IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	**Filed - March 24, 2004**
Appellee,	)	
	)	**COFFEE COUNTY**
v.	)	**NO. M1987-00067-SC-DPE-DD**
	)	
GREGORY THOMPSON,	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE ORDER OF THE COFFEE COUNTY CIRCUIT COURT

BRIEF OF THE STATE OF TENNESSEE

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Where a prisoner's submissions in support of a petition declaring incompetency for execution demonstrate that the prisoner is, in fact, presently aware that he is under a death sentence for murder, does a trial court commit error by dismissing the petition without an evidentiary hearing on grounds that the prisoner has failed to establish a genuine issue for the trier of fact on the question of competency for execution under *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 2000)?

STATEMENT OF THE CASE AND FACTS

Gregory Thompson was convicted for the first-degree murder of Brenda Blanton Lane in the Coffee County Circuit Court in 1985 and was sentenced to death. This Court affirmed his conviction and sentence on direct appeal, *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), and the United States Supreme Court denied certiorari. *Thompson v. Tennessee*, 497 U.S. 1031 (1990). Thompson's conviction and sentence were upheld by the trial court on post-conviction and were affirmed by the Tennessee Court of Criminal Appeals. *Thompson v. State*, 958 S.W.2d 156 (Tenn. Crim. App. 1997) (app. denied Oct. 20, 1997).[1]

In 1998, Thompson filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Tennessee. The district court granted summary judgment in favor of the State and dismissed the petition. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003)(reh. denied Mar. 12, 2003). The United States Supreme Court denied a petition for writ of certiorari on December 1, 2003, *Thompson v. Bell*, 540 U.S. __, 124 S.Ct. 804 (2003) (No. 03-5759), and denied a petition for rehearing on January 20, 2004. *Thompson v. Bell*, 124 S.Ct. 1162, 2004 WL 76656 (2004).

On January 21, 2004, the State of Tennessee filed a motion in this Court requesting the

[1]Thompson has twice sought to reopen his initial post-conviction petition by filing motions in the trial court under Tenn. Code Ann. §40-30-117. The trial court summarily denied both motions, and the court's decisions were affirmed by the Tennessee Court of Criminal Appeals. *Thompson v. State*, No. M2003-02032-CCA-R28-PD (Tenn. Crim. App. Feb. 17, 2004); *Thompson v. State*, No. M2001-02256-CCA-28M-PD (Tenn. Crim. App. Oct. 3, 2001) (app. denied May 28, 2002). In addition, in May 2001, Thompson filed a petition for writ of error coram nobis, which was summarily dismissed by the trial court as being time-barred. That decision was also affirmed by the Tennessee Court of Criminal Appeals. *Thompson v. Bell*, No. M2001-02460-CCA-OT-CO (Tenn. Crim. App. Aug. 15, 2002) (app. denied Dec. 23, 2002).

setting of an execution date for Gregory Thompson under Tenn. S.Ct. R. 12.4(A).[2] Thompson filed a response opposing the State's motion on grounds of mental illness and, in addition, filed a notice raising the issue of present incompetency to be executed and requesting a competency hearing under *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 2000). On February 25, 2004, the Court granted the State's motion and set an execution date of August 19, 2004.[3] In addition, finding that Thompson had raised the issue of his present competence to be executed, the Court remanded the case to the Coffee County Circuit Court, where Thompson was originally tried and sentenced, for competency proceedings under *Van Tran*, including an initial determination of whether he has met the required threshold showing for an evidentiary hearing.

On March 1, 2004, Thompson filed a "Petition Providing Notice of Incompetency to Be Executed, Requesting a Hearing on Competency to Be Executed, and Requesting an Order Finding Gregory Thompson Incompetent to Be Executed and Issuance of a Reprieve" in the trial court. (I, 1)[4] The petition alleged that, during his 18 years of incarceration for the murder of Brenda Lane, Thompson has been treated extensively for mental illness. (I, 9-29) Thompson attached to the petition excerpts from his institutional records in support of that contention. (I, 50-146) The petition listed varying diagnoses Thompson has been given by mental health professionals over the years and alleged that he has been treated with various medications for his mental condition. The petition

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[2]Rule 12.4(A) provides, "After a death-row prisoner has pursued at least one unsuccessful challenge to the prisoner's conviction and sentence through direct appeal, state post-conviction, and federal habeas corpus proceedings, the State Attorney General shall file a motion requesting that the Court set an execution date."

[3]In the same order, the Court denied Thompson's request for a certificate of commutation under Tenn. Code Ann. §40-27-106, finding that Thompson had presented no extenuating circumstances warranting the issuance of a certificate.

[4]The record in this case consists of two volumes of technical record, which will be referenced herein by volume and page number.

further alleged that Thompson currently suffers from "debilitating mental illness," the primary feature being disorganized and delusional thought process (I, 29), and that he received the assistance of a court-appointed conservator for the limited purpose of consenting to medical treatment from March 2001 until October 2003. (I, 27-29) Attached to the petition were reports of John S. Rabun, M.D. (II, 181-95), Faye E. Sultan, Ph.D. (II, 231-34), and George Woods, Jr., M.D. (II, 207-13), all of whom opine that Thompson is not presently competent to be executed. In addition, Thompson submitted affidavits from his attorney and investigator to demonstrate alleged delusional beliefs concerning his upcoming execution. (I, 48-49; II, 251-52)

Also on March 1, 2004, the District Public Defender filed a motion to withdraw as counsel for Thompson, asserting a conflict of interest. (II, 264) In his brief to this Court, Thompson asserts that an identical motion was simultaneously filed in this Court. (Brief of Appellant, p. 2) On March 9, 2004, this Court denied counsel's motion to withdraw.[5]

The State filed a response to Thompson's petition on March 4, 2004, asserting that Thompson's submissions, even taken as true, failed to create a genuine issue of present incompetence for execution and, thus, failed to meet the threshold showing under *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), required to obtain an evidentiary hearing. (II, 268)

On March 8, 2004, the trial court entered an order denying a hearing on the issue of competency to be executed, concluding that the expert reports submitted by Thompson demonstrated that the requirements for competency under *Van Tran* were presently satisfied:

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[5]Although Thompson reasserts this issue in the current appeal (Brief of Appellant, pp. 28-30), the State does not address the matter, since the withdrawal question has already been resolved by this Court. The State notes with some concern, however, that the Office of the Attorney General has never been served with a copy of the motion to withdraw filed either in the trial court or this Court (despite being listed on the certificate of service for the motion filed in the trial court (II, 265)) and was, in fact, unaware of the basis of the motion until entry of this Court's March 9, 2004 order.

> This Court is of the opinion that all three of the expert reports submitted to the Court by Gregory Thompson demonstrate clearly that Thompson is presently aware that he is under a death sentence for the murder of Brenda Lane under the "cognitive test" established by the Supreme Court. All that is necessary for competence to be executed is that the prisoner need only to be aware of the fact of his impending execution and the reasons for it. *Van Tran, supra*. This Court finds and holds that these requirements have been met and are presently existing.

(II, 308-11)

Under the appellate procedure established by this Court in *Van Tran*, review of the trial court's competency determination by this Court is automatic and expedited. *Id.*, at 271-72.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THOMPSON'S PETITION WITHOUT AN EVIDENTIARY HEARING BECAUSE HE FAILED TO ESTABLISH A GENUINE DISPUTED ISSUE ON THE QUESTION OF COMPETENCY TO BE EXECUTED.

In *Van Tran v. State,* 6 S.W.3d 257 (Tenn. 1999), this Court addressed both the standard for determining competency for execution in Tennessee and the procedures afforded state prisoners asserting claims of incompetence, including the threshold showing required to obtain a hearing on the issue. Under *Van Tran*, upon remand by the Court following the setting of an execution date under Tenn. S. Ct. R. 12.4(A), the prisoner must file a petition in the trial court, with supporting affidavits, depositions, medical reports or other credible evidence, that makes a threshold showing that the prisoner is presently incompetent. *Van Tran*, 6 S.W.3d at 268-69. If the trial court determines, upon review of the petition and the State's response, that the prisoner has failed to meet the required threshold showing, the court shall enter a written order denying the petition without an evidentiary hearing. *Id.*, at 269. As set forth below, Thompson's submissions to the trial court, particularly his expert submissions, even taken as true, do not create a genuine issue of present

incompetence for execution. To the contrary, each of the expert reports clearly demonstrates Thompson's awareness that he is under a sentence of death for murder. Because Thompson failed to meet the threshold showing required to obtain an evidentiary hearing, the trial court properly denied his petition without an evidentiary hearing.

A. Standard for competence to be executed

In *Ford v. Wainwright*, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment prohibits a state from executing a prisoner who is insane. The constitutional threshold for sanity, *i.e.*, competence to be executed, according to Justice Powell in his *Ford* concurring opinion, is the prisoner's awareness of the impending execution and the reason for it. This question is independent of the validity of a prisoner's trial and sentencing, affecting only when, not whether, an execution may take place.

In *Van Tran, supra*, this Court addressed both the standard for determining competency for execution in Tennessee and the procedures afforded state prisoners asserting *Ford* claims. Following Justice Powell's concurrence in *Ford*, the Court adopted a "cognitive test" for competence, holding that "under Tennessee law a prisoner is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it." *Van Tran*, 6 S.W.3d at 266. Significantly, this is a less stringent standard than the test used to determine competence to stand trial or plead guilty in Tennessee in that it does not require that the prisoner be able to assist in his or her defense, the so-called "assistance prong." Thus, only those prisoners who are "unaware of the *punishment* they are about to suffer and the *reason* they are to suffer it are entitled to a reprieve." *Id. (*emphasis added).

Thompson argues that the trial court in this case applied an incorrect standard for competence

by omitting the "mental capacity component" of *Van Tran*. (Brief of Appellant, pp. 19-21) He contends that the appropriate standard for competency would require that a prisoner have a rational as well as a factual understanding of the punishment he is about to suffer and the reason for it. This translates, according to Thompson, to a requirement that "the prisoner must understand that he will die in the near future (and what it means to die), and that the reason the State will kill him is to punish him for what he did." (Brief of Appellant, p. 20) In addition, Thompson faults the trial court for not applying the "more rigorous" common law standard for competence articulated in *Jordan v. State*, 124 Tenn. 81, 135 S.W. 327 (1911), *i.e.*, that the prisoner "be aware of the penalty and its purpose [and possess the ability] to assist in his or her own defense." (Brief of Appellant, pp. 22-23) The standard advanced by Thompson is, in essence, the test used to determine competency to stand trial under *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788 (1960) (prisoner must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as a factual understanding of the proceedings against him"). *See also Jordan*, 135 S.W. at 328-29 (person *competent to stand trial* if capable of understanding the nature and object of the proceedings against him and if he rightly comprehends his own condition in reference to such proceedings and can conduct his defense rationally). Although Thompson may desire this higher standard for competency to be executed, neither the Eighth Amendment to the United States Constitution, nor precedent of this Court requires it. Indeed, the Court expressly rejected that position in *Van Tran* on the question of the appropriate standard for competency under Tennessee law. *Van Tran*, 6 S.W.3d at 266 ("We agree with Justice Powell that in a proceeding to determine competency to be executed, only those who are unaware of the punishment they are about to suffer and the reason they are to suffer it are entitled to a reprieve").

Moreover, in *Coe v. State*, 17 S.W.3d 193 (Tenn. 2000), the Court rejected a similar attempt by the petitioner in that case to engraft upon the term "awareness" a requirement that the prisoner possess some higher degree of conceptual understanding than simply a factual one. Pointing to Coe's delusional beliefs about what will happen at the moment of his death ("he will just simply be in another place in the same body, will visit his ex-wife and child" and "when he is given the needle . . . he will then be out of prison and he will be walking around"), the petitioner argued that, although Coe had an "awareness" of his impending execution, he lacked an "understanding" of it. *Coe*, 17 S.W.3d at 219-20. This Court instructed, however, that for purposes of determining competency, the terms "awareness" and "understanding" should be given their ordinary, common meanings, not the technical meanings these words may have in the field of psychology. Thus, where the record clearly reflected that the petitioner "knows that he was sentenced to death for murdering a young girl," the requirements of *Van Tran* were satisfied. *Coe*, 17 S.W.3d at 221. Simply put, a prisoner need only be aware of "the *fact* of his or her impending execution and the *reason* for it" to enable the State to proceed with the lawful execution of the death sentence. *Coe*, 17 S.W.3d at 220 (emphasis added).

B. Thompson failed to meet the threshold showing necessary to obtain an evidentiary hearing on competency for execution.

In order for a prisoner to obtain an evidentiary hearing in the trial court on the issue of competence for execution, he must first make a "substantial showing" that he or she is presently incompetent. *Van Tran*, 6 S.W.3d at 269. The showing may be met by the "submission of affidavits, depositions, medical reports, or other credible evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present competency." *Id.*; *Coe*, 17 S.W.3d at

212. The proof required to meet the showing must relate to the prisoner's *present* competence. *Van Tran*, 6 S.W.3d at 269. This is a "high threshold showing," but one that this Court recognized as being necessary, given the potential for false claims and intentional delay in death penalty litigation. *Id.* at 268. If the trial court is satisfied that there exists "a genuine disputed issue regarding the prisoner's present competency, then a hearing should be held." *Id.* at 269. Otherwise, the petition should be dismissed.

To support his claim of incompetence in this case, Thompson submitted three general categories of information to the trial court: (1) his history of mental illness while in the custody of the Tennessee Department of Correction for the murder of Brenda Lane; (2) affidavits of three mental health experts; and (3) affidavits from members of Thompson's legal team. Because none of Thompson's submissions satisfies the critical inquiry, that Thompson is unaware of the punishment he is about to suffer and the reason for it, the trial court properly denied his petition without further evidentiary proceedings.

(1) History of Mental Illness

Thompson asserts that his 18-year history of mental illness while in custody of the Tennessee Department of Correction, highlighted by delusional beliefs about his personal identity ("he is God and in control of the world" and "he is a wealthy songwriter"), the State's ability to carry out his death sentence ("he believes, despite his death sentence, that he will be released from prison . . . because Big Bird or God is on his side") and/or the likelihood that his execution will occur ("he will be released from prison . . . simply because that is what is going to happen"), demonstrates that he lacks the mental capacity to be executed. The fact that a prisoner may suffer from a mental disease or disorder, however, does not automatically equate to a finding of incompetency to be executed.

Coe, 17 S.W.3d at 221. Moreover, a prisoner's delusional or unorthodox beliefs about what may occur upon death or irrational beliefs about the legal processes and/or the ability of the State to carry out the execution are not pertinent to the question of competency because they do not impede the prisoner's ability to understand the *fact* of the impending execution and the *reason* for it. *See Coe*, 17 S.W.3d at 221-22 (citing *Weeks v. Jones*, 100 F.3d 124, 125 n.3 (11th Cir. 1996) (finding that the prisoner's belief that he would be transformed into a giant tortoise upon his death and rule the universe did not render him incompetent to be executed); *Garrett v. Collins*, 951 F.2d 57, 58 (5th Cir. 1992) (finding the prisoner competent to be executed despite his belief that his deceased aunt would save him through supernatural intervention)).

Under *Van Tran*, a prisoner need only be aware of the *fact* of his or her impending execution and the *reason* for it. *Coe*, 17 S.W.3d at 220. In addition, *Van Tran* makes clear that the proof required to meet the threshold showing for a hearing on competency must relate to the prisoner's *present* competency. The threshold is not satisfied by evidence that is stale in the sense that it relates to the prisoner's distant *past* competency or incompetency. *Van Tran*, 6 S.W.3d at 269.

The medical records and history submitted by Thompson fail to demonstrate *present* incompetence for execution. To the contrary, on October 15, 2003, less than six months ago, and at the request of Thompson's current counsel, the Davidson County Probate Court entered an Order terminating a conservatorship for Thompson that had been in place since March 2001. In its Order, the Probate Court, Judge Frank G. Clement, Jr., presiding, found that Thompson has some insight into his mental illness, that he voluntarily takes his medication, and that he is not in need of the

supervision or assistance of a conservator.[6] (II, 168) In addition to his written Order terminating Thompson's conservatorship, Judge Clement observed at the conclusion of the termination hearing: "[I]n the two plus years that Frank Freemon has been conservator — I'm extremely pleased that he was there, but he's basically been unnecessary, which is pretty compelling in itself. . . . I'm impressed with the fact that, as Mr. Freemon indicated today, they hand him [Thompson] his meds . . . and he takes them voluntarily. With that in mind, I believe the conservator is unnecessary." (II, 175-78) The State submits that the Davidson County Probate Court's relatively recent determination, following evidentiary proceedings directly addressing Thompson's current mental state, that Thompson does not meet the comparably low standard required for the assistance of a conservator is highly probative on the issue of Thompson's present competence for execution.

Moreover, review of Thompson's mental health history, as submitted to the trial court, plainly demonstrates that, even while in the throes of his alleged delusional episodes, Thompson is acutely aware that he is under a death sentence for murder. For example, Thompson relates that on September 24, 1998, he was interviewed by a prison psychiatrist, who took a brief history from Thompson, in which he recounted that he had seen a psychiatrist while in the Navy. "Mr. Thompson told the doctor 'the psychiatrist he saw in the military should have done more tests and *he would not have ended up on death row*.'" (I, 21) (emphasis added) On January 20, 2001, Thompson related to a prison nurse that an officer at the facility "is actually a woman he is suppose [sic] to have

[6]Significantly, incompetence is not the standard for the appointment of a conservator under Tennessee law, and the Davidson County Probate Court made no such finding. Rather, in March 2001, Thompson was found to be "disabled" within the meaning of Tenn. Code Ann. §34-1-101(7) and in need of the protection and assistance of a conservator. A "disabled person" for purposes of a conservator is defined as "any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity." Tenn. Code Ann. §34-1-101(7).

murdered. That she is that person, right age, right build, right hair 'not many people have black-red hair.' Inmate relates that since she is alive and working here *he could not have murdered her and he should not be on death row for something he didn't do*." (I, 25) (emphasis added) On September 6, 2002, Thompson stated to a prison psychiatrist, "I'd like to know when I'm getting out of here." The psychiatrist asked, "How long is your sentence Greg?" He answered, "*Death*." (I, 26-27) (emphasis added)

(2) Mental Health Experts

Likewise, the expert reports submitted by Thompson failed to establish the "high threshold showing" required to necessitate a hearing. Although each of the experts ultimately opines that Thompson is presently incompetent to be executed, it is clear, based upon the factual underpinnings of their opinions, that Thompson's experts labor under a misunderstanding of the *Van Tran* competency standard. Significantly, all three experts acknowledge, either explicitly or as part of the factual bases underlying their opinions, that Thompson is presently aware that he is under a death sentence for murder.

In a report dated January 28, 2004, Dr. John S. Rabun states that, when questioned about the reason for his incarceration, Thompson "readily admitted that he 'killed Brenda Lane.'" (II, 188) Thompson further discussed his trial in Coffee County, Tennessee, stating that he was convicted of first degree murder and, during the "second phase," was sentenced to "death." (*Id.*) Dr. Rabun's report specifically delineates four factors suggesting that Thompson is competent to be executed:

> (1) Mr. Thompson told the examiner that executions in Tennessee are by "lethal injection or the electric chair," suggesting that he understands how the death penalty is carried out;
>
> (2) Mr. Thompson told the examiner that he was convicted in 1985 of killing the

> victim of the instant matter, suggesting that he understands the reason for his death sentence;
>
> (3) Mr. Thompson told the examiner that he received the death penalty during the "second phase" of his trial, suggesting that he understands the penalty he received; and
>
> (4) Although Mr. Thompson did not know anything about the current appeal process in his case, he said that he knew the State of Tennessee was seeking to execute him.

(II, 193)

These factors, in and of themselves, are sufficient to defeat Thompson's claim of incompetence for execution under the *Van Tran* standard. Dr. Rabun's ultimate determination of incompetence is based upon Thompson's alleged delusional beliefs about his personal status and identity ("he is actually a 'lieutenant' in the navy;" he buried "one million dollars, two gold bars, one Grammy award, and two stock certificates from Quaker State and Apple Computers near a church in Georgia;" he "made up the Klingons so that young people would have a strong black person in TV"), the State's ability to carry out the death sentence (even though the murder happened within the State of Tennessee, he is "federal property" due to his "officer" status in the navy and the State cannot execute him), the likelihood that the sentence will actually be carried out (because his military record with the "Secretary of the Navy" provides he is a "lieutenant," this will allow for a "mistrial;" he will be "discharged" and can return to live in Hawaii; he holds "magical, near child-like reasoning about possible avenues of appeal in the present case"), and what will happen to him upon execution (he believes he is a Klingon and that his soul will go to Valhalla). (II, 193-95) As stated above, however, this Court previously rejected a prisoner's reliance on such delusional or unorthodox beliefs as not pertinent to the question of competency for execution. *Coe,* 17 S.W.3d at 221-22.

Moreover, Dr. Rabun's report, recounting the substance of an interview with Thompson as recently as January 19, 2004, clearly demonstrates Thompson's awareness of the details of the murder of Brenda Lane, the trial and sentencing proceedings resulting in his current death sentence, and further, that he accepts full responsibility for his actions.

> Committing Offense: Mr. Thompson was questioned about the reason for his incarceration. Mr. Thompson readily admitted that he "killed Brenda Lane." He noted that he and a female friend had an "idea" to go to Tennessee. He was then living in Georgia, estimating that he returned to Georgia in 1984. He told the examiner that he and his female friend drove to Tennessee, and he kidnapped "Brenda Lane" who worked at a "Methodist newspaper." He again reported that he "killed Brenda Lane." In other words, he accepted responsibility for his actions. At no point in either interview with the examiner did he try and claim he was innocent or allege that another party committed the offense. Subsequently, he discussed his trial in Coffee County, Tennessee. He indicated that he was convicted of "First Degree Murder" and during the "second phase" was sentenced to "death."

(II, 188)

In short, Dr. Rabun's report, on its face, not only fails to meet the threshold showing for a hearing on competency, its detailed description of Thompson's awareness of the crime and his current legal situation strongly reinforces the presumption under the law that Thompson is presently competent to be executed.

In a report dated February 27, 2004, Dr. Faye Sultan states that *in a non-medicated state*, Thompson is "floridly psychotic" and "completely unaware about the reason for his incarceration, the sentence he had received, or the fact of impending execution" and is, thus, not competent to be executed. (II, 232) She concedes in her report, however, that Thompson is "currently participating in a regular regimen of medications prescribed by the mental health staff at Riverbend Maximum Security Institution," and although he holds many of the same delusional beliefs noted in Dr. Rabun's report relating to the State's ability to carry out any execution, "he can say that he knows

he has been sentenced to death." (II, 232-33) At best, Dr. Sultan's affidavit establishes that Thompson *may become incompetent* at some point in the future if he deviates from his current medication regimen, a showing that has been rejected on more than one occasion by this Court as being insufficient to trigger competency proceedings under *Van Tran*. *See Coe v. Bell*, 17 S.W.3d at 221 n.5 (issue in *Van Tran* proceeding is prisoner's *present* competency to be executed); *see also Abu-Ali Abdur'Rahman v. State*, No. M1988-00026-SC-DPE-PD, Order of Tennessee Supreme Court (allegations of future incompetency are insufficient to delay execution date or obtain hearing on competency to be executed); *State v. Sedley Alley*, No. M1991-00019-SC-DPE-DD, Order of the Tennessee Supreme Court (allegation that prisoner will become incompetent at or around the time of execution insufficient to trigger *Van Tran* proceedings) (copies attached).

Dr. Sultan further opines that Thompson lacks the "capacity to assist in his defense," an element squarely rejected by this Court in *Van Tran* as a requirement for competence to be executed.

> [O]nce the conviction is final, there is a lessened need for a defendant to assist in his or her defense given the availability of both state and federal collateral review of trial errors, and the expansion of the right to competent counsel at trial. . . . We agree with Justice Powell that in a proceeding to determine competency to be executed, only those who are unaware of the punishment they are about to suffer and the reason they are to suffer it are entitled to a reprieve.

Van Tran, 6 S.W.3d at 266.

In a report dated February 27, 2004, Dr. George Woods diagnoses Thompson as suffering from a Schizophreniform Spectrum Disorder, Schizophrenia, undifferentiated type, and opines that Thompson is "currently incompetent to be executed." (II, 208) Although Dr. Woods relates the same delusional beliefs noted *supra* in the reports of both Dr. Rabun and Dr. Sultan, his report fails to address directly the critical inquiry under *Van Tran* — whether Thompson is aware of the fact of his

impending execution and the reason for it. Indeed, it is not apparent from Dr. Woods' report that his opinion is even based upon the appropriate legal standard for competence under Tennessee law, as the report fails to set forth any definition or guiding authority for his opinion.[7] Dr. Woods' conclusory declaration of incompetence is insufficient to meet the "high threshold showing" for an evidentiary hearing under *Van Tran*.

Notwithstanding this deficiency, a close reading of Dr. Woods' report plainly reveals, as in the previous instances, Thompson's awareness of his present situation. For example, Dr. Woods reports that "Mr. Thompson believes that he can not die, and there will be a two year period in which he will stay alive, *even if he were executed*. He also believes that *he will not be executed* since he was a lieutenant in the navy, and once this information is acknowledged, *his current conviction will be thrown out and he will receive a military tribunal which will exonerate him*." (II, 209) (emphasis added) Thompson further relates that "the electric chair is his *method of choice*." (*Id.*) (emphasis added) Thus, consistent with the observations of Dr. Rabun, *supra* p. 15, and Dr. Sultan, *supra* p. 17, Thompson clearly has an awareness of the fact of his impending execution and the reason for it, *i.e.*, his "current conviction."

Despite noting a variety of delusional beliefs that Thompson holds relating to his current and future personal and legal situation, all three of the expert reports submitted to the trial court demonstrate clearly that Gregory Thompson is presently aware that he is under a death sentence for murder. Thompson's expert reports, as a matter of law, fail to demonstrate incompetency for execution because they all fall short on the only inquiry pertinent to that issue — that Thompson is

[7]Since Dr. Woods is neither licensed nor in practice in the State of Tennessee, this Court surely cannot assume that he knows the appropriate legal standard for competency to be executed under Tennessee law.

unaware of the *punishment* he is about to suffer and the *reason* for it. By law, a prisoner is presumed to be competent to be executed. *Van Tran*, 6 S.W.3d at 270 (citing *Ford*, 477 U.S. at 426, 106 S.Ct. at 2610). Thus, absent a *prima facie* showing by Thompson on the material question enunciated in *Van Tran*, he failed to establish a genuine dispute for the trier of fact regarding present competency for execution, and the trial court properly dismissed his petition without an evidentiary hearing. *Van Tran*, 6 S.W.3d at 269.

(3) "Legal Team Opinion"

Finally, Thompson submits the affidavits of attorney Dana C. Hansen Chavis (I, 48-49) and investigator Michael R. Chavis (II, 251-52), both employees of Federal Defender Services of Eastern Tennessee, Inc., recounting the substance of conversations with Thompson on January 22, 2004, and February 27, 2004. The affidavit of Dana C. Hansen Chavis relates Thompson's response to being informed that the State had filed a motion to set execution date in January of 2004 ("Don't worry. God told me yesterday I'm not going to die. . . . I'm either going to Hawaii or I'm going back home."), and the affidavit of Michael R. Chavis relates Thompson's response to being informed of the Tennessee Supreme Court's February 25th order setting an execution date. ("It's more important that ever that you find my money and uniform.") Significantly, neither of the affidavits addresses the pertinent inquiry on the issue of competency and, thus, neither lends any support to the threshold showing required for an evidentiary hearing. The State further submits that, by offering personal testimony on a contested issue, Thompson's counsel has disqualified herself and Federal Defender Services from representing Thompson in this matter. Tennessee Rule of Professional Conduct 3.7 provides that "[a] lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness." *See also* Comments to Rule 3.7 ("The opposing party has a proper

objection where the combination of roles may prejudice the party's rights in the litigation. A witness is required to testify on the *basis of personal knowledge*, while an advocate is expected to explain and comment upon *evidence given by others*") (emphasis added). In his petition in the trial court and again in this Court, Thompson asserts, "It is the opinion of Mr. Thompson's current lawyer, based upon close contact and interaction with Gregory Thompson, that he is incompetent to be executed." (I, 36-37; Brief of Appellant, pp. 11-12) By submitting personal affidavits to the trial court as proof of the only factual issue in this matter and injecting counsel's "opinion" on the issue based solely upon "interaction with" Thompson, counsel has placed both herself and her investigator in the position of being material witnesses in this proceeding.[8]

C. The evidence in the record does not preponderate against the trial court's finding that Gregory Thompson is presently competent to be executed.

In *Van Tran*, this Court instructed that, if the trial court determines that the prisoner has failed to meet the required threshold showing, "the trial court shall enter an order denying the petition, which shall include written detailed findings of fact and conclusions of law." *Van Tran*, 6 S.W.3d at 269. The trial court's order must be filed within four days from the filing of the State's response to the petition. *Id.*

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[8]Federal Defender Services is subject to disqualification for another reason, as well, because its appearance in this proceeding exceeds the scope of its authority under federal law to represent state inmates in state-court proceedings. In *House v. Bell*, 332 F.3d 997 (6th Cir. 2003) (en banc) (pet. for reh. pending), the Sixth Circuit held that 21 U.S.C. §848(q)(4)(B) does not authorize federal compensation for representation in state proceedings. "Nothing in the legislative history [of Section 848(q)(4)(B)] indicates to us that Congress decided to pay — by passing money through the federal courts — lawyers to represent defendants in state proceedings." *House*, 332 F.3d at 999 (quoting *King v. Moore*, 312 F.3d 1365, 1366 (11th Cir. 2002)). In the context of capital federal habeas corpus representation of state prisoners, a federal judge may, under limited circumstances, authorize a federal defender organization to represent a petitioner in state-court matters that are ancillary to that proceeding. No federal court authorization has been granted in this case. Indeed, Thompson has no federal proceedings presently pending. Moreover, in its February 25th remand order, this Court specifically appointed a private attorney and the local public defender's office to represent Thompson in this proceeding. Thus, the appearance by Federal Defender Services in this matter is not only without statutory authority but is unnecessary.

The ultimate decision on a *Ford/Van Tran* claim "turn[s] on the finding of a single fact" — whether the prisoner is presently competent as defined by this Court. *Van Tran*, 6 S.W.3d at 271 (citing *Ford*, 477 U.S. at 412, 106 S.Ct. at 2603). On March 8, 2004, applying the "cognitive standard" for competence adopted by this Court in *Van Tran*, the trial court found that "all three of the expert reports submitted to the Court by Gregory Thompson demonstrate clearly that Thompson is *presently aware that he is under a death sentence for the murder of Brenda Lane*" and that the requirements for competence under *Van Tran* "have been met and are presently existing." (II, 309-10) (emphasis added) The trial court's finding of competency is reviewed by this Court as a question of fact and presumed correct, unless the evidence in the record preponderates against it. *Id.*, at 272. Because all three of Thompson's experts, in effect, conceded that he is presently aware that he is under a death sentence for murder, the trial court's competency determination and summary disposition of Thompson's petition should be upheld. Indeed, this Court's decision in *Coe* affirming the trial court's finding of competency in that case rested upon a similar acknowledgment by the petitioner's experts:

> Even Dr. Merikangas [petitioner's expert] testified that "[Coe's] understanding of why he's been convicted is that he was convicted for a crime he did not commit that was involving the murdering and raping of an eight year old girl." Under *Van Tran*, a prisoner need only understand or be aware of the fact of his or her impending execution and the reason for it. . . . [W]e agree with the State that the evidence in this record fully supports the trial court's finding that the appellant has the mental capacity to understand the fact of his impending execution and the reason for it.

Coe, 17 S.W.3d at 220-21. *See also id.*, at 221 ("the record clearly reflects that the appellant knows that he was sentenced to death for murdering a young girl"). The trial court's factual determination of competency in this case satisfies the procedural requirements of *Van Tran* and is fully supported by the record. *See supra*, pp. 14-20.

Thompson alleges, however, that the trial court's decision "does not reflect independent judicial judgment," because, in addition to the specific factual determination noted above, the trial court also found that "the State's response [to Thompson's petition in the trial court] generally enunciates the opinion and findings of this Court." (Brief of Appellant, p. 24-25) First, Thompson's claim that the trial court was anything other than a neutral and independent arbiter is completely unsubstantiated. The fact that the trial court agreed with the position advanced by the State on the competency issue and ruled adversely to Thompson provides no basis for a determination of judicial bias. *See, e.g., Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994) (adverse rulings not sufficient to establish judicial bias).

Moreover, the trial court's order in this case fully comports with this Court's "written order" requirement in *Van Tran* through its express determination of the single fact pertinent to the inquiry before it. The primary purpose of the requirement that a trial court enunciate its factual and legal findings in a written order is to facilitate appellate review. *See State v. Swanson*, 680 S.W.2d 487 (Tenn. Crim. App. 1984) (app. denied Sept. 13, 1984) (addressing written order requirement in post-conviction proceedings). The trial court's order contains the basis for its dismissal of Thompson's petition — "all three of the expert reports submitted to the Court by Gregory Thompson demonstrate clearly that Thompson is *presently aware that he is under a death sentence for the murder of Brenda Lane*" and that the requirements for competence under *Van Tran* "have been met and are presently existing" — and, to the extent the State's response has been incorporated by reference, such incorporation serves only to effectuate meaningful appellate review of that determination.[9] (II, 309-

[9]Even assuming, *arguendo*, the trial court's written order failed to meet this Court's *Van Tran* requirements, the record in this case fully supports the trial court's ultimate determination of competency.

10)

Although Thompson charges that the State's response in the trial court "offered a different interpretation of selected portions of the facts and expert reports [submitted to the trial court] and/or mischaracterized those facts and expert reports" (Brief of Appellant, p. 12), he fails to identify any specific misstatement or mischaracterization contained in the State's response. Morever, Thompson does not even allege in his brief that the evidence preponderates against the trial court's factual determination that Thompson is "presently aware that he is under a death sentence for the murder of Brenda Lane."[10] Indeed, to advance such a position would directly contradict Thompson's evidence in the trial court. The State's response in the trial court largely consisted of direct quotations from Thompson's own expert reports, which clearly demonstrated his awareness of the facts of the murder of Brenda Lane, his capital trial and sentencing proceedings, and the resulting death sentence. (II, 188) Additional "interpretation" or "characterization" of the reports was unnecessary, since the State's argument was fully sustained by the reports themselves. Likewise, the trial court's dismissal is fully justified on the strength of Thompson's submissions without further evidentiary proceedings.

II. GIVEN THE RECORD EVIDENCE AND JUDICIAL DETERMINATION OF COMPETENCY FOR EXECUTION, THE COURT SHOULD RECONSIDER ITS PREVIOUS ORDER SETTING EXECUTION DATE AND SET A DATE NO LATER THAN THIRTY DAYS FROM THE COURT'S DECISION IN THIS CASE.

This Court recognized in *Van Tran* that, given the nature of the claim, "the issue of incompetency can be repeatedly litigated by the same prisoner because until the moment of execution

[10]Rather, Thompson's argument in this Court is that the trial court "employed an improper, limited standard where '[a]ll that is necessary for competence to be executed is that the prisoner need only be aware of the fact of his impending execution and the reason for it.'" (Brief of Appellant, p. 19) The State submits that is precisely the standard set forth by this Court in *Van Tran*.

the prisoner can claim that he or she has become incompetent sometime after the previous determination." *Van Tran*, 6 S.W.3d at 268; *see also Solesbee v. Balkcom*, 339 U.S. 9, 14, 70 S.Ct. 457 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting a death sentence is not a rare phenomenon"). That fact, coupled with the reality that death penalty litigation is replete with the potential for false claims and intentional delay, justifies reconsideration of this Court's previous order setting Thompson's execution on August 19, 2004. As previously indicated, Thompson has completed the standard three-tier appeals process, and there exists no procedure, method, or means by which Thompson's conviction and sentence can be further tested or scrutinized under the procedural guidelines of this Court. Having successfully defended Thompson's conviction and sentence through more than 18 years of appeal, the State is entitled to carry out the lawful judgment of the Coffee County Circuit Court and requests that it be permitted to do so on the earliest possible date.

CONCLUSION

The Court should affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response has been forwarded by fax and First-Class U.S. mail, postage prepaid, on this the 24th day of March, 2004, to:

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IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	**COFFEE COUNTY**
v.	)	**NO. M1987-00067-SC-DPE-DD**
	)	
GREGORY THOMPSON,	)	
	)	
Appellant.	)	

ATTACHMENTS