

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

U.S. DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE, TENNESSEE  
MAR 27 2008

ROBERT GLEN COE )  
Petitioner ) No. 08-0239  
 ) Judge: Prange  
 )  
 )  
RICKY BELL, Warden )  
Respondent )

CLERK

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR DISCOVERY

Petitioner Robert Coe has requested court process to secure the following information: 1) records and deposition of Judge John Clifton and his staff; 2) records of the Shelby County Sheriff's Department; 3) records of the Memphis Police Department, and 4) records of the Shelby County Court Security. As more fully explained in this memorandum, Petitioner Robert Coe should be granted his requested discovery, because he requires the process of the court to fully investigate the fairness of the state court proceedings in order to present this court all available facts in support of claims for relief in his petition for writ of habeas corpus.

THIS COURT MAY PROPERLY ORDER DISCOVERY

In federal habeas corpus proceedings, discovery is governed by Rule 6(d) of the Rules Governing § 2254 Cases, which provides:

A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

According to the United States Supreme Court, a habeas corpus petitioner establishes "good cause" for discovery if he has made credible allegations of a constitutional violation, and the

requested discovery will enable the petitioner to investigate and prove his claims. Bracy v. Grayley, 520 U.S. 1175 (1997). In Bracy, the petitioner alleged that the trial judge in his capital murder case was biased. The Court noted that the petitioner's allegation "if it could be proved would violate the Due Process Clause of the Fourteenth Amendment." Id. at 1797. In support of his claim that the trial judge was biased, the petitioner noted, *inter alia*: (1) the trial judge had been taking bribes to acquit defendants both before and after the petitioner's trial; (2) the judge had been convicted of bribery; (3) the judge's former associate represented the petitioner and quickly took the case to a trial at which the petitioner was convicted, perhaps in an effort to divert attention away from the judge's bribe-induced acquittals in other cases. The Supreme Court held that with the petitioner having pointed to specific facts and evidence "that lends support to his claim," he was entitled to his requested discovery. Id. at 1799.

Bracy confirmed existing law. As held by the Sixth Circuit, "a court must provide discovery in a habeas corpus proceeding only 'when specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief.'" Lynch v. Story, 929 F.2d 228, 232 (6th Cir. 1991), quoting Harris v. Nelson, 394 U.S. 286, 300 (1969) (setting forth standards for discovery under AH Writs Act, 28 U.S.C. §1651). See Lowry v. Scott, 55 F.3d 986, 1001 (5th Cir. 1995) (where petitioner alleged Brady violation, entitled to discovery to prove allegations) granting relief after discovery Rast v. Johnson, 1997 WL 570214 (5th Cir. 1997); Teague v. Scott, 60 F.3d 1167 (5th Cir. 1995). See Toney v. Clamann, 79 F.3d 693 (8th Cir. 1996) (petitioner entitled to discovery of physical evidence to establish constitutional claim). So long as the information before the court "support[s] the inferences" of constitutional deprivation alleged by the petitioner, "good cause" exists

and discovery is mandated if "[t]he information requested by the petitioner would tend to prove or disprove the validity of such inference and is relevant to petitioner's claim." *Rice v. Black*, 112 F.R.D. 620, 626 (D. Neb. 1986).

As demonstrated *infra*, there is indeed "good cause" for the discovery requested by petitioner, because the requested discovery is relevant to claims of constitutional deprivation, there is reason to believe that Robert Coe's constitutional rights may have been violated, and the discovery of the requested materials may establish a basis for securing habeas corpus relief.

## II THERE IS "GOOD CAUSE" FOR THE REQUESTED DISCOVERY

### **Robert Coe Has Made A Prima Facie Showing That He Was Denied A Impartial Judge, Which Is Essential to Any Fair Adjudicative Process To Judge Was Not Impartial Because He Was Threatened with Loss Of Life Or Serious Injury If He Found Robert Coe Incompetent, And The Trial Judge Acted With Bias Against Robert Coe During The State Court Hearing**

As set out in the habeas petition and motion for evidentiary hearing, the judge who presided over the state court evidentiary hearing was biased and was influenced by threats made against him. As a result of those threats, the judge acted with bias against Robert Coe during the hearing resulting in a fundamentally unfair process.

Proof of bias known to Robert Coe at this point is as follows:

(1) Judge Colton received death threats during the state court proceedings. Robert Coe has only learned of these threats by coming across a newspaper article in which Judge Colton told the media about the threats -- though he never told Robert Coe or his counsel. See "Judge In Coe Hearing Says He Was Threatened," Jackson Sun, Feb. 9, 2000, p. 1, attached as an Exhibit to February 22, 2000 Motion To

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Remand Case To Trial Court To Develop Record Pertaining To Threats Made Against Trial Court Judge; Affidavit of Gay Nease (Attached as Exhibit 1 to this memorandum)

(2) One expression of this bias is the fact that the judge ordered Robert Coe gagged even though no one -- even the prosecution -- requested such action.

(3) After the hearing, the judge then talked to the media on several occasions concerning this pending case, itself highly questionable as a matter of ethics. See Tenn. S.Ct.R. 10, Code of Judicial Conduct, Canon 3(B)(9). In a television interview, the judge showed bias by publicly stating his view that Robert Coe should be put to death and that, in his view, Robert Coe should have no more appeals. See Memphis Channel 3 News, Mar. 6, 2000.<sup>1</sup>

And while these actions demonstrate that Robert Coe's constitutional claims were ruled upon by a judge who was not impartial -- as demanded by due process -- it is also particularly troubling that the trial judge failed to disclose the threats and his opinions to petitioner before or during the hearing and instead discussed them in two extraordinary post-hearing interviews with the media.

Petitioner has outlined in his Motion for Evidentiary Hearing and Reply to Respondent's Response to Motion for Evidentiary Hearing, the numerous deficiencies which plagued the state court hearing process. These include: 1) application of an improper standard of proof; 2) denial of

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<sup>1</sup> A transcript of that newscast indicates the following: Q: "Do you think that Robert Glen Coe should be put to death?" A: Someone who -- who is convicted, as he was, and who is capable of understanding, as I believe he is -- Yes, he should be." When asked whether Robert Coe should be entitled to any further appeals, the judge stated that: "He has gotten to a point, in my view, where it needs to end." Such statements hardly seem consistent with an impartial adjudicator.

an adversarial proceeding; 3) forced disclosure of privileged materials; 4) ex parte consideration of materials; 5) exclusion of relevant evidence; 6) failure to subpoena witnesses; 7) reliance upon inherently unreliable tests; 8) failure to disqualify this state attorney general's office.

What all this seems to indicate is that the trial judge was indeed biased, and was biased precisely because his life was threatened if he were to rule in Robert Coe's favor – just as Robert Coe himself was threatened during the state court process. The judge's incentive was to give in to the threats and rule against Robert Coe. There can be no semblance of due process in a situation where the judge must rule against a petitioner in order to secure his own safety.

Because the trial judge never informed counsel about such threats, and state counsel instead learned about them for the first time through the post-hearing *Jackson Sun* article, Robert Coe requested a remand for factual development of this issue, in order that he could establish a violation of his constitutional rights to a fair and impartial tribunal. The Tennessee Supreme Court, however, denied that motion. Therefore, Robert Coe is entitled to discovery in aid of a federal hearing to determine whether his due process rights under *Frye* were violated as a result of the threats against the judge. A judge receiving death threats – especially in the circumstances of this case – is not the kind of adjudicator required by due process, especially where other actions of the judge confirm a failure to be wholly impartial. Compare *United States v. Kirsenspan*, 20 F.3d 1001 (10<sup>th</sup> Cir. 1994)(trial judge who received death threats required to recuse himself under federal statute).

Indeed, an impartial judge is fundamental to any notion of due process. *Gray v. Grantley*, 520 U.S. \_\_\_, 117 S.Ct. 1797 (1997). As the Supreme Court has explained, an unbiased tribunal is essential to any notion of justice:

*A fair trial in a fair tribunal is a basic requirement of due process. Fairness of*

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*course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused shrinks the latter due process of law." Such a stringent rule may sometimes bar trial judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."*

In *Re Murdison*, 349 U.S. 133, 136, 75 S.Ct. 623, 624 (1955)(emphasis supplied), quoting *Turney v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444 (1927). Cf. *Offit v. United States*, 348 U.S. 11, 75 S.Ct. 11 (1955).

As made clear in *Murdison*, a showing of actual bias is sufficient to show a violation of due process, but not the exclusive showing required to make out a due process violation. Rather, it is "every procedure which would offer a possible temptation" to a judge "not to hold the balance nice, clear, and true between the State and the accused" which violates due process of law. *Turney*, 372 U.S. at 532, 57 S.Ct. at 444 (emphasis supplied). "[W]e require not only an absence of actual bias, but an absence of even the appearance of judicial bias." *Anderson v. Sheppard*, 850 F.2d 741, 746 (6th Cir. 1988), quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 n. 19, 71 S.Ct. 624, 649 n. 19 (1951)(Frankfurter, J. concurring)(discussing due process right to tribunal which satisfies the appearance of justice).

"The 'requirement of neutrality in adjudicative proceedings' serves dual interests of equal importance, as it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done." *Anderson v. Sheppard*, 850 F.2d at 746, quoting *Marshall v. Temabo, Inc.*, 426 U.S. 238, 252, 100 S.Ct. 1610, 1618 (1980). Without judicial impartiality, there can be no "faith in the integrity of this country's tribunals that is so

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unquestionably vital to this government's existence." Anderson, 856 F.2d at 716. And in a capital case, the impeccable integrity of the trial court must be unquestioned, for without complete assurance of judicial impartiality, there can be no faith that a death sentence has been meted out in a non-arbitrary and fair manner, the very foundation of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). This is especially true here, where in Tennessee there has not been an execution in fifty years.

In sum, with Robert Coe's life at stake, he has stated a colorable claim that his right to due process under the Fourteenth Amendment was violated through the absence of a completely neutral, unbiased judge, and that as a result he did not receive a full and fair adjudication of his incompetency claims, as demanded by *Ford* and due process. Having stated a colorable claim, but having been denied a full adjudication of this claim in state court proceedings, he is entitled to a hearing on the question of lack of judicial impartiality, and is likewise entitled to a hearing on his *Ford* claims given that lack of impartiality. With the requested discovery being essential to the proof at any such hearing, this Court should grant his request, in order that Robert Coe may fully develop the evidence in support of his allegations and establish his entitlement to relief.

### III.

#### DISCOVERY IS ESPECIALLY WARRANTED BECAUSE THIS IS A CAPITAL CASE.

Finally, the Constitution demands that capital cases be conducted according to procedures which insure heightened reliability in the determination of guilt and/or sentence. Beck v. Alabama, 447 U.S. 625 (1980). Similarly, the federal courts must consider capital habeas petitions with greater scrutiny than non-capital cases. Indeed, Congress has articulated this federal policy through the Anti-Drug Abuse Act of 1988, which provides additional investigatory, expert, and services of

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counsel for those seeking collateral review of a death sentence. 21 U.S.C. §848(g)

Because this is a death penalty case, broad discovery is necessary to ensure that extra measures of process which is demanded in capital cases. Indeed, as recognized by the United States Court of Appeals for the Fifth Circuit, "[I]f death is involved, the petitioner should be presented every opportunity possible . . . to present facts relevant to his constitutional claims." Wilson v. Butler, 825 F.2d 879, 885 (5th Cir. 1987).

Given the gravity of this capital case, Petitioner requests evidence which will enable him to fully investigate, develop, and present any and all relevant claims for relief in this, his one and only opportunity for federal habeas review of his incompetency claims under *Ford*. His request should therefore be granted.

#### CONCLUSION

WHEREFORE, the motion for discovery should be granted.

Respectfully Submitted,

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By: Henry A. Martin

**VERIFICATION**

I aver that the factual assertions made herein are true and correct to the best of my knowledge.

    

**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. Priden, Assistant Attorney General, 402 5th Avenue North, Nashville, Tennessee 37243, on this 27th day of March, 2006.

    

**EXHIBIT**

**AFFIDAVIT**

STATE OF TENNESSEE     )  
   )  
COUNTY OF DAVIDSON     )

Personally appeared before me, the undersigned, a notary public in and for said county and state, Gays M. Nicksa, who having been duly sworn and according to law does make oath as follows:

**I am an investigator with the Office of Federal Public Defender in Nashville, Tennessee. I have worked as an investigator for over ten years.**

1. On March 25, 2000, I met with John Brannon a reporter for the Union City Messenger newspaper.

2. Mr. Brannon said he called Judge John Colton, Criminal Court for the Thirteenth Judicial District in Memphis, TN and requested an interview following the Robert Glen Coe competency hearings which ended January 28, 2000. Mr. Brannon initiated the contact with Judge Colton because of the tight security surrounding this hearing.

3. Mr. Brannon told me that Judge Colton would have granted him a time to time interview, however the Judge told Mr. Brannon that he had not had a day off for two weeks and was tired. Mr. Brannon decided to conduct the interview by telephone.

4. Mr. Brannon did not ask Judge Colton about death threats at this time, however he later contacted the Judge's office and spoke to Judge Colton's secretary and requested to talk to the Judge concerning death threats to the Judge. Judge Colton replied by fax.

5. From this fax, Mr. Brannon knows that at least one death threat had been made to the Judge but he does not know who made the death threat or how many death threats were made.

6. Mr. Brannon did not have the fax from the Judge with him. He said he thought he had thrown it away.

FURTHER AFFIANT SAYETH NOT

George M. Nease  
Clerk of Court

Sworn and subscribed to me before me  
this 22<sup>nd</sup> day of March, 2000

Paul S. Adams  
NOTARY PUBLIC

My Commission Expires: 7/28/2001