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Colburn v. Texas 123 S. Ct. 968 (2003)(mem.)

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I. Introduction

In 1994, James Blake Colburn ("Colburn") was convicted of capital murder and sentenced to death.[1] On direct appeal to the Court of Criminal Appeals of Texas, Colburn argued that under the Eighth and Fourteenth Amendments his mental illness barred his execution.[2] In his argument, Colburn relied on *Ford v. Wainwright*,[3] which held that the Eighth Amendment "prohibits the State from inflicting the penalty of death upon a prisoner who is insane."[4] The Court of Criminal Appeals stated that the issue of whether Colburn suffered from mental illness at the time of trial or sentencing was not determinative of whether he would be sane at the time of his execution.[5] The court instructed that the proper time to make a claim that the defendant is not competent to be executed is when execution becomes imminent.[6] The court concluded that because Colburn's execution was not imminent, his claim was not yet ripe.[7] Additionally, the court noted that the evidence to support this type of claim is best developed by a hearing held as part of an application for a writ of habeas corpus in federal court.[8]

In 1999, Colburn filed an application for a writ of habeas corpus in the United States District Court for the Southern District of Texas.[9] Colburn raised the issue of his incompetence to stand trial.[10] He did not, however, raise the

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1. Colburn v. Texas, 966 S.W.2d 511, 512-13 (Tex. Crim. App. 1998).

2. *Id.* at 513. Colburn has a history of paranoid schizophrenia. *Id.*

3. 477 U.S. 399 (1986).

4. *Colburn*, 966 S.W.2d at 513; *see* Ford v. Wainwright, 477 U.S. 399, 410 (1986) (holding that a state may not execute an insane prisoner). *See generally* Kimberly A. Orem, Case Note, 12 CAP. DEF. J. 191, 197 (1999) (analyzing Swann v. Taylor, No. 98-20, 1999 WL 92435 (4th Cir. Feb. 18, 1999)).

5. *Colburn*, 966 S.W.2d at 513.

6. *Id.*

7. *Id.*

8. *Id.*

9. *See* Colburn v. Cockrell, No. H-02-4180, at 4 (S.D. Tex. Nov. 6, 2002) (order denying Colburn's Motion for a Stay of Execution).

10. *Id.* at 1.

issue of his incompetence to be executed.[11] The district court denied his application.[12]

In May 2002, Colburn filed a second application for a writ of habeas corpus.[13] Colburn alleged, as he had in state court, that his mental illness barred his execution under the Eighth and Fourteenth Amendments.[14] The Southern District of Texas denied Colburn's application and stated that it did not have jurisdiction to hear his second petition for habeas relief.[15] On appeal, Colburn argued that his petition was not a true second petition because the court would have dismissed any *Ford* claim made in his first petition on ripeness grounds.[16] The Fifth Circuit affirmed the district court's dismissal.[17]

In 2002, Colburn filed a "Motion For Stay of Execution, Motion for Appointment of Counsel, and Motion for Constitutionally Adequate Determination of Mr. Colburn's Present Competency to be Executed" in the district court.[18] On November 6, 2002, the district court denied Colburn's motion for a stay of execution and request for competency proceedings.[19] The Fifth Circuit affirmed this denial.[20]

On November 6, 2002, the United States Supreme Court granted Colburn a stay of execution pending the Court's grant of a writ of certiorari.[21] On November 8, 2002, the Court directed Colburn to file a petition for a writ of certiorari.[22] On January 21, 2003, the Supreme Court denied Colburn's petition for a writ of certiorari.[23]

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11. *Id.* Court-appointed experts determined that at the time of Colburn's first petition for habeas relief he was able to understand why he was being executed, and thus was not too insane to be executed. Linda Greenhouse, *Supreme Court Roundup: A Conspiracy Nipped Can Still Bring Conviction, Justices Say*, N.Y. TIMES, Jan. 22, 2003, at A18.

12. *See Colburn*, No. H-02-4180, at 3 (order noting that the district court denied Colburn's initial habeas petition).

13. Telephone Interview with James Rytting, Attorney for James Colburn (January 29, 2003) [hereinafter Telephone Interview with James Rytting].

14. *Id.*

15. Greenhouse, *supra* note 11.

16. *Id.*

17. Colburn v. Cockrell, 37 Fed. Appx. 90, 90 (5th Cir. 2002) (unpublished table decision).

18. *Colburn*, No. H-02-4180, at 1.

19. *Id.* at 4.

20. Colburn v. Cockrell, No. 02-21208, 2002 U.S. App. LEXIS 24777, at *1 (5th Cir. Nov. 6, 2002).

21. Colburn v. Cockrell, 123 S. Ct. 516, 516 (2002) (mem.).

22. Colburn v. Cockrell, 123 S. Ct. 517, 517 (2002) (mem.).

23. Colburn v. Texas, 123 S. Ct. 968, 968 (2003) (mem.).

II. Analysis

In *Ford*, the Court set forth the constitutional principle that an insane individual may not be executed.[24] In *Stewart v. Martinez-Villareal*,[25] the Court held that if a petitioner makes a *Ford* claim in his first habeas petition, then a second petition that presents a *Ford* claim should not be considered successive under § 2244(b)(3).[26] In a case such as Colburn's, in which the petitioner does not meet the incompetency standard at the time of the first habeas petition, and subsequently may meet the standard, the Court has not addressed the proper means by which such a petitioner should exercise the protection provided by *Ford*.

The Supreme Court, by denying review of Colburn's claim, has left in place the construction by the Southern District of Texas and the Fifth Circuit of the AEDPA ban on successive petitions.[27] The Fifth Circuit's analysis creates a "fatal conundrum" for all petitioners who are not too incompetent to be executed when they file their first habeas petitions, and thus do not raise the *Ford* issue.[28] When such a petitioner does become too incompetent to be executed, there is no procedural mechanism for him to make this claim.

This conundrum is created partially by AEDPA's timing requirements.[29] Section 2244(d)(1) sets forth a one year statute of limitation for applications for habeas relief.[30] Because of § 2244(d)(1), counsel cannot delay filing an application for habeas relief until his client has become too incompetent to be executed.[31]

In order to protect a defendant who may become too incompetent to be executed, but who does not meet the standard of incompetence within the

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24. *Ford*, 477 U.S. at 410. In *Ford*, the Court concluded that states are prohibited from inflicting the death penalty on prisoners who are insane. *Id.* The Court discussed this prohibition using the term "insane." *Id.* It also, however, described the state's obligation to determine a prisoner's "competence to be executed." *Id.* at 418. In its conclusion, the Court set forth the general standard for whether a prisoner is competent to be executed by stating that "[i]t is no less abhorrent today than it has been for centuries to exact in penance the life of one *whose mental illness prevents him from comprehending the reasons for the penalty or its implications.*" *Id.* at 417 (emphasis added).

25. 523 U.S. 637 (1998).

26. Stewart v. Martinez-Villareal, 523 U.S. 637, 644-45 (1998) (holding that if a first habeas petition raises a *Ford* claim, then a second petition raising the issue is not successive); *see* 28 U.S.C. § 2244(b)(3)(A) (2000) (stating that before a district court may hear a second or successive petition, the court of appeals must grant the applicant an order authorizing the district court to consider the petition).

27. *See Colburn*, 37 Fed. Appx. at 90 (affirming the district court's denial).

28. *See* Greenhouse, *supra* note 11 (describing Colburn's case and discussing the issue of whether the federal courts have jurisdiction to consider a claim of mental incompetency).

29. *See* 28 U.S.C. § 2244(d)(1) (2000) (setting forth a one year statute of limitation for an application for a writ of habeas corpus; part of AEDPA).

30. *Id.*

31. *See id.* (stating the statute of limitations).

statute of limitation, counsel has three alternatives. First, if counsel foresees any future likelihood of the defendant becoming too incompetent to be executed, counsel may choose to make a *Ford* claim in the first habeas petition.[32] The court may determine that the issue is not ripe at the time of the first petition. However, under *Stewart*, a second petition would not be successive, and the court may reconsider the issue when execution becomes imminent.[33]

Second, counsel may file a Motion to Reserve Judgment on the Issue of Incompetence to Be Executed with the first habeas petition. Rule 54(b) of the Federal Rules of Civil Procedure permits a court to enter a final judgment on less than all of a party's claims.[34] The court, as soon as execution becomes imminent, may then issue a final judgment as to whether the defendant is competent to be executed.[35] By filing this motion, counsel avoids the bar on successive habeas petitions and ensures that the court will consider the defendant's *Ford* claim when it is ripe. This motion does not inhibit the defendant's ability to appeal on other grounds because the court's final judgment on the remaining issues constitutes a final decision that is appealable under § 1291.[36]

Finally, counsel may seek clemency for his client.[37] In 1999, then-Governor James Gilmore granted clemency to Calvin Swann.[38] Swann suffered from severe schizophrenia and his attorneys "contended [that] he was too mentally ill to understand either his crime or the impending punishment."[39] Clemency is discretionary and occurs infrequently; counsel should not depend upon it as a reliable means of protecting the incompetent defendant from execution.[40]

V. Conclusion

In *Ford* and *Stewart*, the Supreme Court granted protection from execution for those persons deemed too incompetent or insane to be executed.[41] By

32. Telephone Interview with James Rytting, *supra* note 13.

33. *See Stewart*, 523 U.S. at 642-44 (holding that if a first habeas petition raises a *Ford* claim, then a second petition raising the issue will not be considered successive).

34. FED. R. CIV. P. 54(b).

35. *See generally id.* (permitting a court to enter a final judgment on less than all of a party's claims).

36. *See* 28 U.S.C. § 1291 (2000) (granting jurisdiction to the courts of appeals for all final decisions from the district courts).

37. *See* VA. CODE ANN. § 53.1-229 (Michie 2002) (vesting power to commute capital punishment and grant pardons in the Governor).

38. Donald P. Baker, *Gilmore Stops Execution for First Time; Mental Illness of Inmate Cited*, WASH. POST, May 13, 1999, at A1.

39. *Id.*

40. *Id.* Before granting Swann clemency, Gilmore allowed twenty-one state-conducted executions to proceed. *Id.*

41. *See Ford*, 477 U.S. at 410 (stating that an insane person may not be executed); *Stewart*, 523 U.S. at 639 (upholding the principle set forth in *Ford*). *But see* Singleton v. Norris, 319 F.3d 1018, 1027 (8th Cir. 2003). In 1979, Charles Singleton ("Singleton") was convicted of capital felony

denying review of Colburn's petition for a writ of certiorari, the Supreme Court has chosen not to fill a gap in this protection. Counsel should be aware of this gap and its relationship with AEDPA's ban on successive habeas petitions. On behalf of their client, counsel must take all measures necessary to avoid defaulting this issue.

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murder and sentenced to death. *Id.* at 1020. Singleton suffered from psychosis, but conceded that antipsychotic medication restored him to competency. *Id.* at 1021-22. In 1992, Singleton terminated his antipsychotic treatment. *Id.* at 1021. The State of Arkansas began to medicate Singleton involuntarily in 1997. *Id.* On appeal from the district court's denial of Singleton's application for habeas relief, Singleton argued to the United States Court of Appeals for the Eighth Circuit that involuntarily administered medication violated his Eighth Amendment rights once his execution date was set because it was no longer in his best medical interest. *Id.* at 1023. The Eighth Circuit held that "[a] State does not violate the Eighth Amendment as interpreted by *Ford* when it executes a prisoner who became incompetent during his long stay on death row but who subsequently regained competency through appropriate medical care." *Id.* at 1027.