement to federal relief attached in 1995 -- when he filed his first federal petition. The question was not *when* Hansard filed his second request for relief, but whether, prior to the passage of the AEDPA, he would have had a right to relief from his pre-AEDPA plea -- even on a second or successive petition. Thus, even though Hansard filed his second application after April 24, 1996, occurrences before April 24, 1996 -- viz. his 1991 plea and his 1995 motion to vacate -- took on new significance under the new law. He would have received relief under pre-AEDPA law, but now risked being denied relief under the AEDPA. The Act therefore could not apply, because it would thus have retroactive effect.

An analogous situation is presented here. Robert Coe filed his habeas petition before the passage of the AEDPA. Unlike Hansard, Robert Coe has not filed a second or successive petition but has merely requested further proceedings prior to any final judgment in this case. *A fortiori*, if the successive provisions of the AEDPA cannot be applied to deny relief on a second petition as in Hansard, they cannot be used to deny the relief requested by Robert Coe in these proceedings on his initial petition. As in Hansard, the standards of the AEDPA therefore cannot be applied to deny relief if relief were available under pre-AEDPA law.

And, relief would be available under pre-AEDPA law. First, amendment is permissible under the pre-AEDPA habeas law, and therefore there are no concerns with this being a second petition. It is not, because there has yet to be a final judgment, and this Court still has the power to allow amendment prior to final judgment, which has yet to be entered in accordance with Fed.R.Civ.P. 58. Yet the claims would still not be barred by pre-AEDPA law concerning second or successive petitions. As to the electrocution claim, Robert Coe would have "cause" for raising the claim now,

as Bryan constitutes an intervening event. Even under the AEDPA, the electrocution claim would not be barred under 28 U.S.C. §2244(b)(1). Robert Coe has, as of yet, never had the claim before this Court, because amendment had previously been denied. Therefore, by its terms, §2244(b)(1) simply does not apply. Further, he would be entitled to raise the claim under §2244(b)(2)(A), as a Supreme Court holding in Bryan declaring electrocution unconstitutional would fall within the provisions of that subsection. As to the Ford claim, because there has been no possible factual basis to raise the claim until the recent setting of an execution date to render the claim potentially ripe, the factual basis of the claim was not reasonably available earlier. Thus, there would also be ample "cause" for any alleged failure to raise the claim sooner.

Therefore, under pre-AEDPA law, the Ford claim – even if it were somehow considered a second petition – would still be available for federal review under the circumstances, not only because of the retroactive effect of the AEDPA, but also because the writ of habeas corpus would then be suspended under Article I §9 of the United States Constitution. See Triestman v. U.S., 124 F.3d 361, 379 (2nd Cir. 1997). As Judge Nelson has explained in Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997)(Nelson, J., specially concurring), a Ford claim could clearly be heard under pre-AEDPA law, and therefore the AEDPA cannot be applied to preclude its consideration:

> A showing of cause required the petitioner to demonstrate the existence of an objective factor external to the defense which hampered efforts to comply with the procedural rule [citations omitted]. *The lack of ripeness of a claim of incompetence to be executed would appear to be a classic case of an external impediment to presentation of the claim.*
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> Thus, on April 23, 1996, a claim involving lack of competency to be executed could be considered in a successive petition filed in federal court. On April 24, 1996, and since, under the clear terms of §2244, such claims simply cannot be considered by any federal court, in spite of the fact that there was no earlier opportunity to do so. If the writ has not been suspended as to those claims, it is difficult to see how it can ever be suspended as to any class of claims.

Id. at 635 (Nelson, J., specially concurring)(emphasis supplied).

The Supreme Court has indicated in Lindh v. Murphy, 521 U.S. ___, 117 S.Ct. 2059 (1997) that habeas corpus revisions of Title 28, Chapter 153 contained in the AEDPA do not apply to cases where the habeas corpus petition was filed before April 24, 1996, the date the AEDPA became law. As the Court explained: "The statute [AEDPA] reveals Congress's intent to apply the amendments to chapter 153 only to such *cases* as were filed after the statute's enactment." Lindh, 521 U.S. at ___, 117 S.Ct. at 2063 (emphasis supplied). The Court reiterated: "We read . . . §107(c) [of the Act] . . . as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases *only when those cases had been filed after the date of the Act*." Lindh, 521 U.S. at ___, 117 S.Ct. at 2063 (emphasis supplied). Finally, in its conclusion in Lindh, this Court emphasized yet again that the AEDPA does not apply to habeas cases which were filed before 1996. The Court concluded: "We hold . . . that the new provisions of chapter 153 generally apply *only to cases filed after the Act became effective*." Lindh, 521 U.S. at ___, 117 S.Ct. at 2068 (emphasis supplied). While "Lindh's case is not one of these," Id., Robert Coe's case also is "not one of these" cases, because his case – his habeas petition – was filed in 1992. As in Lindh, the AEDPA simply does not apply.

Further, the standards of the AEDPA cannot be applied if to do so would impose retroactive effects upon Robert Coe. To determine whether new Congressional legislation applies to a particular case, the Court must ask:

> First 'whether Congress has expressly prescribed the statute's proper reach,' *Landgraf v. USI Film Products*, 511 U.S. 244, 280, 114 S.Ct. 1483 (1994). If there is no congressional directive on the temporal reach of a statute, we determine whether the application of the statute to the conduct at issue would result in a retroactive effect. *Id.* If so, then in keeping with our 'traditional presumption' against

retroactivity, we presume that the statute does not apply to that conduct.

Martin v. Hadix, 527 U.S. ___, ___, 119 S.Ct. 1998, 2003 (1999).

In this case, "Congress has not expressly mandated the temporal reach" of the Chapter 153 habeas revisions of the AEDPA. Martin, 527 U.S. at ___, 119 S.Ct. at 2003. Those revisions are wholly silent on whether they automatically apply to a issues considered after passage of the AEDPA. The language of the AEDPA thus:

> falls short of demonstrating a 'clear congressional intent' favoring retroactive application . . . . Landgraf, 511 U.S. at 280. It falls short, in other words, of the 'unambiguous directive' or 'express command' that the statute is to be applied retroactively.

Martin, 527 U.S. at ___, 119 S.Ct. at 2004, quoting Landgraf, 511 U.S. at 263, 280. See Lindh, 521 U.S. at ___, 117 S.Ct. at 2064 (new legislative enactment will not be allowed to have retroactive effect unless it contains the "clear statement required to apply a statute in the disfavored retroactive way").

The only remaining question, therefore, is whether consideration of AEDPA standards to otherwise preclude relief on his first petition would have retroactive effect upon Robert Coe. "The inquiry into whether a statute operates retroactively demands a common sense, functional judgment, about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" Martin, 527 U.S. at ___, 119 S.Ct. at 2006, quoting Landgraf, 511 U.S. at 270, 114 S.Ct. at 1499. "This judgment should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations." Martin, 527 U.S. at ___, 119 S.Ct. at 2006.

In sum, the provisions of the AEDPA do not apply here, because this is still a first petition. To the extent that those standards would influence this Court's exercise of discretion at this point,

those standards cannot be used to deny relief, as in Hanserd. New 28 U.S.C. §2244(b)(1) and (b)(2) are simply not applicable here and cannot be used to deny relief as to the electrocution or Ford claims, and the Ford claim in particular, since the facts supporting that claim only arise (if at all) after the filing of the initial petition. See In Re Taylor, 171 F.3d 185 (4th Cir. 1999)(petitioner's request for relief on issues which arose only after initial habeas proceedings was not a second petition under the AEDPA).[3]

III.
APPLICABILITY OF 28 U.S.C.§2241 TO FORD CLAIM

There is also a long line of case law which provides that a claim relating to the execution of a sentence – as opposed to the constitutionality of the conviction or sentence – may properly be brought pursuant to 28 U.S.C. §2241. See e.g., Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996)("A petition under 28 U.S.C. §2241 attacks the execution of a sentence rather than its validity. . . ."); United States v. Jalili, 925 F.2d 889, 893-894 (6th Cir. 1991); See also Montano-Figueroa v. Crabtree, 162 F.3d 548 (9tyh Cir. 1998)(§2241 challenge to execution of sentence).

As a claim under Ford does not relate *per se* to the constitutionality of the conviction or the sentence – but to the actual execution of sentence – it may be considered as properly brought pursuant to §2241. Nevertheless, Robert Coe respectfully requests that this Court allow his amendment to the §2254 petition, while not foreclosing the possibility of raising the claim under §2241 should the present amendment – which is proper for the reasons already stated – somehow be deemed improper later.

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[3] As Robert Coe has noted *supra*, he expressly is not requesting permission to file a second application. If the Court would intend to rule against Robert Coe, the Court merely should enter final judgment on the first petition.

Further, if the claim has not been ripe, but §2254 would preclude relief even though the claim could not properly be raised earlier, resort to §2241 would be proper, as it would allow consideration of the claim, and would not risk suspending the writ of habeas corpus as to this type of claim. See Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997)(Nelson, J., specially concurring). Resort to §2241 would thus avoid the constitutional problems (viz. suspension of the writ under Article I §9) inherent in faulting Robert Coe for not raising a claim earlier – when that claim was simply not available earlier – but then precluding him from raising the claim when it were to become available.

CONCLUSION

This Court has yet to enter a complete final judgment in this case pursuant to Fed.R.Civ.P. 58. This Court may therefore allow amendment of the petition in the interests of justice, and should do so now, in the interest of justice, in light of the unique factual circumstances presented by this case. The Court should also conduct further proceedings.

Alternatively, if this Court were to now enter a final judgment against Petitioner in accordance with Rule 58, Robert Coe respectfully requests that this Court enter final judgment with leave to amend into his §2254 petition the *Ford* claim when the claim is actually ripe, with the court specifically entering any such judgment without prejudice to allowing Robert Coe to raise a Ford claim under §2241, if necessary.

Respectfully Submitted,

James Walker
601 Woodland Street
Nashville, Tennessee 37206
(615) 254-0202

Henry Martin
Paul Bottei
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

By: 

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 23 day of December, 1999.